The Transfer of Property Act (IV of 1882)

3

V. V. CHITALEY

AND

K. N. ANNAJI RAO

The pronunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition" .... No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required. (The Hon'ble Sir Cecil Walsh, Kt.,K.C., Ex-Offg. Chief Justice, Allahabad High Court.)

Cases which are supposed to be dead have the uncanny habit of coming into life again and unless a case is overruled by a Full Bench or by a decision of the Privy Council, no one can feel confident whether it will be treated as dead or obsolete or shall come back to life again; and even then, no one can feel sure that the ingenuity of judges or lawyers will not enable them, by processes of reasoning, which are by no means unfamiliar, to get over even Full Bench rulings and Privy Council decisions. (The Right Hon'ble Sir Tej Bahadur Sapru, P.C., K.C.S.I., LL.D.)

1717

1. References to Official Reports are invariably given in all cases found in the Official Reports.
2. Parallel references are given upto 1909. References to All India Journals only are given after 1909 with a view to reduce bulk and cost.
3. The Synopsis for each Section as well as the General Index show where exactly to look for the point required.
4. Remarks in the footnotes amplify and illustrate the principles in the commentary and indicate distinguishing features of the case.
5. Any case in the "Table of Cases" will show where to get the entire case-law on the point. The first reference in the foot-notes and the reference to Official Reports are indicated in the Table of Cases"
6. The special features of this work are indicated in the Preface.

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THE TRANSFER OF PROPERTY ACT

(IV of 1882)

TO THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

THE

TRANSFER OF PROPERTY ACT

(IV of 1882)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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VOLUME III

SECTIONS 91—137

APPENDICES, TABLE OF CASES
AND GENERAL INDEX.

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Law herein stated is as on 31st December 1942.

"The two leading maxims relative to the transfer of property are, *firstly*, that alienation is favoured by the law; and, *secondly*, that an assignee holds property subject to the same rights and liabilities as attached to it whilst in the possession of the grantor."— BROOM, *A Selection of Legal Maxims.*

"Every man is restricted against using his property to the prejudice of others."— LORD TRURO in *Egerton* v. *Earl of Brownlow*, (1853) 23 L. J. Ch. 348 (400).

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ABBREVIATIONS

A. O. ... Government of India (Adaptation of Indian Laws) Order, 1937 as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.

A. I. R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

Agra. ... Agra High Court Reports.
All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ... Allahabad Weekly Reporter.
Beng. L. R. ... Bengal Law Reports.
B. R. ... Bihar Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. H.C.R. ...Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bourke ... Bourke's Reports.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. Tim. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
C. P. L. R. ... Central Provinces Law Reports.
Cor. ... Coryton's Reports.
Cr. L. J. ... Criminal Law Journal.
Hay ... Hay's Reports.
Hyde ... Hyde's Reports.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
Ind. Jur. (N.S.) ... Indian Jurist (New Series).
Ind. Jur. (O.S.) ... Indian Jurist (Old Series).
Ind. Rul. ... Indian Rulings.
Kar. (I. L. R.) ... Indian Law Reports, Karachi Series.
Knapp ... Knapp's Reports.
Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Luck. Cas. ... Lucknow Cases.
Mad. or I.L.R. Mad ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. Jur. ... Madras Jurist.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
Marsh. ... Marshall's Reports.
Moo. Ind. App. — Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. H. C. C. ... Patna High Court Cases.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. Tim. ... Patna Law Times.

Pat. L. R. ... Patna Law Reporter.
Pat. L. W. ... Patna Law Weekly.
Pat. W. N. ... Patna Weekly Notes.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
R. & J.'s ... Ratique and Jackson's Oudh Privy Council Decisions.
Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Sar. ... Saraswati's Privy Council Judgments.
Shome L. R. ... Shome's Law Reports.
Sind L. R. ... Sind Law Reporter.
Suther. ... Sutherland's Privy Council Judgments.
Suth. W. R. ... Sutherland's Weekly Reporter.
U. P. B. R. ... United Provinces Board of Revenue.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Weir. ... Weir's Criminal Rulings.

ENGLISH, IRISH AND SCOTTISH LAW REPORTS

A. C. ... (Law Reports) Appeal Cases (1891 onwards).
Amb. ... Ambler [Chancery].
App. Cas. ... (Law Reports) Appeal Cases (1876-1890).
Atk. ... Atkyns [Chancery].
B. & B. ... Ball and Beatty [Chancery, Ireland].
Beav. ... Beavan [Rolls Court].
Bligh ... Bligh [House of Lords].
Bligh (N S) ... Bligh New Series [House of Lords].
Bro. C. C. ... Brown's Reports of Cases in Chancery.
Bro. Parl. Cas. ... Brown's Reports of Cases in Parliament [House of Lords].
Bunb ... Bunbury [Exchequer].
Burr ... Burrow's Reports [King's Bench].
Cas. T. Talb ... Cases in the time of Lord Talbot [Chancery].
Ch. D. ... (Law Reports) Chancery Division (1876-1890).
Ch. App. ... Chancery Appeals.
Cl. & Fin. ... Clark and Finnelly [House of Lords].
Co. Rep. ... Coke (Sir Edward) (Common Law).
Cox ... Cox [Chancery].
De G. & J. ... De Gex and Jones [Chancery and Bankruptcy Appeals].
De G. M. & G. ... De Gex, Macnaghten and Gordon [Chancery and Bankruptcy Appeals].
De G. & Sm. ... De Gex and Smale [Chancery].
Dick. ... Dickens [Chancery].
Dow ... Dow [House of Lords].
Dow & Cl. ... Dow and Clarke [House of Lords].
Drew. ... Drewry [Chancery].
East ... East [King's Bench].
Eden ... Eden (Hon'ble Robert Henry) [Chancery].
E. R. ... English Reports.
Eq. ... (Law Reports) Equity (1866-1875).
Eq. R. ... Equity Reports (1853-1855).
Eq. Cas. Abr. ... Equity Cases Abridged [Chancery].
H. & N. ... Hurlstone and Norman [Exchequer].
H. & Tw. ... Hall and Twells [Chancery].
Hare ... Hare [Vice-Chancellor's Courts].
H. L. ... (Law Reports) House of Lords.
H. L. C. ... House of Lords Cases (continuation of Clark and Finnelly).
Jac. & W. ... Jacob and Walker [Chancery].
J. & H. ... Johnson and Hemming [Chancery].
J. P. ... Justice of the Peace.
Jur. (N. S.) ... Jurist Reports (New Series).
K. & J. ... Kay and Johnson [Chancery].
K. B. ... (Law Reports) King's Bench.
Keen ... Keen [Rolls Court].
L. J. Ch. ... Law Journal Reports [Chancery].
L. J. (N. S.) Ch. ... Law Journal Reports (New Series) Chancery.
L. J. (N. S.) Ex. — Law Journal Reports (New Series) Exchequer.
L. J. K. B. ... Law Journal Reports, King's Bench.
L. J. P. C. ... Law Journal Reports, Privy Council.
L. J. Q. B. ... Law Journal Reports, Queen's Bench.
L. R. C. P. ... Law Reports Common Pleas.
L. R. Eq. ... Law Reports Equity.
L. R. Ex. ... Law Reports, Exchequer.
L. R. H. L. ... Law Reports House of Lords.
L. R. P. C. ... Law Reports, Privy Council.
L. T. ... Law Times Reports.
L. T. (N. S.) ... Law Times Reports (New Series).

Mac. & G. ... Macnaghten and Gordon [Chancery].
Madd. ... Maddock [Chancery].
M. B. R. ... Morrell Bankruptcy Reports.
M'Cle. ... M'Cleland [Exchequer & Equity].
Meg. ... Megone [Companies' Cases].
Mer. ... Merivale [Chancery].
My. & Cr. ... Mylne and Craig [Chancery Appeals].
My. & K. ... Mylne and Keen [Chancery Appeals].
M. & W. ... Meeson and Welsby. [Exchequer].
Prec. Ch. ... Precedents in Chancery.
Price ... Price [Exchequer].
P. Wms. ... Peere Williams [Chancery].
Q. B. ... (Law Reports) Queen's Bench (1891 onwards) or Queen's Bench Reports (1841 to 1852).
Q. B. D. ... (Law Reports) Queen's Bench Division (1876-1890).
R. ... Reports [All The Courts].
R. R. ... Revised Reports.
R. S. C. ... Rules of the Supreme Court of England.
Sch. & Lefr. ... Schoales and Lefroy [Chancery Ireland].
Sim. ... Simons [Chancery].
Sim. & St. ... Simons and Stuart [Chancery].
S. J. ... Solicitors' Journal.
Swanst. ... Swanston [Chancery].
T. L. R. ... Times Law Reports.
Vern. ... Vernon [Chancery].
Ves. & B. ... Vesey and Beames [Chancery].
Ves. Jun. ... Vesey, Junior (After the first two volumes, Ves. simply) [Chancery].
Ves. Sen. ... Vesey, Senior [Chancery].
Wils. Ch. ... Wilson (John) Chancery.
W. R. (Eng.) ... Weekly Reporter (England).
Y. & C. C. C. ... Younge and Collyer Chancery Cases.

OTHER ABBREVIATIONS

Art. ... Article.
C. A. ... Court of Appeal.
Cl. ... Clause.
Cr. ... Criminal.
D. B. ... Division Bench.
F. B. ... Full Bench.
F. C. ... Federal Court.
F. N. ... Foot-Note.
G. I. ... Government of India Act, 1935.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
O. ... Order.
P. ... Page.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
S. ... Section.
S. B. ... Special Bench.

In the citations of judgments of the Highest Courts in India, absence of the words FB, SB, or DB indicates that the judgment is delivered by a single Judge of that Court.

IN FOOT-NOTES —

('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939). Full year reference is given prior to 1866, like (1818) and *not* ('18), (1865) and *not* ('65) and so on and to all English cases.

The figure preceding the A. I. R. reference denotes the *Volume* Number of All India Reporter. Thus, in ('40) *27* A. I. R 1940 Oudh 441, the figure *27* denotes the 27th Volume of the All India Reporter, "1914" being the 1st Volume.

IMPORTANT NOTE

References to Official Reports are invariably given in all cases found in the Official Reports.

THE TRANSFER OF PROPERTY ACT

(IV of 1882)

Volume III.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES *(contd.)*.

Redemption.

Section 91

Persons who may sue for redemption.

[a]**91.** Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

a. Section 91 was substituted for the original section by Section 46 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). For the text of the original section, see Note 1 on this section.

Section 91
Note 1

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Besides the mortgagor."
4. Clause (a) — General.
5. Puisne mortgagee.
6. Sub-mortgagee of puisne mortgagee.
7. Prior mortgagee.
8. Purchaser of equity of redemption.
9. Person contracting to purchase mortgaged property.
10. Transferee pendente lite.
11. Donee.
12. Lessee of mortgaged property.
13. Landlord, if can redeem mortgage by tenant.
14. Superior proprietor under C. P. Land Revenue Act.
15. Tenant for life and remainderman.
16. Reversioner under Hindu law.
17. Surrender of mortgaged property by Hindu widow to next reversioner.
18. Transfer from limited owner under Hindu law.
19. Crown acquiring mortgagor's interest by escheat.
20. Heirs of mortgagor.
21. Son under Mitakshara law.
22. Mortgage by manager of joint Hindu family.
23. Member of malabar tarwad.
24. Tenants-in-common.
25. Attaching judgment-creditor.
26. Government attaching property under S. 88, Cr. P. C.
27. Judgment-creditor obtaining order for appointment of receiver under S. 51 cl. (d), C. P. Code.
28. Person holding decree for sale of mortgaged property.
29. Trustee.
30. Benamidar.
31. Guardian of property of minor mortgagor and curator of lunatic mortgagor.
32. Trespasser.
33. Person having no interest redeeming mortgage — Effect of. See Notes on S. 92.
34. Person with imperfect title to equity of redemption.
35. Persons entitled to maintenance from an estate.
36. Mortgage by occupancy tenant — Right of person recognised by landlord as tenant to redeem.
37. Clause (b)—Surety.
38. Clause (c) — Creditors of the mortgagor.
39. "May redeem."
40. Partial redemption.
41. Order of redemption.
42. Onus of proof.
43. Whether section applies to redemption of charges.
44. Law in the Punjab.
45. Right of redemption of persons not made parties to suits relating to mortgages.
46. Limitation for suits for redemption of mortgages. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 148.

Other Topics (miscellaneous)

Creditor in administration suit may redeem. See Note 38.

Mortgagor selling equity of redemption but having a charge for unpaid purchase price can redeem. See Note 4.

Persons having interest in or charge on the right to redeem. See Note 4.

Persons having interest in or charge on property. See Note 4.

Redemption of whole or part. See Note 40 and S. 60 Notes 41 to 47.

1. Legislative changes. — The present section has been substituted by S. 46 of the Transfer of Property (Amendment) Act, XX of 1929 for the original section which ran as follows :

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :

(a) any person (other than the mortgagee of the interest sought to be redeemed), having any interest in or charge upon the property;

(b) any person having any interest in or charge upon the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;
(d) the guardian of the property of a minor mortgagor on behalf of such minor;
(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;
(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;
(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property."

The Special Committee in proposing the change observed as follows:

> "Section 91 specifies persons who, in addition to a mortgagor, are entitled to redeem. Clauses (a) and (b) can be suitably combined in one clause. Clauses (d) and (e) are superfluous, and, in our opinion, should be omitted. An attachment does not create any interest such as a charge or a loan in the property attached (I. L. R. 29 Cal. 428, 32 Mad. 429), and there is no reason why an attaching creditor should have the right of redemption. We, therefore, propose to omit clause (f)."

2. Scope of the section.—Section 60 deals with the mortgagor's right to redeem the mortgaged property and this section enumerates the persons who, in addition to the mortgagor, are entitled to redeem or institute a suit for redemption of the mortgaged property.[1] The right of redemption conferred by the section on other persons is, however, the same right which the mortgagor possesses under S. 60 and not a different kind of right.[2] The persons who are given the right of redemption under the section may be broadly grouped under two heads, i. e., persons having an interest in or charge upon the mortgaged property or in or upon the right to redeem the same (cl. (a)); and persons who have no interest or charge upon the mortgaged property or in or upon the right to redeem it but who are given a personal right to redeem on some special grounds (clauses (b) and (c)).[3]

3. "Besides the mortgagor." — This section deals with the right of redemption of persons other than the *mortgagor*, though it recognises the mortgagor's right of redemption, as is shown by the words "besides the mortgagor".[1] The mortgagor himself has a right of

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Section 91 — Note 2

1. See the Report of the Special Committee.
('17) 4 AIR 1917 All 110 (110) : 41 Ind Cas 190 : 39 All 536 (DB), *Lakhpat Rai* v. *Fakhruddin.*
('91) 13 All 432 (454) (FB), *Mata Din Kasodhan* v. *Kazim Husain.*
2. ('17) 4 AIR 1917 All 110 (110) : 41 Ind Cas 190 : 39 All 536 (DB), *Lakhpat Rai* v. *Fakhruddin.*
3. ('36) 23 AIR 1936 Nag 209 (213) : I L R (1936) Nag 127 : 165 Ind Cas 939 (DB), *Amardas* v. *Jailalsao.*
[*See* ('39) 26 AIR 1939 Pat 7 (11) : 180 Ind Cas 974 : 18 Pat 155, *Baiju Lal* v. *Thakur Prasad.*]

Note 3

1. ('10) 6 Ind Cas 764 (766) : 34 Mad 115 (118) (DB), *Ponnammal* v. *Kalithitha Mudali.*
('21) 8 AIR 1921 Mad 51 (52) : 62 Ind Cas 291 (DB), *Govinda Padayachi* v. *Lokanatha Aiyer.*

Section 91
Note 3

redemption given to him by S. 60. Section 59A provides that "unless otherwise expressly provided," the word "mortgagor" shall be deemed to include persons deriving title from him. It has been held by the High Court of Bombay that this section is one of such express provisions inasmuch as, in providing that "besides the mortgagor the following persons are entitled to redeem" and in including among those persons such persons as derive title from the mortgagor, it clearly distinguishes between the mortgagor and persons deriving title from him. Consequently, a purchaser from the mortgagor, for instance, is entitled to redeem, not by virtue of S. 60, but by virtue of this section.[2]

The mortgagor must, in order to be entitled to redeem, have an *existing right* in the equity of redemption. If he absolutely and entirely parts with it, his right to redeem comes to an end.[3] But if, even after he has absolutely parted with his equity of redemption, he is sued by the mortgagee upon his *covenant to pay the mortgage-debt* he acquires a new right to redeem and is entitled to a reconveyance to himself *subject* of course to *any equity of redemption that may have vested in any other person.*[4] In *Dhana Koeri* v. *Ram Kewal*[5] it has been held that this principle will apply not only when the mortgagee sues the mortgagor on the covenant but also on the mortgage-debt. In that case, A mortgaged property to B by way of simple mortgage and then to C by way of usufructuary mortgage. B sued on his mortgage impleading only A, obtained a decree for sale and, in execution, purchased the property himself. Being unable to obtain possession he again sued both C and A. A decree was passed that C should redeem B and that, if he failed to do so B should redeem C. C redeemed B. It was held that the consequence of it was that B's mortgage was satisfied, that therefore *ipso facto* the decree and sale in favour of B were vacated, and that the equity of redemption came again into the hands of A. B could have got in the whole estate by redeeming C, but if he did not take that course, then, he must be taken to have fallen back on his mortgage and thus revived the equity in A. A could, therefore, redeem C by payment of the amount due under C's mortgage plus the amount paid by C to B.

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2. ('42) 29 AIR 1942 Bom 98 (99) : 199 Ind Cas 718 : I L R (1942) Bom 169 (DB), *Narayan Divakarappa* v. *Parameshvarappa.*

3. ('21) 8 AIR 1921 Mad 51 (53, 54) : 62 Ind Cas 291 (DB), *Govinda Padayachi* v. *Lokanatha Aiyar.*

('04) 27 Mad 428 (429) (DB), *Ikkotha* v. *Chakkiamma.* (Sale in execution of a decree.)

('16) 3 AIR 1916 Pat 375 (380) : 35 Ind Cas 404 (DB), *Janhavi Prasad Singh* v. *Gharbaran Dubey.*

[*See also* ('25) 12 AIR 1925 Rang 377 (381): 90 Ind Cas 1011 : 3 Rang 367 (DB), *A. T. A. R. M. M. Chetty Firm* v. *Mahomad Kasim.*]

4. (1888) 39 Ch D 636 (645, 646) : 57 L J Ch 905 : 37 W R (Eng) 234 : 59 L T 433, *Kinnaird* v. *Trollope.*

('30) 17 AIR 1930 Pat 570 (572, 573) : 129 Ind Cas 664 : 10 Pat 197 (DB), *Dhana Koeri* v. *Ram Kewal.*

[*See also* ('21) 8 AIR 1921 Mad 51 (53) : 62 Ind Cas 291 (DB), *Govinda Padayachi* v. *Lokanatha Aiyar.*]

5. ('30) 17 AIR 1930 Pat 570 (572, 573) : 129 Ind Cas 664 : 10 Pat 197 (DB).

Section 91
Note 4

4. Clause (a)—General. — This clause refers to four classes of persons who are entitled to redeem:

(a) persons having an interest in the "*property mortgaged*";

(b) persons having a *charge* upon the "*property mortgaged*";

(c) persons having an *interest* in "*the right to redeem*" the property mortgaged; and

(d) persons having a *charge* upon the "*right to redeem*" the property mortgaged.

The "property mortgaged" is not the same thing as "the right to redeem the same." The former has reference to a stage *before the mortgage was executed* and comprises the *entire interest* of the mortgagor which was offered as security under the mortgage. The latter has reference to a stage *after the mortgage is executed* and comprises the mortgagor's interest which *remains* after deducting the mortgagee-interest. Again the words "property mortgaged" and "the right to redeem the same" cannot obviously comprise interests which the mortgagor did not own and which could not be transferred by the mortgagor by way of mortgage. Thus, suppose A, the owner of property *x*, executes a mortgage first in favour of B and then in favour of C. B cannot be said to have any interest in the "property mortgaged" to C, inasmuch as what was mortgaged to C, was the equity of redemption remaining in A after the mortgage to B. The same view may be expressed by saying that the interest of any person which is *not bound* by the contract of mortgage is not an interest in the "property mortgaged" or in the right to redeem the same and the owner of such interest is not entitled to redeem the mortgage under this clause.[1]

But it is not necessary that in order that a person may have an interest in the "property mortgaged", he should have *derived his title* from or should have claimed through, the mortgagor, though it is necessary that such interest is *bound* by the mortgage.[2]

Note 4

1. ('08) 4 Nag L R 9 (11), *Ghanya* v. *Ukund Rao.*
('15) 2 AIR 1915 Lah 199 (200) : 30 Ind Cas 389 (DB), *Jiwan Singh* v. *Achhar Singh.*
('01) 5 Cal W N 83 (85) (DB), *Girish Chunder Dey* v. *Juramoni Dey.*
('17) 4 AIR 1917 Nag 133 (134, 135) : 14 Nag L R 117 : 47 Ind Cas 99, *Shanker Singh* v. *Hukumchand.*
('07) 29 All 679 (682) : 4 All L Jour 703, *Raghunandan Prasad* v. *Ambika Singh.*
('91) 13 All 432 (454) (FB), *Mata Din Kasodhan* v. *Kazim Husain.*
('26) 13 AIR 1926 Nag 496 (497) : 96 Ind Cas 973 : 23 Nag L R 128, *Pannalal* v. *Rajaram.*
('30) 17 AIR 1930 Nag 173 (175, 176) : 122 Ind Cas 699 : 26 Nag L R 208, *Dinkarrao* v. *Shamrao.*
[*See also* ('86) 12 Cal 414 (422) : 12 Ind App 171 (PC), *Nilakant Banerji* v. *Suresh Chandra Mullick.* (Person made party to mortgage suit but who claims a paramount title and gets the suit dismissed against him cannot afterwards redeem.)]

2. ('08) 4 Nag L R 9 (11), *Ghanya* v. *Ukund Rao.*
('34) 21 AIR 1934 Bom 32 (33) : 58 Bom 75 : 148 Ind Cas 1145, *Ganesh Raghunath* v. *Rajaram Laxman.*

Section 91
Note 4

This clause gives a right of redemption not only to a person having an *interest* in the property mortgaged or in the right to redeem the same, but also to a person having a *charge* upon such property or right to redeem.[3] As has been seen in Note 4 on S. 58 a charge does not create any interest in the property though, under certain circumstances, the property may be made liable for the payment of the money charged.

Illustrations.

(1) A and his son B constitute a Mitakshara undivided Hindu family. A mortgages the family property to C for purposes binding on the family. B is a person having an interest in "the property mortgaged" and so can redeem C. B, it may be noted, does not claim through A.[4]

(2) A, a Hindu widow, mortgages her husband's property to B for purposes binding on the estate. After the death of A, C, the next reversioner, is a person having an interest in the "property mortgaged" and so can redeem B. It may be noted here also that the reversioner C does not claim through the widow but only through the last male owner.[5]

(3) A is the owner of property x and B has a *charge* on that property for certain amounts due. A mortgages the property to C who takes it *bona fide* without notice of the charge. The mortgage is binding on B. B can, therefore, as a person having a charge upon the "property mortgaged" redeem C.

(4) A mortgages property first to X and then to Y. Y has an *interest* in the "right to redeem" remaining in A after the prior mortgage to X. He is, therefore, entitled to redeem X.[6]

(5) A mortgages property x to B and then sells his equity of redemption to C for a consideration of Rs. 4,000, which, however, is not paid. Under s. 55 sub-S. 4 cl. (b) A has got a *charge* on the equity of redemption transferred to C, i. e.,

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3. ('96) 19 Mad 151 (153) (DB), *Paya Matathil Appu* v. *Kovamel Amina.*
('36) 164 Ind Cas 1009 (1010) (Cal), *Simbhuram Beriwalla* v. *Gulzarilal Thakur.* (By a consent decree it was provided that certain property will remain charged for the decretal amount subject to previous encumbrance—It was held that the decree was compulsorily registrable under S. 17 (2) (vi) of the Registration Act, 1908, and as it was not so registered the decree-holder could not claim any charge on the property so as to be able to redeem a mortgage on the property.)
('98) 11 C P L R 95 (96, 101, 102), *Seth Ratan Lal* v. *Rani Umed Kuar.*
('20) 7 AIR 1920 Lah 480 (481) (DB), *Mokandi* v. *Harnam Das.* (*A* mortgaged certain property to *B* and then sold the equity of redemption to *C*—*C* sued *B* for the redemption of the mortgage making *A* a co-defendant—*A* alleged that his consent to the sale was caused by undue influence and fraud; there was no consideration for the sale and the sale was void — It was held that the defence of fraud and undue influence would not avail as part of consideration was proved to have been paid by *C* to *A* and this sum constituted a charge upon the land entitling *C* to maintain the redemption suit.)

4. See Note 21.

5. See ('08) 4 Nag L R 9 (11), *Ghanya* v. *Ukund Rao.*

6. See Note 5.

has a *charge* on the "right to redeem" and so can, under this clause, redeem B.[7]

The "interest" contemplated by the clause is obviously not confined to the right of *ownership* but may be any interest in the property, however small it may be.[8] It may accrue by succession, conveyance or contract.[8a] It must, however, be a *present* interest and not a mere contingent or future interest,[9] i. e., it must be an interest actually in existence at the time when the right of redemption is claimed.[10] A reversionary interest under the Hindu law cannot be said to be a *present interest* as it is merely a *spes successionis*.[11] But although it is necessary that the person should have a *present interest* in the property or in the right to redeem it, *a present right to the possession and enjoyment* of the property is not essential.[12]

The "interest" or "charge" must be a *validly created* "interest" or "charge." An invalid interest or charge will not entitle a person to claim the right of redemption under the clause.[13]

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7. ('25) 12 AIR 1925 Mad 778 (778) : 86 Ind Cas 793, *Ratnam Pillai* v. *Kamalambal Ammal.*

8. (1888) 39 Ch D 456 (462) : 57 L J Ch 1085 : 59 L T 742 : 37 W R (Eng) 276. *Tarn* v. *Turner.*
('96) 19 Mad 151 (153) (DB), *Paya Matathil Appu* v. *Kovamel Amina.*
('29) 16 AIR 1929 Bom 139 (140, 141) : 53 Bom 353 : 116 Ind Cas 225, *Shankar Mahadev* v. *Bhikaji.*
('27) 14 AIR 1927 Cal 479 (480) : 100 Ind Cas 521, *Chandi Charan Roy* v. *Siraj Mia.*
('26) 13 AIR 1926 Nag 496 (498) : 96 Ind Cas 973 : 23 Nag L R 128, *Pannalal* v. *Rajaram.*
(1869) 5 Ch App 227 (229) : 39 L J Ch 342 : 22 L T 190 : 19 W R (Eng) 196, *Pearce* v. *Morris.*
('81) 6 Cal 663 (664) : 7 Cal L R 201, *Soobhul Chunder Paul* v. *N. Churn Bysack.*

8a. ('32) 19 AIR 1932 All 643 (647) : 138 Ind Cas 552 (DB), *Ram Singh* v. *Baldeo Prasad.*

9. ('08) 30 All 497 (498, 499) : 5 All L Jour 631 (DB), *Ram Chandar* v. *Kallu.*
('30) 17 AIR 1930 Oudh 294 (296) : 123 Ind Cas 211 : 5 Luck 691 (DB), *Chhote Singh* v. *Surat Singh.*
('19) 6 AIR 1919 Oudh 217 (220) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*
('14) 1 AIR 1914 Upp Bur 45 (49) : 2 Upp Bur Rul 46 : 28 Ind Cas 821, *Mi The O* v. *Mi Swe.* (Under Buddhist law a daughter has not such an interest in the property sought to be redeemed during the life-time of her mother as is contemplated by the section.)

10. ('35) 22 AIR 1935 Oudh 139 (141) : 10 Luck 531 : 153 Ind Cas 808 (DB), *Ram Adhar* v. *Shankar Bakhsh Singh.*
('02) 15 C P L R 175 (177), *Ganpat* v. *Bhangi.*

11. See Note 16.

12. ('29) 16 AIR 1929 Nag 27 (28, 29) : 112 Ind Cas 248, *Mahadeo Kunbi* v. *Babya.* (A legatee who is to get the devised property after the death of the testator and his wife and who survives the testator has, after the testator's death, a vested interest in the property and consequently his son is entitled to redeem a mortgage executed by the testator.)
[*See* ('09) 3 Ind Cas 519 (520) : 12 Oudh Cas 197 (DB), *Debi Sahay Singh* v. *Sumer Singh.*
('09) 3 Ind Cas 521 (522) : 12 Oudh Cas 201 (DB), *Iqbal Husain* v. *Sheo Charan.*]

13. (38) 42 Cal W N 1106 (1109), *Padma Lochan Roy* v. *Shaik Ajimaddin.*

Section 91
Note 5

5. Puisne mortgagee. — After the creation of the prior mortgage it is only the right to redeem the property which is left in the mortgagor and when he creates a subsequent mortgage on the same property it is only the right to redeem which is mortgaged to the subsequent mortgagee.[1] A puisne mortgagee is thus a person who has an interest in the "right to redeem" the mortgage property under the prior mortgage[2] and is consequently entitled, under this clause, to redeem or to institute a suit for redemption of the prior mortgage.[3]

Note 5

1. ('24) 11 AIR 1924 Nag 191 (194) : 79 Ind Cas 614, *Balaji Vinayak Buti* v. *Vithoba.*
('24) 11 AIR 1924 Nag 198 (198) : 75 Ind Cas 899, *Govindrao* v. *Rukhmanand.*

2. ('95) 22 Cal 33 (39) (DB), *Kanti Ram* v. *Kutubuddin.*
('04) 28 Bom 153 (162, 163) : 5 Bom L R 892 (DB), *Hasanbhai* v. *Umaji.*
('84) 8 Bom 168 (173) (DB), *Radhabai* v. *Shamrav.*
('24) 11 AIR 1924 Nag 191 (194) : 79 Ind Cas 614, *Balaji Vinayak Buti* v. *Vithoba.*
('97) 20 Mad 35 (37, 38) : 6 Mad L Jour 235 (DB), *Muthir Vijia* v. *Venkattachallam.* (Second mortgage is as to the second mortgagee nothing but an assignment of the mortgagor's interest — As an assignee of the mortgagor the second mortgagee may insist upon all the rights of a mortgagor against the first mortgagee.)
[*See also* (1882) 20 Ch D 724 (727) : 51 L J Ch 621 : 47 L T 208 : 30 W R (Eng) 716, *Teevan* v. *Smith.* (The mortgagor by mortgaging the property to the second mortgagee makes him his assign.)]

3. ('95) 22 Cal 33 (37) (DB), *Kanti Ram* v. *Kutubuddin.*
('01) 4 Oudh Cas 100 (103) (DB), *Sheo Ghulam* v. *Ghulam Sarwar.*
('73) 5 N W P H C R 145 (148) (DB), *Sheopal* v. *Deen Dyal.*
('88) 10 All 611 (612) : 1888 All W N 238 (DB), *Girdhar Lal* v. *Bhola Nath.*
('95) 18 All 83 (86) (DB), *Akhara Panchaiti* v. *Suba Lal.*
(1900) 23 All 25 (29, 31): 1900 All W N 185 (DB), *Kudratullah* v. *Kubra Begam.*
('03) 26 All 72 (77) : 1903 All W N 190 (DB), *Shib Lal* v. *Bhawani Shankar.* (Assignee of the puisne mortgagee.)
('05) 27 All 325 (332) : 32 Ind App 123 (PC), *Gopi Narain* v. *Bansidhar.*
(1900) 22 All 453 (460) : 1900 All W N 160 (DB), *Wahid-un-Nissa* v. *Gobardhan Das.*
('06) 3 All L Jour 240 (241, 242), *Ram Lal* v. *Lakhpat Rai.*
('83) 1883 All W N 193 (193) (DB), *Raghubans Kuar* v. *Ramsahai.*
('94) 1894 All W N 136 (137) (DB), *Harnam Singh* v. *Bishan Singh.*
('04) 1904 All W N 285 (286) (DB), *Sital Prasad* v. *Tufail Fatma.*
('06) 1906 All W N 190 (190), *Ram Nidh* v. *Ishar Dayal.*
('09) 1 Ind Cas 505 (506) (All), *Har Sahai* v. *Mukkarram Hussain.*
('11) 10 Ind Cas 925 (926) (All), *Bhura* v. *Ghure.*
('11) 9 Ind Cas 158 (159) (DB) (All), *Shiamsundar Lal* v. *Harnarayan.*
('15) 2 AIR 1915 All 299 (300) : 29 Ind Cas 794, *Mt. Ram Piari* v. *Raghunath Singh.*
('30) 17 AIR 1930 All 869 (871) : 129 Ind Cas 378 (DB), *Raghunandan Prasad* v. *Ajodhya Singh.*
('34) 21 AIR 1934 All 946 (948) : 153 Ind Cas 664, *Narotam Das* v. *Sanwal Dass.*
('14) 1 AIR 1914 Bom 259 (259, 260) : 27 Ind Cas 38 (DB), *Mahomedali Kamruddin* v. *Abdulali.*
('28) 15 AIR 1928 Cal 116 (117) : 55 Cal 602 : 107 Ind Cas 355 (DB), *Bhodai Sheikh* v. *Barada Kanta.*
('11) 11 Ind Cas 512 (513) (Lah), *Jagat Singh* v. *Buta.*
('82) 4 Mad 213 (215) (DB), *Vencatachella Kandian* v. *Panjanadien.*
('92) 15 Mad 54 (56) (DB), *Chinnan* v. *Ramachandra.*

Section 91
Note 5

There is a difference of opinion on the question whether a puisne mortgagee who has allowed his remedy on the mortgage against the mortgagor to be barred by limitation, can be said to have a *subsisting interest* in the right to redeem so as to entitle him to sue for redemption of the prior mortgage. On the one hand, it has been held that the right of the puisne mortgagee to redeem the prior mortgage is not an absolute right but has been conceded to him for the protection of the rights possessed by him under his own mortgage and that, therefore, if the puisne mortgagee has lost all the remedies available to him in respect of his own mortgage, he cannot be said to have a subsisting interest sufficient to entitle him to claim redemption[4] under this clause. The effect of this view is that though under Art. 148 a period of 60 years is prescribed for a suit for redemption, this period is reduced to 12 years in

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('94) 17 Mad 17 (20) (DB), *Krishnan* v. *Chadayan Kutti.*
('94) 17 Mad 62 (64) : 4 Mad L Jour 17 (DB), *Narayanaswami* v. *Narayana.*
('03) 13 Mad L Jour 1 (1, 2) (DB), *Mangab Thuppan* v. *Kadir Kutti.*
('11) 9 Ind Cas 513 (516) (FB) (Mad), *Mulla Veetil* v. *Achuthan Nair.*
('21) 8 AIR 1921 Mad 612 (614) : 63 Ind Cas 730 (DB), *Rukmani Ammal* v. *Narasimha Iyer.*
('33) 20 AIR 1933 Mad 583 (583) : 56 Mad 846 : 144 Ind Cas 833 (FB), *Nagendran Chettiar* v. *Lakshmi Ammal.*
('89) 2 C P L R 173 (174), *Narayen Seth* v. *Mukund Ram.*
('23) 10 AIR 1923 Nag 24 (25), *Laxmi Narayan* v. *Radhakisan.*
('15) 2 A I R 1915 Oudh 211 (213) : 27 Ind Cas 960 (DB), *Suraj Kishan* v. *Ajudhya Prasad.*
('34) 21 AIR 1934 Oudh 246 (250) : 9 Luck 657 : 149 Ind Cas 543 (DB), *Harihar Baksh Singh* v. *Lachhman Singh.*
('35) 22 A I R 1935 Oudh 139 (141) : 10 Luck 531 : 153 Ind Cas 808 (DB), *Ram Adhar* v. *Shankar Bakhsh Singh.*
('01) 4 Oudh Cas 199 (202) (DB), *Jawahir Singh* v. *Baldeo Bakhsh.*
('15) 2 AIR 1915 Sind 9 (9) : 9 Sind L R 86 : 31 Ind Cas 37 (DB), *Kanayaram* v. *Tirith Singh.*
('66) 1866 Agra F B 7 (12) (FB), *Dookhchore Rai* v. *Hajee Hidayaut-ool-lah.*
('01) 1 Cal L Jour 65 (69) (DB), *Baikantha Nath* v. *Mohendra Nath.* (A puisne mortgagee's right to redeem a prior mortgage arises when he asserts it by a suit.)
('08) 30 All 30 (31) : 4 All L Jour 689 (DB), *Kaniz Fatima* v. *Waliullah.* (A decree for sale on a mortgage was passed, giving a right of redemption to a puisne mortgagee—The puisne mortgagee did not redeem, and the decree became absolute—*Held*, that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee, and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.)
('14) 1 A I R 1914 Mad 563 (563, 564) : 22 Ind Cas 907 (DB), *Govind Menon* v. *Chattu Menon.* (The question how far a second mortgage by a karnavan is binding on the tarwad cannot be raised by the first mortgagee in a suit for redemption by the second mortgagee unless the second mortgage is wholly invalid and not merely voidable—Until it is avoided by the tarwad in a proper suit the second mortgagee is entitled to redeem.)
('42) 29 AIR 1942 Oudh 260 (267) : 200 Ind Cas 146 (FB), *Abdul Hamid* v. *Ram Kumar.*
[*See also* ('33) 20 AIR 1933 Lah 503 (504) : 142 Ind Cas 805 : 14 Lah 596 (DB), *Sundar Das* v. *Beli Ram.*
('26) 13 AIR 1926 Lah 607 (608) : 98 Ind Cas 960 : 7 Lah 399 (DB), *Gopal Das* v. *Mulchand.*]

4. ('35) 22 AIR 1935 Oudh 139 (141) : 10 Luck 531 : 153 Ind Cas 808 (DB), *Ram Adhar* v. *Shankar Bakhsh Singh.*

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Notes 5–7

the case of a puisne mortgagee as, in suits governed by Art. 132 he has only a period of 12 years for instituting a suit on his mortgage. On the other hand a contrary view is taken in the undermentioned cases[5] that even when the puisne mortgagee's right to enforce payment of his mortgage is barred under Art. 132, his *right as mortgagee* is not extinguished under S. 28, Limitation Act, and he can, therefore, redeem under Art. 148 within the period of 60 years. It is submitted that the latter view is correct.

Where there are successive mortgages a puisne mortgagee can redeem any of the prior incumbrances and is not required to redeem only the mortgage immediately prior to him.[6]

The puisne mortgage must be a *valid* mortgage; a void mortgage cannot give the person in whose favour it is executed, a right to redeem a prior mortgage.[7]

6. Sub-mortgagee of puisne mortgagee. — A sub-mortgagee of the rights of a puisne mortgagee is entitled to redeem or to institute a suit for redemption of the prior mortgage as being a person having an interest in the 'right to redeem' the mortgaged property.[1]

7. Prior mortgagee. — As has been seen already in Note 4, a person not bound by the mortgage sought to be redeemed, cannot be said to have an 'interest' in the "property mortgaged" within the meaning of this section. A prior mortgagee is not bound by the second

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('25) 12 A I R 1925 Mad 76 (77) : 84 Ind Cas 301, *Lakshmanan Chettiar* v. *Sella Muthu.*

[*See also* ('29) 16 A I R 1929 Cal 609 (610) : 57 Cal 704 : 119 Ind Cas 135 (F B), *Sayamali Molla* v. *Anisuddin.*

('34) 21 A I R 1934 Lah 799 (800) : 155 Ind Cas 1116, *Phul Chand* v. *Shugan Chand.*

('24) 11 A I R 1924 Oudh 56 (59) : 79 Ind Cas 654 (DB), *Duber* v. *Ram Sahai.*]

5. ('33) 20 A I R 1933 Bom 25 (25, 26) : 141 Ind Cas 811 (DB), *Nathmal* v. *Nilkanth.*

('37) 24 AIR 1937 Nag 205 (207) : I L R (1937) Nag 367 : 172 Ind Cas 289, *Mt. Ramkunwarbai* v. *Mt. Chhitia Bai.* (The two rights of foreclosure of one's own mortgage and redemption of the prior mortgage are distinct — Extinction of one does not necessarily lead to the extinction of the other.)

('19) 6 AIR 1919 Nag 93 (94) : 51 Ind Cas 374, *Karniram Nathuram* v. *Hardeo Jaganath.*

6. ('13) 21 Ind Cas 560 (561) (DB) (Mad), *Venkatanarayanaswami Reddi* v. *Kanni Ammal.*

('24) 11 AIR 1924 Oudh 56 (59) : 79 Ind Cas 654 (DB), *Duber* v. *Ram Sahai.*

('91) 13 All 432 (488) (FB), *Mata Din* v. *Kazim Husain.* (Mahmood J., contra.)

7. ('38) 42 Cal W N 1106 (1109), *Padma Lochan* v. *Shaik Ajimaddin.*

Note 6

1. ('13) 21 Ind Cas 560 (561) (DB) (Mad), *Venkatanarayanasami* v. *Kanni Ammal.*

('05) 27 All 472 (476, 477, 478) : 2 All L Jour 162 (DB), *Ram Subhag* v. *Nar Singh.*

[*See also* ('05) 2 All L Jour 609 (611, 612) (DB), *Har Parshad* v. *Phul Chand.*]

[But see (1900) 1900 Pun L R No. 23 (DB), *Devi Chand* v. *Basho Ram.*]

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Note 7

mortgage.[1] He has no interest such as is contemplated by the section in 'the property mortgaged' under the second mortgage, for, what is mortgaged under the second mortgage is the equity of redemption remaining in the mortgagor after the first mortgage. It follows that a prior mortgagee cannot redeem the second mortgage under this section. This is in accordance with the well-known principle of law "redeem up and foreclose down", which means that, of any number of mortgagees, the later can always redeem the earlier but cannot be compelled to do so and *the earlier cannot redeem the later except by consent.*[2] The Explanation to O. 34, R. 1, Civil Procedure Code, also makes this clear. That rule provides that all persons having an interest either in the mortgage-security or in the right of redemption are necessary parties to any suit relating to the mortgage, but that a prior mortgagee is not a necessary party to a suit for sale or foreclosure by a puisne mortgagee or to a suit for redemption by the mortgagor of the puisne mortgage. There is, however, *no prohibition* against joining him as a party to such suits; and the undermentioned cases[3] have held that where he is joined as a party to the suit by the puisne mortgagee he is entitled to pay off the puisne mortgage.

A prior mortgagee who purchases the mortgagor's equity of redemption whether privately,[4] or in execution of a decree[5] stands in

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Note 7

1. ('20) 7 AIR 1920 Pat 630 (631) : 58 Ind Cas 33 (DB), *Lachmi Narayan* v. *Bhagwat Singh.*
[*See also* ('24) 11 AIR 1924 Nag 198 (198) : 75 Ind Cas 899, *Govindrao* v. *Rukhmanand.*]

2. ('26) 13 AIR 1926 Nag 21 (23) : 23 Nag L R 86 : 95 Ind Cas 979, *Premsukhdas* v. *Peerkhan.*
('21) 8 AIR 1921 Mad 612 (614) : 63 Ind Cas 730 (DB), *Rukmani Ammal* v. *Narasimma Iyer.*
('17) 4 AIR 1917 Mad 751 (752) : 34 Ind Cas 507 : 40 Mad 778 (DB), *Chinnu Pillai* v. *Venkata Samy.*
('08) 4 Nag L R 9 (11), *Ghanya* v. *Ukund Rao.*

3. ('10) 5 Ind Cas 142 (143) : 37 Cal 282 (DB), *Bhojohari* v. *Gajendra Narain.*
('29) 16 AIR 1929 Nag 135 (136) : 25 Nag L R 171 : 118 Ind Cas 54, *Narsingh* v. *Nathuji.*

4. ('07) 10 Oudh Cas 356 (358) (DB), *Kedar Nath* v. *Saiyad Hafiz Ali.*
('15) 2 AIR 1915 All 299 (300) : 29 Ind Cas 794, *Mt. Ram Piari* v. *Raghunath Singh.*
('24) 11 AIR 1924 Pat 452 (453): 3 Pat 114: 75 Ind Cas 942 (DB), *Birinchi Singh* v. *Saroda Prasad.*
('10) 5 Ind Cas 142 (143) : 37 Cal 282 (284) (DB), *Bhojohari* v. *Gajendra Narain.*

5. ('09) 2 Ind Cas 495 (496) (All), *Charni* v. *Raj Bahadur.*
('07) 10 Oudh Cas 356 (358) (DB), *Kedar Nath* v. *Saiyad Hafiz Ali.*
('17) 4 AIR 1917 All 237 (238) : 38 Ind Cas 573 (DB), *Ghulam* v. *Sukhi.*
('15) 2 AIR 1915 All 299 (300) : 29 Ind Cas 794, *Mt. Ram Piari* v. *Raghunath Singh.*
('87) 1887 All W N 125 (125) (DB), *Mithu Lal* v. *Ramchandar.*
('04) 1 All L Jour 360 (362, 363) (DB), *Mangli Prasad* v. *Pati Ram.*
('97) 20 Mad 120 (123) (DB), *Rangayya Chettiar* v. *Parthasarathi Naicker.*
('21) 8 AIR 1921 Mad 648 (649) (DB), *Sarvothama Rao* v. *Raja Row Sahib.*

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Notes 7–8

the shoes of the mortgagor and can, *in that capacity*, redeem the subsequent mortgage. So also, where the prior mortgagee forecloses behind the back of the subsequent mortgagee and acquires the mortgagor's equity of redemption he will be entitled to redeem the subsequent mortgage.[6]

8. **Purchaser of equity of redemption.**—A purchaser of the equity of redemption is entitled to redeem or to institute a suit for redemption of the mortgaged property.[1] This he will be entitled to do

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('24) 11 AIR 1924 Pat 484 (486): 3 Pat 435: 78 Ind Cas 614 (DB), *Mt. Dhanwanti Chaudharin* v. *Hargobind Prasad.*
('93) 16 Mad 121 (125, 126) : 2 Mad L Jour 281 (DB), *Perumal* v. *Kaveri.*
('10) 6 Ind Cas 670 (671) (DB) (Cal), *Gobinda Proshad* v. *Lakshmi Chander.*
('26) 13 AIR 1926 Nag 135 (136) : 88 Ind Cas 803, *Yado Rao* v. *Amrit Rao.*

6. ('04) 28 Bom 153 (163, 170) : 5 Bom L R 892 (DB), *Hassanbhai* v. *Umaji Hiraji.*

Note 8

1. ('06) 28 All 638 (640) : 3 All L Jour 548 (DB), *Gokul Das* v. *Debi Prasad.*
('12) 14 Ind Cas 415 (416): 35 Mad 42 (DB), *Kuttisseri Illath Raman Namboodri* v. *Achutha Pishurodi.*
('82) 6 Bom 538 (540) (FB), *Naran Purshotam* v. *Dolatram Virchand.*
(1900) 4 Cal W N 266 (268) (DB), *Protap Chandra* v. *Ishan Chandra.*
(1865) 3 Suth W R 128 (128) (DB), *Dinonath Butobyal* v. *Womachurn Roy.*
('20) 7 AIR 1920 Mad 389 (390) : 58 Ind Cas 493 (DB), *Malireddi* v. *Gopalakrishnayya.*
('17) 4 AIR 1917 Nag 137 (138) : 14 Nag L R 184 : 46 Ind Cas 368, *Deochand* v. *Binjraj.*
('87) 1887 Bom P J 209 (DB), *Gangadhar* v. *Balshet.*
('22) 9 AIR 1922 Cal 23 (24) : 49 Cal 626 : 69 Ind Cas 759 (DB), *Jnanendra Nath Singh* v. *Shorashi Charan.*
('27) 14 AIR 1927 Pat 25 (26) : 97 Ind Cas 386 (DB), *Promatha Nath* v. *Ram Kishun Singh.*
('26) 13 AIR 1926 Rang 183 (184) : 4 Rang 96 : 97 Ind Cas 243 (DB), *Ma Kin Kyaw* v. *R. C. Dey.*
('31) 18 AIR 1931 Mad 542 (547, 548) : 133 Ind Cas 497 (DB), *Chandramma* v. *Gunna Seethan.* (Private sale.)
('36) 23 AIR 1936 Mad 70 (74, 78) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar* v. *Subramania Pillai.*
('01) 4 Oudh Cas 100 (103) (DB), *Sheo Ghulam Singh* v. *Ghulam Sarwar.*
('08) 4 Nag L R 9 (11), *Ghanya* v. *Ukund Rao.*
('21) 8 AIR 1921 Mad 648 (649) (DB), *Sarvothama Rao* v. *Raja Row Sahib.*
('36) 23 AIR 1936 Nag 207 (208) : ILR (1936) Nag 183 : 165 Ind Cas 76, *Narayan Vishnooram* v. *Maruti Nago.* (If the sale of the mortgaged property is unreal the person in whose favour the sale is made obtains no interest in either the property or the right to redeem.)
('92) 16 Bom 705 (707) (DB), *Subrao Mangeshaya* v. *Manjapa Shetti.*
('66) 6 Suth W R 230 (231) (DB), *Bissonath Singh* v. *Brojonath Dass.*
('68) 3 Agra 30 (31) (DB), *Heera Singh* v. *Ragho Nath.* (Default by a purchaser in payment of the purchase-money or any portion of it does not necessarily invalidate the sale, and in a suit brought to redeem the property purchased, the mortgagee cannot avail himself of the objection that the full amount of purchase-money has not been paid.)
[*See also* ('14) 1 AIR 1914 Lah 289 (290) : 1914 Pun Re No. 102 : 24 Ind Cas 636 (DB), *Dewanchand* v. *Harichand.* (In a suit by a mortgagee to redeem a sub-mortgage, the sub-mortgagee could not claim by way of defence, a right to redeem the mortgage on the ground of the transfer of the equity of redemption.)

even if he has purchased only a portion of the equity of redemption[2] or has purchased the same in execution of a decree.[3]

('10) 6 Ind Cas 837 (837, 838) (DB) (All), *Ram Pargas* v. *Sooba Upadhya.* (Transferee from a mortgagee has a right to redeem the sub-mortgage created by the mortgagee.)
(1865) 3 Suth W R 230 (231) (DB), *Kishen* v. *Belasoo.* (Assignee of mortgagor's equity of redemption held to be mortgagor's legal representative within the meaning of S. 8 of Bengal Regulation XVII of 1806.)
(1900) 4 Cal W N 452 (453) (DB), *Grish Chunder* v. *Iswar Chunder.*]

2. ('33) 20 AIR 1933 Pat 33 (35) : 140 Ind Cas 845 (DB), *Jhum Lal* v. *Sham Narayan Singh.*
('29) 16 AIR 1929 Bom 139 (140, 141) : 53 Bom 353 : 116 Ind Cas 225, *Shankar Mahadeo* v. *Bhikaji Ramchandra.*
('98) 21 Mad 64 (66) : 8 Mad L Jour 21 (DB), *Sivathi Odayan* v. *Ramasubbayyar.*
('18) 5 AIR 1918 Cal 975 (976) : 44 Ind Cas 77 (DB), *Baikantha Nath* v. *Mohesh Chandra.*
('79) 2 Mad 223 (224, 225) (DB), *Asansab Rawthan* v. *Vamana Rau.*
('04) 27 All 178 (182) : 1 All L Jour 579 (DB), *Rugad Singh* v. *Sat Narain Singh.*
('98) 21 Mad 18 (26) (DB), *Nainappa Chetty* v. *Chidambaram Chetti.*
('33) 20 AIR 1933 Rang 392 (393) : 150 Ind Cas 692 (DB), *Bank of Chettinad Ltd.* v. *C. T. A. C. T. Firm.*
('27) 14 AIR 1927 Cal 559 (561) : 101 Ind Cas 15 (DB), *Dharanidhar Boral* v. *Panchanan Saha.*
('01) 23 All 429 (430, 431) : 1901 All W N 121 (DB), *Bhagwan Das* v. *Sham Das.*
('27) 14 AIR 1927 Cal 259 (260) : 100 Ind Cas 420 (DB), *Bhagaban Chandra* v. *Tarak Chandra.*
('13) 20 Ind Cas 184 (185) (DB) (All), *Hajra Bibi* v. *Shiam Narain.*
('23) 10 AIR 1923 Mad 533 (534) : 47 Mad 7 : 72 Ind Cas 292 (DB), *Subba Rao* v. *Balusu Buchi.*
('17) 4 AIR 1917 Oudh 415 (415, 416) : 36 Ind Cas 709, *Puran Singh* v. *Bhikhan Singh.*
[*See also* ('28) 15 AIR 1928 Lah 105 (105) : 106 Ind Cas 570 (DB), *Ashaq Ali* v. *Shafi Ali.*]

3. ('37) 24 AIR 1937 Oudh 493 (497) : 13 Luck 484 : 171 Ind Cas 233 (DB), *Parsotam Das* v. *Syed Ali Haidar.*
('79) 2 Mad 223 (224, 225) (DB), *Asansab Rowthan* v. *Vamana Rau.*
('12) 15 Ind Cas 5 (8) : 15 Oudh Cas 211, *Ram Kumar* v. *Dwarka Prasad.*
('37) 24 AIR 1937 Nag 205 (208) : ILR (1937) Nag 367 : 172 Ind Cas 289, *Mt. Ramkunwarbai* v. *Mt. Chhitiabai.*
('29) 16 AIR 1929 Nag 246 (250) : 25 Nag L R 19 : 123 Ind Cas 462, *Ramanath* v. *Hazarilal.* (A mortgagee who forecloses a mortgagor, omitting to implead the owner of the equity of redemption as a party to the suit and at a time when he had left in the mortgagor no interest to foreclose, cannot plead that the settlement entry based on a foreclosure, which brought him no part of the equity of redemption that had already vested in another person and gave him nothing beyond his own right as prior mortgagee, secured to him the status of an absolute occupancy tenant under the provisions of S. 80, C. P. Land Revenue Act, and also under S. 104 of the C. P. Tenancy Act, and deprive the owner of the right of redemption which the Transfer of Property Act secures to him.)
('22) 9 AIR 1922 Cal 32 (34) : 69 Ind Cas 841 (DB), *Sital Chandra* v. *Parbati Charan.* (If the purchaser at the rent sale under Bengal Tenancy Act has not availed himself of the privilege of annulling the mortgage within the prescribed period of one year under S. 167 of the Act he holds the property subject to the mortgage and is entitled to redeem.)
('68) 10 Suth W R 167 (169) (DB), *Jokhee Lall* v. *Mt. Huns Kooer.*
('23) 10 AIR 1923 All 232 (232) : 65 Ind Cas 654 (DB), *Mt. Rampia* v. *Hazarilal.*
('88) 10 All 520 (523, 524) : 1888 All W N 210 (DB), *Gajadhar* v. *Mul Chand.*

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Notes 9–10

9. Person contracting to purchase mortgaged property. — As will be seen from the provisions of S. 54, a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. Therefore, a person who has merely entered into a contract to purchase the mortgaged property cannot redeem or institute a suit for redemption of such property on the basis of the contract.[1]

10. Transferee pendente lite. — A transferee from the mortgagor during the pendency of a suit for sale, foreclosure or redemption of the mortgage is, as has been seen in Note 40 on S. 52, bound by the decree or order made in the suit[1] and will be entitled to redeem the mortgage.[2] But he can redeem only before a final decree debarring the

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('20) 7 AIR 1920 Mad 389 (390) : 58 Ind Cas 493 (DB), *Malireddi* v. *Gopala Krishnayya.*
('84) 7 Mad 423 (424) (DB), *Periandi* v. *Angappa.*
('91) 16 Bom 486 (491) (DB), *Dadoba Arjunji* v. *Damodar Raghunath.*
('04) 26 All 464 (465, 466) : 1904 All W N 108 (DB), *Ram Prasad* v. *Bhikari Das.*
('01) 3 Bom L R 92 (94) (DB), *Baijnath* v. *Bhimappa.*
('81) 6 Bom 139 (142) (DB), *Krishnaji* v. *Ganesh.* (If a party whose title may, to some extent, be imperfect sues for redemption and is able to prove a perfect title at the hearing of his case, he should be given a decree for redemption.)
('21) 8 AIR 1921 Mad 648 (649) (DB), *Sarvothama Rao* v. *Raja Row.*
('18) 5 AIR 1918 Cal 806 (806) : 38 Ind Cas 523 (DB), *Ram Kumar* v. *Rameshwar Saha.*
('33) 20 AIR 1933 Cal 728 (731) : 60 Cal 948 : 148 Ind Cas 42 (DB), *Niharmala Debee* v. *Sarojebandhu.*
('70) 14 Suth W R 233 (235) (DB), *Narain Sahoo* v. *Ochoot Sahoo.*
[*See also* ('75) 24 Suth W R 210 (210) (DB), *Byjnath Singh* v. *Gobardhun Lall.* (When a creditor under a bond by which property is mortgaged, takes a money decree and proceeds to attach and sell the mortgaged property, he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor.)
('96) 18 All 320 (321) : 1896 All W N 86 (DB), *Nathu Singh* v. *Gumani Singh.*]

Note 9

1. ('26) 13 AIR 1926 Mad 597 (598) : 92 Ind Cas 715, *Mayappa Chettiar* v. *Kolandaivelu Chettiar.*
('02) 15 C P L R 175 (177), *Ganpat* v. *Bhangi.*
('36) 23 AIR 1936 Nag 209 (213) : I L R (1936) Nag 127 : 165 Ind Cas 939 (DB), *Amardas* v. *Jailal Sao.*
[*See also* ('28) 15 AIR 1928 Oudh 298 (299) : 107 Ind Cas 885 (DB), *Hasan Bandi* v. *Barati Lal.* (*N* was claiming certain rights in a certain estate—He having no money with which to prosecute his claim executed an agreement in favour of *D* whereby *D* undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded — On the strength of this agreement *D* instituted a suit for redemption of a two annas share in a village in which *N* had the right to redeem four annas — *Held* that *D* had no right to redeem, as the agreement was neither a sale nor a transfer.)]

Note 10

1. See also the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn., O. 22 R. 10 Note 2 and the following cases.
('15) 2 AIR 1915 Nag 28 (28) : 33 Ind Cas 496 : 12 Nag L R 50, *Digambar* v. *Ganpat.*
('26) 13 AIR 1926 Nag 21 (23) : 23 Nag L R 86 : 95 Ind Cas 979, *Premsukhdas* v. *Peer Khan.*
('07) 29 All 76 (80, 81) : 3 All L Jour 675, *Parsotam Narain* v. *Chheda Lal.*
2. (33) 20 AIR 1933 Nag 171 (173) : 30 Nag L R 265 : 144 Ind Cas 326 (DB), *Gadiram Chimna* v. *Punamchand.*

mortgagor from redeeming the mortgaged property under O. 34, R. 3 or R. 8 of the Code of Civil Procedure is passed;[3] or before the confirmation of sale made in pursuance of a final decree under O. 34, R. 5 or R. 8 of the Code of Civil Procedure,[4] but not afterwards.[5]

11. Donee. — A person to whom a gift has been made of the equity of redemption can redeem or institute a suit for redemption of the mortgaged property.[1]

12. Lessee of mortgaged property. — In England a lessee from the mortgagor is a person having an interest in the equity of redemption and is entitled to redeem the mortgage.[1] Under this section also, a lessee is entitled to redeem the mortgage, as a person having an interest in the right to redeem.[1a] In *Paya Matathil Appu* v. *Kovamel Amina*[2] their Lordships of the Madras High Court said :

[*See also* (1909) 2 Ch 437 (439) : 78 L J Ch 782 : 101 L T 382, *In re Parbola Ltd.*; *Blackburn* v. *Parbola Ltd.*

('15) 2 AIR 1915 All 88 (88, 99) : 37 All 226 : 27 Ind Cas 771, *Masih Ullah Khan* v. *Jarao Bai.* (Purchaser from the mortgagor after a preliminary decree in a redemption suit by the mortgagor but before the final decree acquires an interest in the property which entitles him to be made a plaintiff in the suit under O. 22, R. 10, C. P. C.)]

3. ('15) 2 AIR 1915 Nag 28 (28) : 33 Ind Cas 496 : 12 Nag L R 50, *Digambar* v. *Ganpat.*

('26) 13 AIR 1926 Nag 21 (22, 23) : 23 Nag L R 86 : 95 Ind Cas 979, *Premsukhdas* v. *Peerkhan.*

[*See* ('07) 29 All 76 (81) : 3 All L Jour 675, *Parsotam Narain* v. *Chheda Lal.*

('07) 10 Oudh Cas 356 (358) (DB), *Kedar Nath* v. *Hafiz Ali.*]

[*See also* (1909) 2 Ch D 437 (439) : 101 L T 382 : 78 L J Ch 782, *In re Parbola Ltd. Blackburn* v. *Parbola Ltd.*]

4. *See also* ('99) 26 Cal 966 (970, 971, 972) : 4 Cal W N 317 (DB), *Har Shanker* v. *Sheo Gobind.*

('01) 23 All 331 (334) (DB), *Chunni Lal* v. *Abdul Ali.*

5. ('37) 24 AIR 1937 Nag 400 (401, 402) : ILR (1937) Nag 452 : 172 Ind Cas 389, *Gharbhoya Bhimji* v. *Deodatta Bihari.* (Principle of the doctrine of *lis pendens* applies to auction sales.)

Note 11

1. ('21) 8 AIR 1921 Bom 413 (413) : 45 Bom 105 : 59 Ind Cas 480 (DB), *Sitaram Ravaji* v. *Khandu Mairala.*

Note 12

1. (1888) 39 Ch D 456 (463, 465, 468, 469) : 57 L J Ch 1085 : 59 L T 742 : 37 W R (Eng) 276, *Tarn* v. *Turner.*

1a. ('12) 17 Ind Cas 1 (3) (DB) (Cal), *Madan Mohan Singh* v. *Raj Kishori Kumari.*

('26) 13 AIR 1926 Nag 496 (498) : 96 Ind Cas 973 : 23 Nag L R 128, *Pannalal* v. *Rajaram.*

('01) 4 Oudh Cas 100 (103) (DB), *Sheo Ghulam Singh* v. *Ghulam Sarwar.*

('96) 19 Mad 151 (153) : 5 Mad L Jour 279 (DB), *Paya Matathil Appu* v. *Kovemal Amina.*

('23) 10 AIR 1923 All 140 (141) : 76 Ind Cas 862 (DB), *Mahabir Chaube* v. *Dip Narain.*

('40) 27 AIR 1940 Bom 15 (16, 17) : I L R (1939) Bom 713 : 186 Ind Cas 643, *Gafur Usman* v. *Sakharam Tanshet.* (Transferees of Khoti land from permanent tenant.)

2. ('96) 19 Mad 151 (153): 5 Mad L Jour 279 (DB). ((1888) 39 Ch D 456 followed— So long as the plaintiff has an interest validly entitling him to possession he is in a position to redeem.)

Section 91
Note 12

"In our opinion the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant . . . . . ."

Thus, a perpetual lessee,[3] a lessee for a term of years,[4] an ex-proprietary tenant[5] a *verumpattom* tenant in Malabar claiming under a lease from the *ottidar*,[6] a holder of a *zaripeshgi* lease,[7] a *patnidar*[8] and a *darpatnidar*[9] have all been held to have an "interest" within the meaning of section 91, clause (a).

In the undermentioned case[10] it has been held that a year-to-year lessee is not a person entitled to redeem under S. 91, cl. (a). So also in

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3. ('25) 12 AIR 1925 Oudh 270 (271) : 78 Ind Cas 47, *Kalu Singh* v. *Hansraj Upadhiya.*
('23) 10 AIR 1923 Nag 273 (273, 274) : 65 Ind Cas 503 : 19 Nag L R 18, *Sheoram* v. *Jamnabai.*
('07) 29 All 679 (682): 4 All L Jour 703, *Raghunandan Prasad* v. *Ambika Singh.*
('29) 16 AIR 1929 All 616 (617) : 121 Ind Cas 223, *Sheo Saran Rai* v. *Jaimangal Misir.* (Where a usufructuary mortgagor first makes a perpetual lease of the property mortgaged and subsequently sells whatever rights he has in the property to the mortgagee himself, the mortgagee purchases merely the remaining rights of the mortgagor in the equity of redemption subject to perpetual lessee's right to redeem.)
[*See also* ('33) 20 AIR 1933 Bom 97 (99) : 57 Bom 194 : 142 Ind Cas 481 (DB), *Venktesh Krishna* v. *Bhujaballi.*
('09) 3 Ind Cas 869 (871) : 12 Oudh Cas 271 (274), *Lotan* v. *Patan Din.* (Compromise creating permanent heritable non-transferable interest and not a mere cultivating tenancy.)
('17) 4 AIR 1917 Nag 133 (134, 135) : 14 Nag L R 117 : 47 Ind Cas 99, *Shankar Singh* v. *Hukumchand.* (Perpetual lease by a Malik Makbuza in C. P.—The lessee becomes a sub-tenant under C. P. Tenancy Act, XVII of 1889.)]
4. ('26) 13 AIR 1926 Nag 496 (498) : 23 Nag L R 128 : 96 Ind Cas 973, *Pannalal* v. *Rajaram.* (If the mortgagor grants a lease of the mortgaged property to another the latter becomes a transferee of a portion of the equity of redemption and as such is a person having an interest in the property or at least in the right to redeem the property within the meaning of S. 91 cls. (a) and (b).)
('37) 24 AIR 1937 Oudh 146 (148) : 12 Luck 161 : 162 Ind Cas 225, *Tulshi Ram* v. *Muna Kuar.*
('33) 20 AIR 1933 Nag 44 (46) : 144 Ind Cas 521 : 29 Nag L R 77, *Ananda Pandurang* v. *Uttamrao.* (A lessee who takes the property for a lease of 15 years on pre-payment of a lump sum has an interest in the property.)
5. ('18) 5 AIR 1918 All 392 (392) : 47 Ind Cas 861 (DB), *Mahomed Husain Khan* v. *Hanuman.*
('33) 14 L R All 645 (647) (Rev.), *Umrai Singh* v. *Anek Singh.*
6. ('96) 19 Mad 151 (153): 5 Mad L Jour 279 (DB), *Paya Patathil Appu* v. *Kovamel Amina.*
7. ('80) 6 Cal 317 (319) : 7 Cal L R 293 (DB), *Radha Pershad* v. *Monohur.*
('37) 24 AIR 1937 Oudh 146 (148) : 12 Luck 161 : 162 Ind Cas 225, *Tulshi Ram* v. *Mt. Muna Kuar.*
('20) 7 AIR 1920 Nag 176 (176) : 59 Ind Cas 511 : 16 Nag L R 180, *Gulam Nabi* v. *Kanhai Singh.*
('82) 8 Cal 79 (87) : 10 Cal L R 113 (DB), *Kasumunnissa Bibee* v. *Nilratna Bose.*
8. ('82) 8 Cal 79 (87): 10 Cal L R 113 (DB), *Kasimunnissa Bibee* v. *Nilratna Bose.*
('92) 21 Cal 116 (120) (DB), *Jugal Kissore* v. *Kartic Chunder.*
9. ('22) 9 AIR 1922 Cal 23 (24) : 49 Cal 626 : 69 Ind Cas 759 (DB), *Jnanendra Nath Singh* v. *Shorashi Charan.*
10. ('25) 12 AIR 1925 Oudh 270 (271) : 78 Ind Cas 47, *Kalu Singh* v. *Hansraj Upadhiya.*

the cases noted below[11] arising before the Transfer of Property Act, it was held that a person holding a *maurasi mokurari patta* from a mortgagor was not entitled to redeem. It is submitted that this view does not appear to be correct. There is no reason why such persons should not be entitled to redeem.

Where A mortgages property to B usufructuarily and B leases back the property to A who sub-leases the same to C, C really derives title from the mortgagee, since he is a transferee of an interest from A who is a transferee from B in so far as the leasehold interest is concerned. And as the mortgagee himself cannot redeem his own mortgage (as is shown by the words "other than the mortgagee of the interest sought to be redeemed"), C who derives title from him cannot also redeem the mortgage. In the case noted below[12] in which the facts were as above stated, it was held that C was not entitled to redeem the mortgage as he had no interest in the equity of redemption. This is no doubt true, but the better reason why he should not be allowed to redeem is, as stated above, that he derives his title from the mortgagee.

13. Landlord, if can redeem mortgage by tenant. — A leases property to B for a *term of years*. B mortgages his lease-hold interest to C. A's right in the property, called a "reversion",[1] though a vested right, is not an interest in the "property mortgaged" or "the right to redeem the same" inasmuch as what is mortgaged is the *leasehold interest*. Consequently, A cannot claim to redeem the mortgage. He is in fact not bound by the mortgage at all.

There is a class of tenancy in this country in which the landlord is not entitled to the reversion except on failure of all the heirs of the tenant. In such cases the landlord's interest is really not a subsisting interest at all but merely a *spes successionis* like that of a reversioner to a Hindu widow. In such cases also the landlord cannot be said to have any "interest" such as will entitle him to claim redemption of a mortgage by the tenant of his holding.[2]

But where the holding *reverts* to the landlord, either because the tenant dies without leaving any heirs[3] or by the tenant abandoning the

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11. ('83) 9 Cal 643 (644): 13 Cal L R 119 (DB), *Sripoti Churn* v. *Mohip Narain.* (Following 17 Suth W R 271.)
('71) 17 Suth W R 271 (272) (DB), *Lalla Doorga Pershad* v. *Lalla Luchman Sahoy.*

12. ('35) 22 AIR 1935 Mad 813 (814) : 158 Ind Cas 1073, *Krishnan* v. *Gopala Kurup.*

Note 13

1. ('16) 3 AIR 1916 Bom 223 (223) : 40 Bom 313 : 33 Ind Cas 267 (DB), *Bhaskar Gopal* v. *Padman Hira.*
Halsbury, *Laws of England*, Vol. 18, Page 335.

2. ('09) 3 Ind Cas 521 (522) : 12 Oudh Cas 201 (DB), *Iqbal Husain* v. *Sheo Charan.*
('02) 15 C P L R 175 (178), *Ganpat* v. *Bhangi.* (Contrary observations in 3 C. P. L. R. 154 held as being purely obiter.)

3. ('10) 7 Ind Cas 231 (233) : 33 All 111 (FB), *Tulshi Ram* v. *Gurdiyal Singh.* (30 All 488 overruled—A fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown—Such a tenancy is carved out of the land-

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Notes 13–15

village[4] or in some other way,[5] he will be entitled to redeem the mortgage.

14. Superior proprietor under C. P. Land Revenue Act.— Section 122 of the C. P. Land Revenue Act, II of 1917 (S. 65 of the C. P. Land Revenue Act, XVIII of 1881) provides that the sum payable under a sub-settlement shall be a first charge upon the land comprised in the sub-settlement. The word "charge" as used in that section has the same meaning as the word "charge" used in cl. (a) of this section. Where, therefore, a superior proprietor holds a decree against the inferior proprietor on account of the sum payable under the sub-settlement he is entitled to redeem a mortgage on the land comprised in the sub-settlement.[1]

15. Tenant for life and remainderman. — A mortgages property to D and transfers his equity of redemption to B for life or for a particular period and then to C. Under the English law B can sue for redemption.[1] C also can redeem, but only with the *consent* of B.[2]

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holder's interest in the land to which it relates, and a fixed rate tenant has no absolute interest in it — If the tenancy comes to an end it necessarily goes back to the estate, which it was carved out of, and lapses to the land-holder.)

('09) 3 Ind Cas 521 (522) : 12 Oudh Cas 201 (DB), *Iqbal Husain* v. *Sheo Charan.* (When a tenant mortgages his grove and dies without heirs the equity of redemption must vest in the zemindar though the mortgagee is in possession—1 Oudh Cas 42, Overruled.)

('33) 20 AIR 1933 Bom 97 (99) : 57 Bom 194 : 142 Ind Cas 481 (DB), *Venkatesh Krishna* v. *Bhujaballi Annappa.* (Even in the case of permanent tenancy the property reverts to the landlord under certain circumstances.)

('25) 12 AIR 1925 Pat 57 (59) : 3 Pat 818 : 84 Ind Cas 293 (DB), *Sri Kanta* v. *Jag Sah.* (Hereditary and rent free occupancy holding—There can be an escheat to crown only of an absolute hereditary mokarrary tenure.)

('32) 19 AIR 1932 All 437 (438) : 138 Ind Cas 366 (DB), *Arjun Singh* v. *Mahesha Nand.*

('27) 14 AIR 1927 Lah 75 (77) : 99 Ind Cas 962, *Ram Labhaya* v. *Kartar Singh.*

4. ('09) 3 Ind Cas 519 (520) : 12 Oudh Cas 197 (DB), *Debi Shay Singh* v. *Sumer Singh.* (Overruling 1 Oudh Cas 42.)

5. ('32) 19 AIR 1932 All 53 (55): 136 I.C. 69 (DB), *Basdeo Rai* v. *Jaimangal Rai.*

('23) 10 AIR 1923 All 263 (263) : 73 Ind Cas 651 (DB), *Saithwar Kumar* v. *Bishun Mohan.* (Relinquishment of holding by tenant.)

('11) 10 Ind Cas 307 (308) (DB) (Cal), *Issur Behara* v. *Kashi Nath.* (Do.)

Note 14

1. ('98) 11 C P L R 95 (96, 101, 102), *Ratan Lal* v. *Umed Kuar.* (Case under S. 65 of the C. P. Land Revenue Act, XVIII of 1881.)

Note 15

1. (1896) 2 Ch 808 (809, 810) : 66 L J Ch 24 : 45 W R (Eng) 157 : 75 L T 409, *Prout* v. *Cock.*

(1864) 11 L T (N S) 591 (591, 592) : 10 Jur (N S) 1257 : 2 Dr & Sm 293 : 13 W R (Eng) 223 : 143 R R 123, *Riley* v. *Croydon.*

(1860) 1 John & H 215 : 128 R R 331 : 70 E R 726 (727), *Wicks* v. *Scrivens.*

2. (1896) 2 Ch D 808 (809, 810) : 66 L J Ch 24 : 45 W R (Eng) 157 : 75 L T 409, *Prout* v. *Cock.* (The same principle applies to any limited estate.)

(1869) 5 Ch 227 (230) : 39 L J Ch 342 : 22 L T 190 : 19 W R (Eng) 196, *Pearce* v. *Morris.*

[*See also* (1836) 44 R R 126 (127) : 1 Keep 601 : 6 L J (NS) Ch 87 : 48 E R 439, *Raffety* v. *King.*]

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Notes 15–16

On the death of the *tenant for life* his interest comes to an end and if he has transferred his interest to a third person such third person cannot redeem the mortgage after the death of the tenant for life.[3] In the undermentioned case,[4] A, a holder of a life-estate, mortgaged the entire proprietary interest in the land to B. The life-estate holder died and thereafter C, the remainderman, *accepted the mortgage as binding on him* and claimed redemption. It was held that he could do so.

16. Reversioner under Hindu law. — The interest of a reversioner under the Hindu law is an interest expectant on the death of the limited owner such as a Hindu widow. During the life-time of the limited owner the reversioner has no more than a *spes successionis* and has no present interest in the property held by the limited owner[1] so as to entitle him to redeem a mortgage during the life of the limited owner.[2] In the undermentioned cases[3] the view has been expressed that *ordinarily* a reversioner is not entitled to redeem during the life-time of the limited owner; but that he can do so where it is necessary to preserve the property from loss, on the same principle on which he is allowed to institute a suit to restrain waste by the limited owner. A contrary view, namely that, irrespective of the question of the necessity of preserving the property from loss, a reversioner has sufficient interest in the property held by the limited owner so as to entitle him to redeem the mortgage during the life-time of such owner.[4] It is submitted

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3. (1864) 11 L T (N S) 591 (591, 592) : 10 Jur (N S) 1257 : 2 Dr & Sm 293 : 13 W R (Eng) 223 : 143 R R 123, *Riley* v. *Croydon.*

4. ('31) 18 AIR 1931 Oudh 358 (362) : 134 Ind Cas 865 : 6 Luck 715 (DB), *Swami Dayal* v. *Ramadhar.*

Note 16

1. ('17) 4 AIR 1917 P C 95 (97) : 45 Cal 590 : 45 Ind App 35 : 44 Ind Cas 408 (PC), *Amrit Narayan Singh* v. *Gaya Singh.*

('19) 6 AIR 1919 Oudh 217 (220) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*

('30) 17 AIR 1930 Oudh 294 (296) : 123 Ind Cas 211 : 5 Luck 691 (DB), *Chhote Singh* v. *Surat Singh.*

('08) 30 All 497 (498, 499) : 5 All L Jour 631 (DB), *Ram Chandar* v. *Kallu.*

Mulla, *Principles of Hindu Law*, 9th Edn., 1940, Section 175 Pages 161, 162.

2. ('19) 6 AIR 1919 Oudh 217 (220) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*

('08) 30 All 497 (498, 499) : 5 All L Jour 631 (DB), *Ram Chandar* v. *Kallu.*

('30) 17 AIR 1930 Oudh 294 (296, 297) : 123 Ind Cas 211 (DB), *Chhote Singh* v. *Surat Singh.*

[*See also* ('31) 129 Ind Cas 730 (731) (DB) (All), *Harpal Singh* v. *Ram Paltan Singh.* (Mortgage by limited owner for legal necessity — Declaratory suit by reversioner that mortgage was not binding—Decree declaring reversioner's right to succeed but upholding mortgage by limited owner—Foreclosure suit by mortgagee against the limited owner—*Held* declaratory decree did not give reversioner present right to property mortgaged; limited owner represented entire estate in foreclosure suit and the right to redeem was lost on such foreclosure.)]

3. ('21) 8 AIR 1921 Mad 272 (276) : 44 Mad 951 : 68 Ind Cas 734 (DB), *Narayanasamy Naicker* v. *Periasamy Odayar.* (Per Ramesam, J.)

('12) 15 Ind Cas 206 (211) : 36 Mad 426, *Narayana Kutti* v. *Pachiammal.*

4. (1894) Oudh Select Cases No. 271, *Sheoratan Singh* v. *Hubba Singh.*

('05) 8 Oudh Cas 349 (351) (DB), *Gumani Singh* v. *Chakkar Singh.*

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Notes 16-18

that the last two views are not correct. The mere fact that the reversioner is interested in the preservation of the property and is allowed to maintain a suit for that purpose does not mean that he has any present *interest in the property* so as to entitle him to redeem the mortgage under cl. (a) of the section. After the death of the widow, the reversioner would be entitled, if the mortgage was one binding on the estate, to redeem the same as being a person having an interest in the "property mortgaged." (See Note 4.)

17. **Surrender of mortgaged property by Hindu widow to next reversioner.** — A Hindu widow can renounce the estate in favour of the nearest reversioner and by a voluntary act efface herself from the succession as effectively as if she had then died. The effacement opens the estate of her deceased husband to his next heirs at that date.[1] It is thus evident that on such renouncement the next reversioner in whose favour the renouncement is made becomes entitled to redeem the mortgage existing on the estate. In the undermentioned case[2] a Hindu widow mortgaged the estate of her husband and then by a compromise surrendered the possession of the estate to the next reversioner who agreed to hold the estate for her and pay her a fixed sum in cash and grain for her maintenance. It was held that the next reversioner acquired such an interest in the estate as qualified him to redeem.

18. **Transfer from limited owner under Hindu law.**— An alienation made by a Hindu widow or other limited owner in excess of her powers is not absolutely void but voidable at the option of the reversionary heir, that is to say, it is perfectly valid until set aside. The persons entitled to dispute the validity of such alienation are obviously the reversionary heirs or persons who are entitled to succeed to the estate after the widow. A stranger to the reversion is certainly not entitled to dispute the validity of such alienation.[1] Where therefore a Hindu widow or other limited owner mortgages the estate to A and

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('25) 12 AIR 1925 Oudh 30 (33) : 82 Ind Cas 747, *Basawan* v. *Natha.*

('15) 2 AIR 1915 Oudh 177 (180) : 30 Ind Cas 234 (237) (DB), *Jangi Ram* v. *Sheoraj Singh.*

('29) 16 AIR 1929 Nag 27 (29) : 112 Ind Cas 248, *Mahadeo Kunbi* v. *Babya.* (Possessing a present right to possession and enjoyment is not essential for claiming a right of redemption.)

[*See also* ('25) 12 AIR 1925 Mad 95 (105) : 85 Ind Cas 855 (DB), *Mollayya Padayachi* v. *Krishnaswami Iyer.* (Per Spencer, J.)]

Note 17

1. ('18) 5 A I R 1918 P C 196 (198, 199) : 42 Mad 523 : 46 Ind App 72 : 50 Ind Cas 498 (P C), *Rangaswami Gounden* v. *Nachiappa.*

('19) 6 AIR 1919 P C 75 (78) : 47 Cal 466 : 46 Ind App 259 : 53 Ind Cas 347 (PC), *Mt. Bhagwant Koer* v. *Dhanukdhari Prasad Singh.*

2. ('19) 6 A I R 1919 Lah 109 (110) : 50 Ind Cas 868, *Jumma Ram* v. *Mt. Soni Bai.*

Note 18

1. ('21) 8 A I R 1921 Bom 413 (413, 414) : 45 Bom 105 : 59 Ind Cas 480 (DB), *Sitaram* v. *Khandu.*

('32) 19 AIR 1932 Oudh 342 (343) : 6 Luck 710 : 139 Ind Cas 631, *Ajodhia Prasad* v. *Sanjhari Kuar.*

Mulla, *Principles of Hindu Law*, 9th Edn., 1940, Section 185A, page 192.

then transfers her equity of redemption to B, the mortgagee A has no *locus standi* to resist the claim of B for redemption on the ground that the transfer to B is beyond the powers of the limited owner.[2]

19. Crown acquiring mortgagor's interest by escheat. — When by the law applicable to the last owner there is a total failure of heirs, the property escheats to the Crown as the *ultimus hæres*. If there is a valid and subsisting mortgage existing on the property the Crown will take the property subject to such mortgage[1] and will, as owner of the mortgagor's interest, be entitled to redeem the mortgage.[2]

Where the property mortgaged is a *tenancy right*, and the tenant dies without heirs, then the tenancy right will escheat to the Crown if it is a *permanent* and heritable tenure.[3] Otherwise it will revert to the landlord. In the latter case, it is the landlord and not the Crown that will be entitled to redeem the mortgage.[4]

Where the equity of redemption of the mortgagor is *forfeited* to the Crown by reason of the treason or other offence committed by the mortgagor the Crown and its transferees will be entitled to redeem the mortgage.[5]

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2. ('21) 8 A I R 1921 Bom 413 (413, 414) : 45 Bom 105 : 59 Ind Cas 480 (D B), *Sitaram* v. *Khandu.*
('32) 19 A I R 1932 Oudh 342 (343) : 139 Ind Cas 631 : 6 Luck 710, *Ajodhia Prasad* v. *Mt. Sanjhari Kuar.*
[*See also* ('13) 18 Ind Cas 787 (790) : 1913 Pun Re No. 87 (DB), *Nihal* v. *Hira.* (Case under Customary law in the Punjab.)]

Note 19

1. (1861) 8 Moo Ind App 500 (525, 526, 527) : 2 Suth W R 59 (P C), *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah.*
('66) 11 Moo Ind App 619 (635, 636) : 10 Suth W R 47 (P C), *C. V. Narrainapah* v. *Collector of Masulipatam.*
('75) 1 Cal 391 (401) : 3 Ind App 92 (P C), *Sonet Kooer* v. *Himmut.*

2. ('66) 11 Moo Ind App 619 (636) : 10 Suth W R 47 (P C), *C. V. Narrainapah* v. *Collector of Masulipatam.*
(1864) 10 L T (N S) 519 (520) : 33 Beav 551 : 34 L J Ch 96 : 12 W R (Eng) 927, *Catley* v. *Sampson.*

3. ('75) 1 Cal 319(401,402): 3 Ind App 92(PC),*Soonet Koer* v. *Himmut Bahadur.*
('25) 12 AIR 1925 Pat 57 (59) : 3 Pat 818 : 84 Ind Cas 293 (DB), *Srikanta Prasad* v. *Jag Sah.* (A hereditary and rent-free service tenure is not necessarily permanent.)
[*See also* ('32) 19 A I R 1932 All 437 (438) : 138 Ind Cas 366 (DB), *Arjun Singh* v. *Mahesha Nand.*
('02) 15 C P L R 89 (90), *Sheoshankarpuri Guru Padampuri Gosai* v. *Mt. Rukhma.* (1 Cal 391 followed.)
('02) 15 C P L R 175 (177), *Ganpat* v. *Bhangi.* (If absolute occupancy rights under C. P. Tenancy Act could form the subject of an escheat then the escheat would be to the Crown and not to the landlord.)
('32) 19 AIR 1932 All 53 (55) : 136 Ind Cas 69 (DB), *Basdeo Rai* v. *Jai Mangal.* (Rights of ex-proprietary tenant extinguished by ejectment — The rights do not escheat to the Crown but revert to the zamindar—7 Ind Cas 231 followed.)]

4. ('10) 7 Ind Cas 231 (233) (S B) (All), *Tulshiram Sahu* v. *Gur Diyal Singh.* (30 All. 488 overruled.)
('25) 12 AIR 1925 Pat 57 (59) : 3 Pat 818 : 84 Ind Cas 293 (DB), *Srikanta Prasad* v. *Jag Sah.*

5. (1696) 91 E R 80 (80) : 1 Salk 85, *Sir Salathiel Lovel's case.*

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Notes 20–23

20. Heirs of mortgagor. — As seen in Note 4, interest under cl. (a) can accrue, *inter alia*, by succession to the original mortgagor. Thus, a person who succeeds to the original mortgagor as his heir can redeem the mortgaged property.[1]

21. Son under Mitakshara law. — Under the Mitakshara law the son takes by birth an interest in the ancestral property of the family. Where the father mortgages such property for a binding purpose the son will be a person having an interest in "the property mortgaged" (see Note 4). As such the son has a right to redeem the mortgage.[1] As to the question whether the son's right to redeem is affected where he is not made a party under O. 34 R. 1 of the Code of Civil Procedure, see the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edition, O. 34 R. 1 Note 12.

The son under Mitakshara law does not acquire by his birth any interest in the self-acquired property of his father. He cannot, therefore, in the life-time of the father claim a right to redeem a mortgage created by the father. After his death, however, he will be entitled to redeem as his heir.[2]

22. Mortgage by manager of joint Hindu family. — Where the manager of joint Hindu family mortgages the family property for a binding purpose, and subsequently the family gets divided in status, each of the members has a right to redeem the mortgage as a person having an interest in the mortgaged property.[1]

23. Member of Malabar tarwad. — The *anandravans* or junior members of a Malabar *tarwad* are persons having an 'interest'

Note 20

1. ('14) 1 AIR 1914 All 265 (267) : 25 Ind Cas 233, *Sukh Kunwar* v. *Bhagwani.*
('20) 7 A I R 1920 Pat 67 (69, 70) : 5 Pat L Jour 644 : 58 Ind Cas 129 (DB), *Ram Narainlal* v. *Murlidhar.* (Where two of the successors of the mortgagor enter into a compromise with the mortgagee whereby they effect a new mortgage in lieu of the old mortgage, the compromise is not binding on the other successors and they can redeem the old mortgage.)
('94) 18 Bom 22 (33) (DB), *Swamirao* v. *Bhujangarao.*
(1900) 24 Bom 556 (561) : 27 Ind App 86 (PC), *Padapa* v. *Swamirao.*
('81) 5 Bom 14 (19, 20) (DB), *Jatha Naik* v. *Venkatapa.*
('25) 12 A I R 1925 All 707 (710) : 47 All 803 : 92 Ind Cas 63 (DB), *Naunihal Singh* v. *A. G. Skinner.*
('85) 9 Bom 429 (432) (DB), *Akoba* v. *Sakharam.*
('25) 12 AIR 1925 All 15 (15, 16), *Ram Jatan* v. *Radha Kishun.*
[*See also* ('81) 5 Bom 8 (13) (DB), *Shaik Abdulla* v. *Haji Abdulla.*]

Note 21

1. ('09) 3 Ind Cas 570 (572) : 5 Nag L R 117, *Jian* v. *Gopadya.*
('33) 20 AIR 1933 Nag 44 (47) : 29 Nag L R 77 : 144 I. C. 521, *Ananda* v. *Uttamrao.*
('84) 8 Bom 481 (488) (DB), *Trimbak Balkrishna* v. *Narayan Damodar.*
'16) 3 AIR 1916 Pat 375 (380) : 35 I. C. 404 (DB), *Jahnavi Prasad* v. *Gharbaran.*
('06) 2 Nag L R 90 (90), *Balaji* v. *Tulsiram.*
2. ('16) 3 AIR 1916 Pat 375 (380) : 35 Ind Cas 404 (DB), *Jahnavi Prasad* v. *Gharbaran.* (20 All 267 followed.)

Note 22

1. ('13) 18 Ind Cas 691 (692) (DB) (Mad), *Kurucha Gangu* v. *Kovvuri Basava.*

in the *tarwad* property within the meaning of this section. But the right of the junior members to redeem a mortgage created by the *karnavan* of the *tarwad* must be taken subject to the *marumakkatayam* law applicable to the parties. Under that law a Malabar family "speaks through the karnavan" and except in antagonism to him, can speak in no other way. It has, therefore, been held that only under very special circumstances (the onus of proving which is on the junior members), can the junior members be allowed to maintain a suit for redemption of a *kanom* granted by their *karnavan*.[1] As to an illustration of such special circumstances, see the undermentioned case.[2]

24. Tenants-in-common. — A tenant-in-common does not possess any interest in the share held by another tenant-in-common in the common property. The interest of each tenant-in-common is distinct and defined and is held by him not in unison with the others but independently of them. One tenant-in-common has, therefore, no right to redeem a mortgage created by another tenant-in-common of his share in the common property.[1]

25. Attaching judgment-creditor. — Under the English law, an execution creditor who took out attachment of the equity of redemption was in the position of a tenant by *elegit* having an *interest* in the property, sufficient to entitle him to redeem.[1] In this country it has long been established that the attaching creditor does not obtain, by reason of the attachment, any interest in or charge or lien upon the attached property.[2] In cases before the Act it was accordingly held

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Note 23

1. ('20) 7 AIR 1920 Mad 401 (401) : 43 Mad 393 : 55 Ind Cas 760 (DB), *Thazath Soopi* v. *Marriyamma.* (Karnavan alleged to be guilty of gross misconduct and collusion with the mortgagee.)

2. ('23) 10 AIR 1923 Mad 706 (706, 707) : 74 Ind Cas 1026 (DB), *Puthulath Amina Umma* v. *Anandravan Cheriya.* (Collusion between karnavan and kanomdar or prejudice to the tarwad interest by the continuance of the kanom.)

Note 24

1. ('30) 17 AIR 1930 Nag 173 (176): 26 Nag L R 208: 122 Ind Cas 699, *Dinkarrao* v. *Shamrao.*

Note 25

1. ('81) 6 Cal 663 (664) : 7 Cal L R 201, *Soobhul Chunder* v. *Nitye Churn.*
('21) 8 AIR 1921 Mad 30 (33, 34) : 44 Mad 232 : 62 Ind Cas 121 (DB), *Chamiyappa Tharagan* v. *M. S. Rama Iyer.*
(1874) L R 9 Ch App 229 (236) : 22 W R (Eng) 356 : 43 L J Ch 372 : 30 L T 279, *Hatton* v. *Haywood.*
(1874) L R 17 Eq 435 (437) : 22 W R (Eng) 294, *Beckett* v. *Buckley.*
(1870) 23 L T 584 (584) : 19 W R (Eng) 148, *Champneys* v. *Burland.*
[*See also* (1744) 26 E R 917 (917) : 3 Atk 200, *Shirley* v. *Watts.* (Judgment-creditor has no right to redeem unless he has taken out execution.)]

2. (1881) 6 Cal 663 (664) : 7 Cal L R 201, *Soobhul Chunder* v. *Nitye Churn.*
('98) 25 Cal 179 (185) : 24 Ind App 170 (PC), *Motilal* v. *Karrabuldin.*
('02) 29 Cal 428 (431) : 6 Cal W N 577 (FB), *Frederick Peacock* v. *Madan Gopal.*
('09) 2 Ind Cas 18 (25) : 32 Mad 429 (DB), *Raja of Karvetnagar* v. *Prayag Dossji.*

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Note 25

that such a creditor was not entitled to redeem a mortgage which had been executed before his attachment.[3] The Act, however, in cl. (f) of the old section gave him a right to redeem.[4] The Legislature has, in

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('30) 17 AIR 1930 Mad 801 (807) : 53 Mad 881 : 127 Ind Cas 624 (FB), *Subramanian Chettiar* v. *Sinnammal.* (Confirming A I R 1925 Mad 266 on Letters Patent Appeal.)
('15) 2 AIR 1915 All 201 (203) : 28 Ind Cas 901 (DB), *Bharat Indu* v. *Gobardhan Das.*
('21) 8 AIR 1921 Mad 30 (33, 34) : 62 Ind Cas 121 : 44 Mad 232 (DB), *Chamiyappa Tharagan* v. *M. S. Rama Iyer.*
('31) 18 AIR 1931 Cal 763 (770) : 58 Cal 598 : 134 Ind Cas 561 (DB), *C. L. Kiernander* v. *Benimadhab.*
('36) 164 Ind Cas 1009 (1010) : I L R (1937) 1 Cal 65, *Simbhuram Beriwalla* v. *Gulzarilal Thakur.*
('22) 64 Ind Cas 525 (527) (Low Bur), *Hansu* v. *A. T. K. P. L. M. Chetty.*
('38) 25 AIR 1938 All 651 (652) : 179 Ind Cas 1007, *Alliance Bank of Simla Ltd.* v. *F. B. Powel.*
('39) 26 AIR 1939 Pat 7 (12) : 18 Pat 155 : 180 Ind Cas 974 (DB), *Baiju Lal* v. *Thakur Prasad.*
('12) 17 Ind Cas 432 (432, 433) (DB) (Cal), *Shananda Chandra* v. *Srinath Roy.*
('36) 23 AIR 1936 Nag 209 (213) : ILR (1936) Nag 127 : 165 Ind Cas 939 (DB), *Amardas* v. *Jailalsao.*
('20) 7 AIR 1920 Mad 126 (127, 128, 129) : 43 Mad 696 : 58 Ind Cas 501 (DB), *Veyindramuthu Pillai* v. *Maya Nadan.*
('33) 20 AIR 1933 All 934 (938) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Mt. Kalawati.*
See also the Authors' *Commentaries on the Code of Civil Procedure*, 3rd (1940), Edn., S. 64 Note 5.
[But see ('14) 1 AIR 1914 Mad 439 (439) : 37 Mad 418 : 15 Ind Cas 334 (DB), *Venkata Seetharamayya* v. *Venkataramayya.* (Section 91 recognises an attaching creditor as one who, by virtue of his interest in the property, is entitled to redeem.)
('03) 25 All 446 (452, 453): 1903 All W N 150 (DB), *Dina Nath* v. *Lachmi Narain.* (Do.)]

3. ('81) 6 Cal 663 (664) : 7 Cal L R 201, *Soobhul Chunder* v. *Nitye Churn.*
('81) 3 All 413 (414, 415) (DB), *Radhey Tewari* v. *Bujha Misr.*

4. ('01) 23 All 467 (469) : 1901 All W N 143 (DB), *Ghulam Husain* v. *Dina Nath.*
('39) 26 AIR 1939 Pat 7 (11) : 18 Pat 155 : 180 Ind Cas 974 (DB), *Baiju Lal* v. *Thakur Prasad.*
('91) 13 All 432 (457) (FB), *Matadin Kasodhan* v. *Kazim Husain.*
('36) 23 AIR 1936 Nag 209 (213) : I L R (1936) Nag 127 : 165 Ind Cas 939 (DB) *Amardas* v. *Jailalsao.*
('12) 17 Ind Das 432 (432) (DB) (Cal), *Shananda Chandra* v. *Srinath Roy.*
('03) 26 All 72 (75) : 1903 All W N 190 (DB), *Shib Lal* v. *Bhawani Shankar.*
('03) 25 All 446 (452) : 1903 All W N 150 (DB), *Dina Nath* v. *Lachmi Narain.*
('14) 1 AIR 1914 Mad 439 (439) : 37 Mad 418 : 15 Ind Cas 334 (DB), *Venkata Seetharamaya* v. *Venkataramaya.*
('30) 17 AIR 1930 Mad 801 (807) : 53 Mad 881 : 127 Ind Cas 624 (FB), *Subramanian Chettiar* v. *Sinnammal.* (Confirming A I R 1925 Mad 266 on Letters Patent Appeal.)
('15) 2 AIR 1915 All 201(203): 28 I.C. 901 (DB), *Bharat Indu* v. *Gobardhan Das.*
('26) 13 AIR 1926 Nag 67 (68) : 89 Ind Cas 446 (DB), *Bruel & Co., Bombay* v. *Kesheo Rao.*
('36) 23 AIR 1936 All 512 (513) : 163 Ind Cas 966, *Gopal Devi* v. *Lachhmi Shankar.*
('21) 8 AIR 1921 Mad 30 (33, 34) : 62 Ind Cas 121 : 44 Mad 232 (DB), *Chamiyappa Tharagan* v. *M. S. Rama Iyer.*

1929, repealed cl. (f) and the attaching creditor is now no longer a person who may redeem or institute a suit for redemption of the mortgaged property.[5]

26. Government attaching property under section 88, Criminal Procedure Code.—Under S.88, Criminal Procedure Code, the Court has power to order an attachment of the property belonging to a person who is absconding. Sub-section (7) of that section provides that if the proclaimed person does not appear within the time specified, the property under attachment *shall be at the disposal of the Provincial Government*. Thus, the interest possessed by the Provincial Government under S.88, Criminal Procedure Code, is not that of a mere attaching decree-holder. The effect of the section is to create an interest in the property and to entitle the Government to remain in possession of it. The Provincial Government, therefore, comes within the category of persons who may redeem or institute a suit for redemption of the mortgaged property under S. 91 of the Transfer of Property Act.[1]

See also the Authors' Commentaries on the Code of Criminal Procedure, 2nd (1941), Edn., section 88 Note 7.

27. Judgment-creditor obtaining order for appointment of receiver under section 51, clause (d), Civil Procedure Code. — A judgment-creditor who has obtained an order for the appointment of a receiver of the judgment-debtor's property under S. 51, cl. (d) of the Civil Procedure Code in execution of a decree cannot be said to have an interest in the property within the meaning of cl. (a) of this section and cannot, therefore, redeem a mortgage previously executed by the judgment-debtor on the property.[1]

('28) 15 AIR 1928 Nag 97 (98) : 105 Ind Cas 427 : 23 Nag L R 164, *Linganna Naganna* v. *Ahmadshah.*
('36) 164 Ind Cas 1009 (1010) : I L R (1937) 1 Cal 65, *Simbhuram Beriwalla* v. *Gulzarilal Thakur.*
('37) 24 AIR 1937 Nag 400 (401) : I L R (1937) Nag 452 : 172 Ind Cas 389, *Gharbhoya Bhimji* v. *Deodatta Bihari.*
('22) 64 Ind Cas 525 (526, 527) (Low Bur), *Han Su* v. *A. T. K. P. L. M. Chetty.*
('33) 20 AIR 1933 Nag 333 (334) : 147 Ind Cas 525, *Chaganlal Hiralal* v. *Ismailji.*
('23) 10 AIR 1923 Nag 311 (312) : 73 Ind Cas 8, *Meghraj Marwari* v. *Kesheo Gopal Buti.*
('17) 4 AIR 1917 All 110 (110) : 39 All 536 : 41 Ind Cas 190 (DB), *Lakhpat Rai* v. *Fakhruddin.*
('32) 19 AIR 1932 All 356 (357) : 136 Ind Cas 840 (DB), *Mt. Fatima Begam* v. *Bansidhar.*

5. See the Report of the Special Committee printed on page 22 (61).
('36) 23 AIR 1936 All 512 (513) : 163 Ind Cas 966, *Gopal Devi* v. *Lachhmi Shankar.*

Note 26

1. ('30) 17 AIR 1930 Mad 1017 (1020) : 129 Ind Cas 47 (DB), *Alagammal* v. *Sadasiva Padayachi.* (The Government is a necessary party to mortgage suit under O. 34, R. 1, C. P. Code.)

Note 27

1. ('36) 164 Ind Cas 1009 (1010) : I L R (1937) 1 Cal 65, *Simbhuram Beriwalla* v. *Gulzarilal Thakur.*

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Notes 28–29

28. Person holding decree for sale of mortgaged property. — In the undermentioned case,[1] one A, a prior mortgagee brought a suit for sale on his mortgage and impleaded B, a subsequent mortgagee as a party thereto. The suit was decreed against the mortgagor but dismissed against B. In a subsequent suit by B on his mortgage it was held that A was entitled to be impleaded as a party as he had a right to redeem B's mortgage under cl. (a) of the section by virtue of the decree for sale which he held against the mortgagor. It is submitted that this view is not correct. As has been seen already a *prior mortgagee* cannot claim to redeem a subsequent mortgage. The mere fact that he has obtained a decree for sale on his mortgage does not alter his position so as to give him an interest in the "right to redeem." This view is also supported by a reference to cl. (c) of the section which provides for a special case of a creditor obtaining a decree for sale of the mortgaged property.

29. Trustee. — A person holding property as a trustee has an interest in the property within the meaning of this section, which would entitle him to redeem a valid mortgage on the property.[1]

Section 48 of the Trusts Act provides that where there are more trustees than one all of them must join in conducting the business of the trust.[2] It has been held by the High Court of Madras that so far as the question of redemption of a mortgage is concerned the wide language of S. 91 entitles one of several trustees to bring a suit to redeem a mortgage of the trust property without averring or proving that the other trustees were asked to join as plaintiffs in the suit.[3]

Where A, B, C and D are the trustees, and A and B alone grant a mortgage of the trust property without consulting the others, the

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Note 28

1. ('38) 25 AIR 1938 Oudh 10 (10, 11) : 171 Ind Cas 434 : 13 Luck 625 (DB), *Sheo Prasad Lal* v. *Mt. Prakash Rani.*

Note 29

1. ('20) 7 AIR 1920 Lah 480 (481) (DB), *Mokandi* v. *Harnam Das.*
(1865) 11 L T (N S) 730 (731) : 13 W R (Eng) 367 : 147 R R 796 : 11 Jur (NS) 130, *Fray* v. *Drew.* (Where a testator mortgages his freehold estate and then devises the equity of redemption to trustees subject to the payment of his debts, the trustees can redeem the mortgage and if they refuse to do so any other person having an interest in the equity of redemption can redeem.)
2. ('20) 7 AIR 1920 Mad 746 (747) : 61 Ind Cas 510 (DB), *Raru Nair* v. *Thirunarayana.*
3. ('03) 26 Mad 649 (653) : 13 Mad L Jour 322 (FB), *Karattole Edammana* v. *Unni Kannan.* (Overruling 24 Mad 296.)
('20) 7 AIR 1920 Mad 746 (747) : 61 Ind Cas 510 (DB), *Raru Nair* v. *Thirunarayana.*
('10) 7 Ind Cas 422 (425, 426) : 34 Mad 406 (DB), *Kumban* v. *Moorthi.*
[See however ('20) 7 AIR 1920 Mad 965 (967) : 60 Ind Cas 766 (DB), *Angamuthu* v. *Ramalinga.* (Per Sadasiva Aiyar J.—*Obiter*—So far as acts like the institution of suits etc., are concerned, all the trustees must be parties and must act after mutual consultations. Discretion has to be used as regards the propriety of redeeming a kanom of the trust properties. One trustee cannot act in such a case without consulting others.)]

mortgage is invalid and not binding on the trust. The trust, in such a case, cannot, as has been seen in Note 4, be said to have an interest in the property mortgaged or in the right to redeem the same. Consequently, it follows that even A and B cannot, on behalf of the trust, claim to redeem the mortgage. In the undermentioned case[4] where the facts were as stated above, it was held that A and B were not entitled to redeem, though the reasoning on which the view was based is not clear.

30. Benamidar. — A benamidar executing a mortgage on the property which he holds benami for the real owner can maintain a suit for redemption of the mortgaged property.[1] So also a person purchasing the mortgaged property from a mortgagor, benami for another person is entitled to maintain the suit for redemption in his own name.[2] The reason is that the benamidar is a trustee for the real owner. In *Gur Narain* v. *Sheolal Singh*[3] their Lordships of the Privy Council said:

> "The *benamidar* has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the *benamidar* in respect of the property although the beneficial owner is no party to it . . . . It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him."

31. Guardian of property of minor mortgagor and curator of lunatic mortgagor. — Clauses (d) and (e) of the old section provided that the guardian of property of a minor mortgagor on behalf of such minor and the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot may redeem or institute a suit for redemption of the mortgaged property. These clauses have now been omitted in the new section as being superfluous.[1] Section 103 lays down the procedure where a person incompetent to contract wants to make a tender or deposit under the provisions of Chap. IV of the Transfer of Property Act, and O. 32 of the Code of Civil Procedure provides rules for a suit to be instituted on behalf of a minor or a person of unsound mind. There is, therefore, no necessity of making a special provision in this section for such cases.

32. Trespasser. — A mere trespasser who has not perfected his title by adverse possession has no right to redeem; and if the

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4. ('12) 16 Ind Cas 435 (435) (DB) (Mad), *Istoop* v. *Ayappen*.

Note 30

1. ('33) 20 AIR 1933 Mad 635 (635) : 145 Ind Cas 230, *Mahomed Sheriff Sahib* v. *Kasim Saheb*.
2. ('20) 7 AIR 1920 Pat 21 (24) : 56 Ind Cas 599, *Bisudhanand* v. *Isri Singh*.
3. ('18) 5 AIR 1918 P C 140 (143) : 46 Ind App 1 : 46 Cal 566 : 49 Ind Cas 1 (PC).

Note 31

1. See the Report of the Special Committee.

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mortgagee allows such a person to redeem, the true owner can treat the transaction as a nullity.[1] But when he acquires the interest of the mortgagor by adverse possession he is entitled to redeem.[2] The fact that the trespasser acquires, by adverse possession, the interest of the mortgagor, *subsequent to the act of redemption* by him, cannot validate such redemption.[3]

33. **Person having no interest redeeming mortgage—Effect of.**—See Notes on Section 92.

34. **Person with imperfect title to equity of redemption.** — If a person seeking to redeem the mortgaged property has, to some extent, an imperfect title at the time when he institutes the suit for redemption, but is able to prove a perfect title at the hearing of the case he should have a decree for redemption.[1] Thus, A purchased the mortgaged property in execution of a money decree against B the mortgagor. When A instituted the suit for redemption against the mortgagee, the sale certificate was not issued in favour of A. It was, however, issued subsequently and A produced it at the hearing of the suit. It was held that a decree for redemption should be passed in his favour.[2] But if a person, at the hearing of the case, sets up a new title, based upon purchase of rights made after the institution of the suit and not the ripening of the prior imperfect title, the suit for redemption cannot succeed.[3] A person with an imperfect title to the equity of redemption can also make a tender under O. 21, R. 69, cl. (3) of the Civil Procedure Code and have the sale in execution of a mortgage decree stopped.[4] Thus, in the undermentioned case[5] A was a first mortgagee and B, a second mortgagee. B sued on his mortgage and obtained a decree and the property was purchased by C on 26-10-1906 in execution of the mortgage-decree; but the sale was not confirmed till 9-1-1907. A sued on his mortgage impleading B and obtained a decree and applied for execution. The property was fixed for sale on 5-11-1906. Before the sale took place C deposited the amount under O. 21, R. 69 (old S. 291), and prayed for stopping the sale. The lower Court held that C had no *locus standi* to make the deposit.

Note 32

1. ('19) 6 AIR 1919 Oudh 217 (219) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*
2. Fisher & Lightwood, *Law of Mortgage*, 7th Edn., page 595.
('19) 6 AIR 1919 Oudh 217 (219) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*
3. ('19) 6 AIR 1919 Oudh 217 (222) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*

Note 34

1. ('82) 6 Bom 139 (142, 143) (DB), *Krishnaji* v. *Ganesh.*
(1900) 1900 Pun L R No. 23 (DB), *Devi Chand* v. *Basho Ram.*
2. ('82) 6 Bom 139 (142, 143) (DB), *Krishnaji* v. *Ganesh.*
3. (1900) 1900 Pun L R No. 23 (DB), *Devi Chand* v. *Basho Ram.*
4. ('07) 11 Cal W N 495 (496) (DB), *Radha Kishun* v. *Hemchandra.*
('99) 26 Cal 966 (972) : 4 Cal W N 317 (DB), *Har Shankar* v. *Shew Gobind.*
5. ('07) 11 Cal W N 495 (496) (DB), *Radha Kishun* v. *Hemchandra.*

It was held by the High Court, reversing the decision of the lower Court, that when C made the deposit and prayed for redemption, he had an inchoate title to the property which was subsequently perfected by the confirmation of the sale and which therefore related back to the time of C's purchase of the rights of B.

35. Persons entitled to maintenance from an estate. — A mere right to receive maintenance from an estate does not amount to an interest in or charge upon the property mortgaged within the meaning of cl. (a) and the person entitled to such maintenance cannot redeem a mortgage on the estate.[1]

36. Mortgage by occupancy tenant — Right of person recognised by landlord as tenant to redeem. — Where an occupancy tenant mortgaged his land to X and after the death of the tenant, Y claimed to redeem the mortgage on the ground that he had been recognised by the landlord as the occupancy tenant, it was held that such recognition was not sufficient to give him a right to redeem a mortgage held by a third party in the absence of evidence that he acquired the rights as heir of the mortgagor.[1]

37. Clause (b) — Surety. — Clause (b) gives a surety for the payment of the whole or part of a mortgage-debt a right to redeem or to institute a suit for redemption of the mortgaged property.[1] A surety who covenants to pay only the *interest* on the principal amount is entitled to redeem the mortgage.[2] The right to redeem is, however, given to the surety not because he has any interest in the mortgaged

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Note 35

1. (1900) 22 All 191 (199): 27 Ind App 51 (PC), *Roshan Singh* v. *Balwant Singh.* (Confirming 18 All 253 on appeal.)

('09) 1 Ind Cas 690 (691) : 12 Oudh Cas 37, *Gajadhar Singh* v. *Phula Kunwar.* (A daughter-in-law entitled to maintenance from joint family property must establish beyond reasonable doubt that she has interest within the meaning of S. 91 to entitle her to redeem.)

Note 36

1. ('25) 12 AIR 1925 All 15 (15, 16), *Ram Jatan* v. *Radha Kishun.*

Note 37

1. ('32) 19 AIR 1932 Nag 171 (171): 28 Nag L R 214: 140 Ind Cas 532, *Manoharlal* v. *Kanhaiyalal.*
(1869) 4 Ch App 204 (207) : 38 L J Ch 220 : 17 W R (Eng) 385 : 20 L T 131, *Green* v. *Wynn.*
[*See also* (1863) 7 L T 811 (812) : 1 De G J & Sm 87 : 137 R R 158 : 11 W R (Eng) 273 : 32 L J Ch 182, *Gleaves* v. *Paine.* (Where the estate of the wife is mortgaged for the debt of the husband the wife becomes a surety for him and has a right to redeem.)
(1901) 2 Ch 602 (607) : 70 L J Ch 794 : 50 W R (Eng) 132 : 85 L T 404, *Dixon* v. *Steel.* (Do.)]
2. (1869) 4 Ch App 204 (207) : 38 L J Ch 220 : 17 W R (Eng) 385 : 20 L T 131, *Green* v. *Wynn.*
(1882) 19 Ch D 615 (622) : 51 L J Ch 690 : 30 W R (Eng) 652, *Forbes* v. *Jackson.*

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property[3] but because he is liable to pay the mortgage-debt and has a right on such payment to avail himself of all the creditor's securities.[4]

A surety has no right to redeem if the suretyship is for another debt or for a part of the debt which is not covered by the mortgage.[5]

38. **Clause (c) — Creditors of the mortgagor.** — In England the general creditors of the mortgagor have, generally, no right to redeem; but under special circumstances they are given such a right.[1] Thus, a creditor who has obtained a decree for sale of the debtor's real estate in a creditor's suit has a right to redeem the mortgagee of the estate.[2] Under this Act a creditor has no right to redeem apart from the provisions of clause (c).

39. **"May redeem."** — Redemption is a legal right and not a liability. Therefore a person having that right cannot be forced to exercise it against his will.[1] This will be clear from the use of the words "may redeem" in the section. This is made clear in S. 60 also where the words used are "at any time after the principal money has become due, the mortgagor *has a right*." Thus, a subsequent mortgagee who is entitled to redeem a prior mortgage under Cl. (a) of this section cannot

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3. *See* ('39) 26 AIR 1939 Pat 7 (11) : 18 Pat 155 : 180 Ind Cas 974 (DB), *Baiju Lal* v. *Thakur Prasad.* (Section 91 enumerates the class of persons entitled to redeem and amongst them those who have an interest in or charge upon the property or the right of redemption are put under clause (a).)
('30) 17 AIR 1930 Mad 801 (807) : 53 Mad 881 : 127 Ind Cas 624 (FB), *Subramanian* v. *Sinnammal.* (Cases contemplated by clause (a) of the section exhaust the class of cases contemplated by O. 34 R. 1, C. P. Code.)
('36) 23 AIR 1936 Nag 209 (213) : I L R (1936) Nag 127 : 165 Ind Cas 939, *Amardas* v. *Jailalsao.* (There is a clear distinction between the parties who have a personal right to redeem and those who have the right to redeem by virtue of an interest in mortgaged property.)

4. Fisher and Lightwood, *Law of Mortgage*, 7th Edition, page 603.
(1869) 4 Ch App 204 (207) : 38 L J Ch 220 : 17 W R (Eng) 385: 20 L T 131, *Green* v. *Wynn.*
(1882) 19 Ch D 615 (622) : 51 L J Ch 690: 30 W R (Eng) 652, *Forbes* v. *Jackson.*
(1853) 90 R R 501 (504) : 10 Hare 646 : 2 Drew 333, *Newton* v. *Chorlton.*
See Sections 140 and 141 of the Indian Contract Act, 1872.

5. Fisher and Lightwood, *Law of Mortgage*, 7th Edition, page 603 F-N (b).
(1827) 57 E R 747 (747) : 2 Sim 155 : 29 R R 70, *Wade* v. *Coope.*

Note 38

1. Fisher and Lightwood, *Law of Mortgage*, 7th Edition, pages 597, 598.

2. (1842) 62 R R 67 (70) : 2 Hare 177 : 67 E R 74 : 14 L J Ch 97 : 5 Jur 1130, *Christian* v. *Field.*

Note 39

1. ('11) 9 Ind Cas 513 (519) (FB) (Mad), *Mulla Veetil* v. *Achuthan Nair.*
('26) 13 AIR 1926 All 480 (487) : 97 Ind Cas 4 (DB), *Lachmi Narain* v. *Hirdey Narain.*
('35) 22 AIR 1935 Cal 139 (141) : 62 Cal 75 : 154 Ind Cas 868 (DB), *Jagat Chandra* v. *Abdul Rashid.*
('21) 8 AIR 1921 Low Bur 61 (63) : 66 Ind Cas 562 : 11 Low Bur Rul 119 (DB), *S. P. S.Chetty Firm* v. *Maung Po Aung.*
('31) 18 AIR 1931 Mad 542 (548) : 133 Ind Cas 497 (DB), *Chandramma* v. *Gunna Seethan.*
('41) 28 AIR 1941 Cal 484 (488) : ILR (1941) 1 Cal 514 : 198 Ind Cas 315 (DB), *Sailendra Nath* v. *Amarendra Nath.*

be compelled to redeem the prior mortgage before he can sue on his own mortgage.[2]

40. Partial redemption. — The section provides, in general terms, that certain persons, besides the mortgagor, who have an interest in the mortgaged property or in the right to redeem it are entitled to redeem the property. The question whether a person who is *entitled to a share only* of the mortgaged property has the right to insist on redeeming the *whole of the mortgaged property* cannot, however, be decided under this section. That question can be decided only by a reference to the provisions of S. 60.[1] See Notes on that section.

41. Order of redemption. — The section merely specifies the persons who, besides the mortgagor, are entitled to redeem or institute a suit for redemption of the mortgaged property, but does not prescribe any order in which such persons may redeem. The general rule, in this respect, is, that as between several persons entitled to redeem the person in whom the equity of redemption vests, earlier in point of date has a preferential and a prior right to redeem.[1] Thus, in *Beevor* v. *Luck*[2] Sir W. Page Wood, V. C., observed as follows :

> "A general principle, however, may be traced, which is this. Wherever a number of persons, some prior to others as to the period of their enjoyment, come in under the same instrument, as tenants-for-life and in remainder under a settlement, there no successive rights to redeem are given but only one single common

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2. ('11) 9 Ind Cas 513 (519) (FB) (Mad), *Mulla Veetil* v. *Achuthan Nair.*
('26) 13 AIR 1926 All 480 (486, 487) : 97 Ind Cas 4 (DB), *Lachmi Narain* v. *Hirdey Narain.*
('16) 3 AIR 1916 Nag 120 (122) : 13 Nag L R 69 : 39 Ind Cas 849, *Raghunath* v. *Sheo Lal.*
('98) 11 C P L R 75 (78, 79), *Ghasi Ram* v. *Jawahir Singh.*
('04) 7 Oudh Cas 330 (332, 333), *Najju Khan* v. *Ram Bali.*
('41) 28 AIR 1941 Cal 484 (488) : ILR (1941) 1 Cal 514 : 198 Ind Cas 315 (DB), *Sailendra Nath* v. *Amarendra Nath.*
[*See also* ('42) 29 AIR 1942 Cal 290 (291) : I L R (1941) 2 Cal 551 : 201 Ind Cas 585, *Satish Chandra* v. *Silchar Co-operative Town Bank Ltd.* (A second mortgagee owes no duty to the mortgagor to redeem the prior mortgage—He is entitled to do so if he thinks it desirable to protect his own interest.)]

Note 40

1. *See* ('16) 3 AIR 1916 Mad 863 (864, 865, 869) : 17 Ind Cas 837 : 38 Mad 310 (DB), *Rathna Mudali* v. *Perumal Reddy.*

Note 41

1. (1867) 4 Eq Cas 537 (548) : 15 W R (Eng) 1221 : 36 L J Ch 865, *Beevar* v. *Luck.*
(1875) 32 L T 689 (691), *Loveday* v. *Chapman.*
(1882) 20 Ch D 724 (727, 730) : 51 L J Ch 621 : 30 W R (Eng) 716 : 47 L T 208, *Teevan* v. *Smith.*
(1878) 39 L T 78 (79), *Breedley* v. *Riches.*
(1890) 44 Ch D 161 (166) : 38 W R (Eng) 698 : 59 L J Ch 567 : 62 L T 802 *Smithett* v. *Hesketh.*
(1880) 13 Ch D 639 (650) : 42 L T 169 : 28 W R (Eng) 549 : 49 L J Ch 209, *Mills* v. *Jennings.*
2. (1867) 4 Eq Cas 537 (548) : 15 W R (Eng) 1221 : 36 L J Ch 865.

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right of redemption. But where some of the persons interested are prior to others by reason of priority in the date of the instrument under which they claim, as in the case of first, second and third mortgagees, the person entitled to priority in date has the first right to redeem, and in the event of his not redeeming, successive rights of redemption are given to those who follow."

As between a mortgagor himself and any other person interested in the right of redemption, the latter has a preferential right to redeem. Thus, it has been held in England that as between the mortgagor and the second mortgagee the latter has a preferable right to redeem the prior mortgage: the reason is that a mortgagor, by mortgaging the property to the second mortgagee, makes him his assign.[3] In the undermentioned case,[4] where a subsequent mortgagee had obtained a decree for redemption against the prior mortgagee, it was held that so long as the decree remained in force and executable, the right to redeem the prior mortgage, as between the mortgagor and the second mortgagee, was preferentially in the latter.

A prior mortgagee who obtains a decree for foreclosure in a suit on his mortgage without impleading the subsequent mortgagee,[5] or in a suit for redemption by the mortgagor to which the subsequent mortgagee was not made a party,[6] or who, having obtained a decree for sale on his mortgage without impleading the subsequent mortgagee, himself purchases the property in execution of the decree for sale[7]

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3. (1881-82) 20 Ch D 724 (727) : 51 L J Ch 621 : 30 W R (Eng) 716 : 47 L T 208, *Teevan* v. *Smith.*

4. ('12) 14 Ind Cas 415 (416): 35 Mad 42 (DB), *Kuttisseri Illath Raman Namboodri* v. *Achutha Pishuroddi.*

5. ('22) 9 AIR 1922 All 135 (137, 139) : 67 Ind Cas 533 : 44 All 462 (DB), *Parasuram Singh* v. *Pandhohi.*
('24) 11 AIR 1924 Nag 198 (199) : 75 Ind Cas 899, *Govindrao* v. *Rukhmanand.*
('90) 3 C P L R 82 (84), *Patiram* v. *Ghasiram.*
('19) 6 AIR 1919 Nag 93 (94) : 51 Ind Cas 374, *Karniram Nanhuram* v. *Hardeo Jagannath.*

6. ('04) 28 Bom 153 (170) : 5 Bom L R 892 (DB), *Hassanbhai* v. *Umaji.*

7. ('25) 12 A I R 1925 All 804 (807) : 47 All 751 : 89 Ind Cas 295 (DB), *Ram Baran* v. *Bhagwati Pandey.*
('24) 11 A I R 1924 Pat 484 (486) : 3 Pat 435 : 78 Ind Cas 614 (DB), *Mt. Dhanwanti* v. *Hargobind Prasad.*
('25) 12 A I R 1925 Cal 59 (61) : 86 Ind Cas 193 (DB), *Madhuram Hazarika* v. *Bhotong Chutiya.*
('03) 13 Mad L Jour 72 (74) (DB), *Sivaraman Chetty* v. *Kuppumuthu Chetty.*
('15) 2 A I R 1915 All 299 (300) : 29 Ind Cas 794, *Mt. Ram Piari* v. *Raghunath Singh.*
('90) 18 Cal 164 (179, 181) : 17 Ind App 201 (PC), *Umes Chunder* v. *Zahur Fatima.*
('08) 8 Cal L Jour 173 (175, 176) (DB), *Kedar Prosanna* v. *Girindra Prosad.*
('01) 5 Cal W N 232 (233) (DB), *Sheo Pershad Singh* v. *Tilak Singh.*
('30) 17 A I R 1930 Pat 579 (581) : 9 Pat 930 : 130 Ind Cas 33 (DB), *Mt. Azizunnissa* v. *Komal Singh.*
('21) 8 AIR 1921 Mad 648 (649) (DB), *Sarvothama Rao* v. *Raja Row.*

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becomes the owner of the mortgagor's equity of redemption and is, therefore, entitled to redeem the subsequent mortgage in that capacity. But the subsequent mortgagee also has a right to redeem the prior mortgage and that right is not affected by the proceedings in the suit to which he was not a party. Thus, *prima facie* the prior mortgagee as owner of the mortgagor's equity of redemption and the subsequent mortgagee, both have the right to redeem each other's mortgage in such a case. The question, however, arises as to which of them is entitled first to redeem the other's mortgage. The general trend of decisions is that the prior mortgagee (who has obtained the equity of redemption) will have a prior right to redeem the subsequent mortgagee.[8] Thus, in *Hassanbhai* v. *Umaji*[9] Jacob, J., observed :

> "The question which is before us is concerned strictly with their legal rights *inter se*. There can be no doubt upon the authorities that a puisne mortgagee, who was not made a party to a suit on a prior mortgage, does not lose his right to redeem that mortgage by sale or foreclosure in that suit. The further question however whether the prior mortgagee who had foreclosed, or purchased

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('33) 20 A I R 1933 Cal 181 (182) : 145 Ind Cas 575, *Ram Kinkar* v. *Hareram*. (The same rule applies where the auction purchaser is a stranger instead of the mortgagee.)

[But see ('09) 1 Ind Cas 505 (506) (All), *Har Sahai* v. *Mukkarram Hussain*. (Even if it were held that the prior mortgagee stands in the shoes of the mortgagor by virtue of the purchase in execution of his decree, the mortgagor's right of redemption does not exist when decree is passed on the puisne mortgage and the property is sold in execution of that decree.)

('92) 16 Mad 121 (125, 126) : 2 Mad L Jour 281 (DB), *Perumal* v. *Kaveri*. (Prior mortgagee purchasing the mortgaged property in execution of mortgage decree in a suit to which puisne mortgagee was not a party—*Held* prior mortgagee as purchaser of right of redemption was entitled to redeem the puisne mortgagee but puisne mortgagee was not entitled to redeem the prior mortgagee.)]

8. ('25) 12 AIR 1925 All 804 (807): 47 All 751: 89 Ind Cas 295 (DB), *Ram Baran* v. *Bhugwati Pandey*.

('04) 28 Bom 153 (170) : 5 Bom L R 892 (DB), *Hassanbhai* v. *Umaji*.

('01) 5 Cal W N 232 (233) (DB), *Sheo Pershad Singh* v. *Tilak Singh*.

('33) 20 A I R 1933 Cal 181 (182) : 145 Ind Cas 575, *Ram Kinkar* v. *Hareram*. (As between two purchasers of mortgaged property the title to the outstanding equity of redemption is determined by the priority not of the respective mortgages but of the respective sales and the person who first buys the equity of redemption whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title—A I R 1922 All 135 : 44 All 462 and A I R 1925 All 804 : 47 All 751, followed.)

('19) 6 AIR 1919 Nag 93 (94) : 51 Ind Cas 374, *Karniram Nanhuram* v. *Hardeo Jagannath*.

('90) 3 C P L R 82 (84, 85), *Patiram* v. *Ghasiram*.

('22) 9 AIR 1922 All 135 (137, 139): 44 All 462: 67 Ind Cas 533 (DB), *Parasuram Singh* v. *Pandhohi*.

('15) 2 A I R 1915 All 299 (300) : 29 Ind Cas 794, *Mt. Ram Piari* v. *Raghunath Singh*. (28 Bom 153 approved but a decree in terms similar to that passed in 28 Bom 153 not passed because the prior mortgagee did not claim to redeem the subsequent mortgagee but simply prayed for a dismissal of the subsequent mortgagee's suit for redemption.)

('21) 8 AIR 1921 Mad 648 (649) (DB), *Sarvothama Rao* v. *Raja Row*.

9. ('04) 28 Bom 153 (173, 174) : 5 Bom L R 892 (DB).

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under a sale in such a suit, is in his turn entitled to the option of redeeming such a puisne mortgagee, is one that is not so free from doubt. It is true that the interest of the mortgagor was acquired by proceedings in a suit to which the present plaintiff was not a party, and by which he is not therefore bound, but it appears to me that it can only be for the protection of his rights, and not for their enlargement, that the puisne mortgagee under such circumstances can claim to disregard the effects of the previous litigation. If there had been no such former suit for redemption of the prior mortgage, there can be no doubt that the plaintiff would have been liable to be redeemed by the mortgagor. Can he then be allowed to say in reply to the prior mortgagee that the foreclosure operates to extinguish the rights of the mortgagor as against him . . . . . If the puisne mortgagee would still be liable to be redeemed, then it is no hardship on him that he should be redeemed at the instance of the prior mortgagee, who has by foreclosure acquired the title of the mortgagor, rather than by the mortgagor himself or any other private assignee of the mortgagor's interest."

In *Parasurama Singh* v. *Pandhohi*[10] Ryves, J., observed :

"It seems to me that both are, *prima facie*, entitled to what they claim and the question for the Court, under such circumstances, when all the parties were before it and all the necessary evidence was on the record, was to decide once and for all, having regard to the equities of the parties and to prevent further litigation what the justice of the case demanded. In this view what I think we have to look at in this appeal, is not whether the decisions of the Courts below were legally correct but whether we should now do what I think the Courts below should have done, looking at the consequences. If we uphold this decree, the plaintiffs (puisne mortgagees) pay the decretal amount to the defendants (prior mortgagees), and the next day the defendants will inevitably file their suit to redeem the plaintiffs and so recover the property. All that the plaintiffs are entitled to is to get back their mortgage-money. After all, they are merely mortgagees and as such are liable to be redeemed by the owner of the property, that is the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property. I should be content to stop here and base my decision on what seems to me to be required by the equities of the case . . . . . As I have already said the decision of the Courts below in this case was legally right, but I do not think it was the proper decision to give having regard to all the circumstances of the case and the pleadings of the parties. I would, therefore, allow the appeal and allow the defendants to redeem the plaintiffs' mortgages, on payment to them of the sum due on their mortgages."

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10. ('22) 9 AIR 1922 All 135 (137, 139) : 44 All 462 : 67 Ind Cas 533 (DB).

The contrary view taken in the undermentioned cases[11] does not appear to be correct.

42. Onus of proof. — Under the English law a person who seeks to redeem a mortgage must show a *prima facie* title to the equity of redemption.[1] The same principle applies under this Act also. If a person other than the mortgagor claims to redeem, he must prove that he is one of the persons described in S. 91.[2] Thus, where he claims to redeem in the capacity of a puisne mortgagee he must prove the due execution of the puisne mortgage, and this is so even when the mortgagor admits the due execution of the mortgage, as the suit is primarily against the prior mortgagee and not against the mortgagor.[3] It is not, however, necessary for a subsequent mortgagee or a purchaser to prove the passing of consideration for the mortgage or transfer.[4]

A Muhammadan mortgaged certain property and then died. After his death his major son acting on behalf of his three minor brothers executed a second mortgage in favour of another person. The second mortgagee sued to redeem the prior mortgage. The prior mortgagee contended that the major son had no power to act on behalf of his minor brothers, that therefore the mortgage in favour of the second mortgagee was invalid and that he had no right to redeem the prior mortgage. All the minor brothers (who had now attained majority) accepted the mortgage in favour of the second mortgagee in the pleadings. It was

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11. ('24) 11 A I R 1924 Nag 198 (199) : 75 I. C. 899, *Govindrao* v. *Rukhmanand.*
('08) 8 Cal L Jour 173 (175, 176) (DB), *Kedar Prosanna* v. *Girindra Prosad.*
('03) 13 Mad L Jour 72 (74) (DB), *Sivaraman Chetty* v. *Kuppumuthu Chetty.*

Note 42

1. (1683) 23 E R 402 (402) : 1 Vern 182, *Lomax* v. *Bird.*
(1793) 19 R R 201 (201) : 3 Swan 241*n* : 36 E R 847, *Pym* v. *Bowreman.*
(1683) 23 E R 402 (402) : 1 Vern 183, *Talbat* v. *Braddill.* (Without showing a *prima facie* title he cannot say "I shall redeem at my peril.")
(1819) 36 E R 844 (845) : 3 Swans 234 : 19 R R 200, *James* v. *Biou.*

2. ('26) 13 AIR 1926 All 725 (726) : 96 Ind Cas 775 (DB), *Mt. Mohammadi Bibi* v. *Kashi Upadhya.*
('02) 15 C P L R 175 (176, 177), *Ganpat* v. *Bhangi.*
('09) 1 Ind Cas 690 (691) : 12 Oudh Cas 37, *Gajadhar Singh* v. *Mt. Phula Kunwar.*
('91) 1891 Pun Re No. 101, *Buta* v. *Khushal Singh.*
('14) 1 AIR 1914 Mad 23 (23) : 22 Ind Cas 17 (DB), *Rasa Gounden* v. *Sinnappayyan.* (Where in a redemption suit a plaintiff relies for his title on a sale for arrears of rent, he must prove the validity of the sale—But it is not necessary that he should do so in a particular way—It is sufficient if he offers general evidence of the sale, and of the subsequent conduct of parties.)
(1841) 65 R R 333 (336) : 1 Ph 61 : 6 Jur 456, *Lloyd* v. *Wait.* (Person claiming to be heir of mortgagor has only to make out *prima facie* case of heirship.)
[*See also* ('66) 5 Suth W R 163 (164) (DB), *Fuzlool Ruhman* v. *Ali Kureem.*]

3. ('26) 13 AIR 1926 All 725 (726) : 96 Ind Cas 775 (DB), *Mt. Mohammadi Bibi* v. *Kashi Upadhya.*
('92) 15 Mad 54 (55) (DB), *Chinnan* v. *Ramachandra.* (*Prima facie* when the execution of a mortgage or other conveyance is proved, further evidence is not necessary to show that the purchaser has taken the interest which the document purports to convey.)

4. ('92) 15 Mad 54 (55, 56) (DB), *Chinnan* v. *Ramachandra.*

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held that as the minor brothers admitted the mortgage it was not open to the prior mortgagee to raise the question of the validity of the second mortgage on the ground of the incapacity of the major son to act as guardian of his minor brothers.[5]

When a person claims to redeem as the heir of the mortgagor under the Muhammadan law and there are several collaterals of the mortgagor, he must prove that he has a preferential right of succession.[6]

43. Whether section applies to redemption of charges. —It has been held in England that a charge is not subject to redemption or foreclosure.[1] Where a charge for maintenance was given in perpetuity to X and his heirs, it was held by the Allahabad High Court that such a charge was not capable of redemption so as to free the property from the charge and that all that could be done in such a case was to pay up the arrears of maintenance due and prevent the sale of the property.[2] In the undermentioned case[3] however, where a Hindu widow obtained a decree for maintenance charging certain properties and in execution of the decree for *arrears* of maintenance, a third party purchased the property subject to the charge for future maintenance, it was held that a subsequent mortgagee of the property could "redeem" the purchaser by payment of the arrears and get subrogated to that extent to the rights of the charge-holder. See also the undermentioned case.[4]

44. Law in the Punjab. — The Transfer of Property Act has not been extended to the Province of the Punjab; but the principle of the section has been applied to the cases arising in that Province.[1]

45. Right of redemption of persons not made parties to suits relating to mortgages. — As for the rights of redemption of persons who are necessary parties to suits relating to mortgages under O. 34 R. 1, Civil Procedure Code, but have not been made so, see the Authors' Commentaries on the Civil Procedure Code, 3rd (1940) Edn., O. 34 R. 1.

46. Limitation for suits for redemption of mortgages.—See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 148.

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5. ('27) 14 AIR 1927 Lah 81 (81) : 101 Ind Cas 324, *Maula Bakhsh* v. *Imam Din.* [*See also* ('91) 4 C P L R 128 (129), *Vithoba* v. *Sakharam.* (Where property belonging to a minor was by his guardian first mortgaged to one person and then sold to another, the mortgagee could not impugn the sale and contend that it was not made for the benefit of the minor.)]

6. ('23) 10 AIR 1923 Lah 222 (223) : 81 Ind Cas 325, *Mahammada* v. *Mt. Ajjan.*

Note 43

1. (1866) 147 R R 129 (132) : 35 Beav 234 : 35 L J Ch 253 : 12 Jur (N S) 85 : 13 L T (N S) 783 : 14 W R (Eng) 293 : 55 E R 885, *Earl Poulett* v. *Hood.*

2. ('33) 20 AIR 1933 All 934 (938) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Kalawati.*

3. ('35) 22 AIR 1935 Mad 867 (869) : 59 Mad 101 : 158 Ind Cas 778 (DB), *Ramaswami* v. *Trichnopoly Co-operative Credit Bank.*

4. ('19) 6 AIR 1919 Low Bur 143 (144) : 47 Ind Cas 121 : 94 Low Bur Rul 169 (DB), *Kya Zan* v. *Tun Gyaw.*

Note 44

1. *See* ('15) 2 AIR 1915 Lah 199 (200) : 30 Ind Cas 389 (DB), *Jiwan Singh* v. *Achhar Singh.*

[a]92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

Subrogation.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

a. The original section as it stood in the year 1882 was repealed by the Civil Procedure Code, 1908; see now, Order 34 Rule 7. The present section was inserted by Section 47 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Doctrine of subrogation.
2. Law prior to 1929.
3. This section and S. 69, Contract Act.
4. Law in the Punjab and N. W. F. Province.
5. Section whether retrospective.
6. Whether section applies to charges.
7. Right of subrogation arises on redemption.
8. There must be relationship of mortgagor and mortgagee.
9. "Other than the mortgagor."
10. Covenant to pay mortgage — Effect of.
11. Redemption by subsequent mortgagee.
12. Redemption by prior mortgagee.
13. Redemption by purchaser.
14. Redemption by surety.
15. Redemption by co-mortgagor.
16. Redemption by volunteer.
17. Redemption by a person claiming under a void or voidable title.
18. Redemption by trespasser.
19. Third paragraph.
20. Person who has advanced money to a mortgagor.
21. "Mortgage has been redeemed."
22. Sale or mortgage to pay off prior mortgage — Whether the first or the third paragraph applies.
23. Fourth paragraph — Mortgage must be redeemed in full.
24. Rights of subrogee.
25. Right of subrogation is available to successors-in-interest.
26. Purchaser entitled to subrogation—Pre-emptor whether can claim that right.
27. Enforcement of rights acquired by subrogation.
28. Limitation.
29. Defence of subrogation is not barred even if suit to enforce it is time-barred.
30. Res judicata.
31. Plea of subrogation.

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Other Topics (miscellaneous)

Covenant excludes subrogation. See Note 10.
Defective title whether bars subrogation. See Note 17.
Extent of subrogation. See Note 24.
Mortgages of different class — Right of subrogation. See Note 24.
Nature of right acquired by co-mortgagor on redemption. See Note 15 and S. 82 Note 17.
Partial subrogation abolished. See Note 23.
Personal right of reimbursement. See Notes 1 and 3.
Redemption by claimant under invalid purchase. See Note 17.
Redemption by purchaser whose purchase is set aside. See Note 17.
'So far as regards redemption, foreclosure or sale.' See Note 24.
Subrogation by operation of law. See Note 1.
Subrogee's right to interest. See Note 24.
Voluntary payment excludes subrogation. See Note 16.

1. Doctrine of subrogation. — Subrogation in its wide signification means that one person is substituted to the rights of another person.[1] Such substitution may arise in various ways. The simplest case is where A *assigns* his rights against B, to C. C is then 'subrogated' to the rights of A. Apart from assignment, a subrogation or substitution of rights may arise by *agreement* between the parties. Thus, if A advances money to B to enable B to pay off his creditor C and B *agrees* that A shall be substituted to the rights which C may have against B, A will be subrogated to the rights of C. This kind of subrogation is generally known as "*conventional*" or "*contractual*" subrogation,[2] though even the first class of substitution of rights is also sometimes referred to as conventional subrogation.[3]

Independent of assignment or contract, a right of subrogation is recongnised *by law* under certain circumstances. This is called *legal subrogation*. Thus, a subsequent mortgagee paying off a prior mortgage on the same property is given the same rights against the mortgagor as the prior mortgagee had in respect of his mortgage. This class of subrogation rests upon doctrines of equity and principles of natural justice and not on privity of contract.[4] One of these principles is that a

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1. ('28) 15 AIR 1928 All 241 (244) : 50 All 569 : 109 Ind Cas 38 (DB), *Aziz Ahmad Khan* v. *Chotelal.*
('16) 3 AIR 1916 All 44 (46) : 35 Ind Cas 647 (DB), *Umrai Lal* v. *Mt. Rukmin Kuar.*
('14) 1 AIR 1914 Mad 371 (374) : 22 Ind Cas 253 (DB), *Karuppan Ambalagaran* v. *Muhammad Sakuth Levvai.*
('34) 21 AIR 1934 Oudh 213 (215) : 149 Ind Cas 84 (DB), *Mahomed Raza* v. *Bilqis Jehan Begam.*
See also Halsbury, *Laws of England* Vol. 13, Page 149 Para. 175.
('42) 29 AIR 1942 Nag 111 (112) : ILR (1942) Nag 393 : 201 Ind Cas 472, *Balchand* v. *Ratanchand.*

2. ('36) 23 AIR 1936 Nag 32 (33) : 31 Nag L R Sup 169 : 161 Ind Cas 551, *Ramgopal Bholaram* v. *Nanakram Jodhraj.*
('37) 24 AIR 1937 Pesh 5 (5) : 167 Ind Cas 698, *Gurdit Singh* v. *Kalumal.*
('32) 19 AIR 1932 Oudh 54 (55, 56) : 7 Luck 237 : 134 Ind Cas 1093 (DB), *Ram Hait* v. *Pohkar.*
('42) 29 AIR 1942 Oudh 260 (261) : 200 Ind Cas 146 (FB), *Abdul Hamid* v. *Ram Kumar.* (Per Bennett, J.)

3. Ghose, *The Law of Mortgage in India*, 5th Edn., 1922, Page 352.

4. ('36) 23 AIR 1936 Oudh 280 (285) : 162 Ind Cas 362 (DB), *Bholanath* v. *Maharani Kunwar.* (Legal subrogation.)

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person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it is entitled to be reimbursed by the other.[5] This principle is found enacted in S. 69 of the Contract Act. Another principle is that he who seeks equity must do equity.[6]

The doctrine of subrogation is not confined in its applicability to *mortgages* though, in this Act, the doctrine is dealt with only in relation to mortgages.[7] In the undermentioned case[8] it has been held by the High Court of Madras that where a trustee or executor or guardian contracts a loan for the benefit of the estate the creditor is subrogated to such rights of reimbursement as the borrower himself may have out of the estate.

Section 92 of the Act deals with both conventional and legal subrogation in relation to mortgages. The first paragraph deals with legal subrogation and the third paragraph with conventional subrogation.[9]

('07) 6 Cal L Jour 134 (137, 138) (DB), *Bisseswar Prosad* v. *Sarnam Singh.*
('14) 1 AIR 1914 Mad 371 (374) : 22 Ind Cas 253 (DB), *Karuppan Ambalagaran* v. *Muhammad Sakuth Levvai.*
('09) 1 Ind Cas 825 (826) : 31 All 166 (DB), *Har Prasad* v. *Raghunandan Prasad.*
('29) 16 AIR 1929 Mad 860 (862) (DB), *Nangunni Kovillamma* v. *Nedungadi.*
('33) 20 AIR 1933 Oudh 9 (12) : 7 Luck 655 : 138 Ind Cas 206 (DB), *Kanhaiya Lal* v. *Gulab Singh.*
('11) 7 Ind Cas 980 (982) (DB) (Cal), *Tara Sundari Debi* v. *Khedan Lal.*
('34) 21 AIR 1934 Oudh 213 (215) : 149 Ind Cas 84 (DB), *Mahomed Raza* v. *Bilqis Jehan Begam.* (Quoting *Jones on Mortgage* Vol. 2, 7th Edn. page 204.)

5. ('37) 24 AIR 1937 All 588 (591) : ILR (1937) All 580 : 171 Ind Cas 153 (FB), *Hirasingh* v. *Jaisingh.*
[*See also* ('32) 19 AIR 1932 Cal 126 (132, 133) : 59 Cal 117 : 138 Ind Cas 177 (DB), *Kalipada Mukerji* v. *Basanta Kumar.*
('28) 15 AIR 1928 All 241 (244) : 50 All 569 : 109 Ind Cas 38 (DB) *Aziz Ahmad Khan* v. *Chotelal.*
('05) 2 Cal L Jour 288 (299) (DB), *Surjiram Marwari* v. *Barhamdeo Persad.*
('34) 21 AIR 1934 Oudh 213 (215) : 149 Ind Cas 84 (DB), *Mahomed Raza* v. *Bilqis Jehan Begam.*
('31) 18 AIR 1931 All 40 (42) : 52 All 1037 : 131 Ind Cas 599 (DB), *Narain Pershad* v. *Narain Singh.*]

6. ('28) 15 AIR 1928 All 241 (244) : 50 All 569 : 109 Ind Cas 38 (DB), *Aziz Ahmad Khan* v. *Chotelal.*
('32) 19 AIR 1932 Cal 126 (133) : 59 Cal 117 : 138 Ind Cas 177 (DB), *Kalipada Mukerji* v. *Basanta Kumar.*

7. ('42) 29 AIR 1942 Nag 111 (113) : ILR (1942) Nag 393 : 201 Ind Cas 472 *Balchand* v. *Ratanchand.*
('39) 26 AIR 1939 Pat 375 (377) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamlapati Devi* v. *Jageshwar Dayal.* (Incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity. The supposed assignment however does not necessarily carry with it all the consequences that would flow from a legal assignment.)
('13) 20 Ind Cas 458 (461) : 16 Oudh Cas 148 (DB), *Sohan Lal* v. *Jot Singh.*

8. ('39) 26 AIR 1939 Mad 538 (542) : ILR (1939) Mad 891 : 189 Ind Cas 364 (DB), *Annamalai Chetty, Joint Firm, Palni* v. *Muthuswami Maniagaran.*

9. ('36) 23 AIR 1936 Mad 171 (174) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara Narayana Menon.* (Per Varadachariar, J.)
('36) 23 AIR 1936 Nag 32 (33) : 31 Nag L R Sup 169 : 161 Ind Cas 551, *Ramgopal Bholaram* v. *Nanakram Jodhraj.*
('42) 29 AIR 1942 Oudh 260 (261) : 200 Ind Cas 146 (FB), *Abdul Hamid* v. *Ram Kumar.* (Per Bennett, J.)

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2. Law prior to 1929. — Before the passing of this Act in 1882, the Courts applied the rule of conventional subrogation wherever there was an agreement between the parties to that effect.[1] They also applied the doctrine of legal subrogation as being in consonance with justice, equity and good conscience, to cases where a person, for the protection of his own interest, paid off a charge on the property.[2] Thus, a subsequent mortgagee paying off a prior mortgage was held entitled to stand in the shoes of the prior mortgagee in respect of the mortgage paid off.[3]

As regards a subsequent *purchaser* of the equity of redemption paying off a prior mortgage on the property, his right of subrogation depended upon the applicability, to the particular case, of the doctrine of *merger*. According to the English law, where the ownership of a property and a charge thereon became united in the same person, the charge was *extinguished* unless the parties *intended* to keep the charge alive. This intention was *presumed* where it was for the benefit of the party paying, to keep the charge alive. There was, however, one exception to this rule of intention against merger and that was, where the person paying off the charge was himself *personally liable to pay* the charge. In that case, he could not claim to keep the charge alive.[4]

It may be noted that the rule of intention referred to above was only applicable where a charge and the *ownership* of the property became united in the same person. If, in such a case, there was an intention, actual or presumed, to keep the charge alive, then the person paying off the charge was subrogated to the rights of the charge-holder. Otherwise the charge was extinguished and the question of subrogation did not arise.

The principles mentioned above were applied to cases arising in this country, before the Act.[5] The leading case on the point is *Gokuldas* v. *Puranmal*.[6] In that case property subject to two mortgages in favour of A and B respectively, was sold in execution of a money decree and was purchased by C. C paid off A and then claimed, as against B, to stand in the shoes of A. Their Lordships of the Privy Council observed as follows :

('31) 18 AIR 1931 All 40 (42) : 52 All 1037 : 131 Ind Cas 599 (DB), *Narain Pershad* v. *Narain Singh*.

Note 2

1. ('40) 27 AIR 1940 Pat 385 (394, 395) : 189 Ind Cas 513 : 19 Pat 752 (FB), *Tika Sao* v. *Hari Lal*.
2. ('72) 17 Suth W R 480 (482) (DB), *Syed Wajed* v. *Hafez Ahmed*.
3. ('75) 24 Suth W R 47 (48) (DB), *Bekon Singh* v. *Deen Dyal Lall*.
4. Halsbury, *Laws of England*, Volume 21, page 318.
5. ('83) 9 Cal 961 (971, 977) : 10 Ind App 62 (PC), *Mohesh Lal* v. *Mohant Bawan Das*.
6. ('84) 10 Cal 1035 (1046) : 11 Ind App 126 (PC).

Note :—Before the decision in *Gokuldas's case* there was a difference of opinion in this country as to whether the rule laid down in the English case of *Toulmin* v. *Steere* (1817) 3 Mer 210 should be followed. That decision laid down that the purchaser of an equity of redemption could not set up a prior mortgage of his own or which he has got in, against subsequent incumbrancers of which he had notice. *The rule was applied in the following cases :*

('70) 14 Suth W R 491 (492) : 5 Beng L R 463 (DB), *Gournarain Mozoomdar* v. *Brojonath Kundu Chowdhry*.

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"The obvious question to ask in the interest of justice, equity and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest."

In 1882, the Act introduced two provisions in Ss. 74 and 101. The former enacted a rule of legal subrogation where a *subsequent mortgagee* paid off a prior mortgage though the word "subrogation" was not used.[7] That section ran as follows :

"*Section 74.* Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender."

Right of subsequent mortgagee to pay off prior mortgagee.

Although the section in terms applied to the payment, by a subsequent mortgagee, to the "*next*" prior mortgagee[8] it was held by the Courts

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('75) 11 Bom H C R 41 (43) (DB), *Itcharam Dayaram* v. *Raiji Jaga.*
It was not applied in the following case :
('71-74) 7 Mad H C R 229 (231, 232) (DB), *Ramu Naikan* v. *Subbaraya Mudali.*
Even in England the authority of the decision was questioned. See the follcwing cases :
(1912) 1 Ch 735 (760) : 81 L J Ch 457 : 106 L T 490, *Manks* v. *Whiteley.* (Per Fletcher Moulton, L. J.)
(1898) 1898 A C 321 (333, 335) : 67 L J Ch 251 : 78 L T 329 : 46 W R (Eng) 589, *Liquidation Estates Purchase Co.* v. *Willoughby.*
(1895) 1895 A C 11 (16) : 64 L J Ch 1 : 71 L T 852, *Thorne* v. *Cann.*
The decision in *Gokuldas's case* held that the rule in *Toulmin* v. *Steere*, (1817) 3 Mer 210, was not applicable to India.

7. ('37) 24 AIR 1937 All 588 (592) : 171 Ind Cas 153 : I L R (1937) All 880 (FB), *Hira Singh* v. *Jai Singh.*
('38) 25 AIR 1938 Mad 779 (779) : 182 Ind Cas 937 (DB), *Srinivasulu* v. *Damodaraswami.*
('39) 26 AIR 1939 Pat 375 (377) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamlapati Devi* v. *Jageshwar Dayal.*
('40) 27 AIR 1940 Pat 385 (394) : 189 Ind Cas 513 : 19 Pat 752 (FB), *Tika Sao* v. *Hari Lal.*
('23) 10 A I R 1923 Mad 349 (350) : 70 Ind Cas 286 (DB), *Nagayyar* v. *Govindayyar.*
('36) 23 AIR 1936 All 33 (35, 36) : 58 All 602 : 160 Ind Cas 541 (FB), *Alam Ali* v. *Beni Charan.*
('39) 26 A I R 1939 Mad 949 (953) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*
('37) 24 AIR 1937 Mad 826(829): 176 I.C. 939, *Madappaya* v. *P. Mahabala Rao.*
('31) 18 A I R 1931 Mad 110 (111) : 130 Ind Cas 506, *Pichaiyappa Chetty* v. *Govindarajulu Mudali.*
[*See also* ('29) 16 AIR 1929 Mad 860 (862) (DB), *Kovillamma* v. *Nedungadi.*]

8. ('26) 13 A I R 1926 All 653 (655) : 95 Ind Cas 998 (DB), *Chhote Lal* v. *Bansidhar.*

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that the same rule applied to cases where the payment was made to *any* prior mortgagee.[9]

Section 101 enacted the doctrine of merger referred to above, in a restricted form. It applied only to cases where the owner of a charge *acquired* the property charged. It did not, in terms, apply to cases where a *transferee from the owner* of the property charged paid off the charge. But in such cases, the rule laid down by their Lordships of the Privy Council in *Gokuldas's case* was followed and the charge was treated as kept alive, unless the person paying off was himself personally liable to pay the amount, or it was clear that there was no intention to keep the charge alive.[10]

('29) 16 AIR 1929 All 943 (947) : 123 Ind Cas 101 : 52 All 139 (DB), *Md. Shafiqullah* v. *Md. Samiullah.*

('31) 18 A I R 1931 Mad 110 (111) : 130 Ind Cas 506, *Pichaiyappa Chetty* v. *Govindarajulu Mudaly.*

('23) 10 AIR 1923 Mad 349 (350): 70 Ind Cas 286 (DB), *Nagayar* v. *Govindayyar.*

[See however ('09) 5 Ind Cas 132 (133) : 32 All 138 (DB), *Mutiullah Khan* v. *Banwari Lal.* (A property was mortgaged first to *A*, then to *B* and then to *C*. *C* discharged *A*'s mortgage and then brought the property to sale in execution of the decree on his mortgage — *M* purchased the property — *B* brought a suit for sale upon his mortgage — *Held* that *M* could set up *A*'s mortgage as a shield, and *B* could not sell the property unless he paid off that mortgage—S. 74 applied —Question of intention also considered.)]

9. ('37) 24 AIR 1937 All 583 (592) : 171 Ind Cas 153 : I L R (1937) All 830 (FB), *Hira Singh* v. *Jai Singh.*

('36) 23 AIR 1936 All 33 (36) : 58 All 602 : 160 Ind Cas 541 (F B), *Alam Ali* v. *Beni Charan.*

('39) 26 A I R 1939 Mad 949 (953) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

('26) 13 A I R 1926 All 653 (654) : 95 Ind Cas 998 (D B), *Chhote Lal* v. *Bansidhar.*

('99) 12 C P L R 70 (71, 72), *Seetaram* v. *Lachman.*

('21) 8 A I R 1921 Bom 172 (174) : 45 Bom 1112 : 62 Ind Cas 477 (DB), *Narayan* v. *Posha Jama.*

('84) 8 Mad 246 (249) (DB), *Gangadhara* v. *Sivarama.*

[*See also* ('11) 11 Ind Cas 469 (471) (DB) (All), *Sundar Lal* v. *Amanatulla.* (Mortgages *A* and *B* in favour of C — Mortgages *D*, *E* and *F* in favour of G — G paying off mortgages *A* and *B* held to have kept alive those mortgages for his benefit.)

('25) 12 AIR 1925 Nag 21 (22, 23) : 87 Ind Cas 264, *Narayan* v. *Syed Hafiz.*]

10. ('02) 29 Cal 154 (165) : 29 Ind App 9 (PC), *Dinobundhu Shaw* v. *Jogmaya Dasi.* (3 Cal W N 153 affirmed.)

('29) 16 AIR 1929 All 943 (946) : 123 Ind Cas 101 : 52 All 139 (DB), *Md. Shafiqullah Khan* v. *Md. Samiullah.*

('25) 12 AIR 1925 Pat 605 (607) : 88 Ind Cas 340 (DB). *Gauri Shankar* v. *Bahadur Singh.*

('20) 7 A I R 1920 Pat 251 (254) : 58 Ind Cas 489 (DB), *Baijnath* v. *Daleep Narain.*

('17) 4 AIR 1917 Pat 417 (418) : 39 Ind Cas 500 (DB), *Mahabir Prasad* v. *Mt. Bibi Nagin.*

('28) 15 AIR 1928 Pat 195 (196) : 108 Ind Cas 95 (DB), *Ram Das Saw* v. *Ramnandan Prasad Singh.*

('12) 14 Ind Cas 496 (503): 39 Cal 527: 39 Ind App 68 (PC), *Md. Ibrahim Hossein Khan* v. *Ambika Pershad.*

('36) 23 AIR 1936 Cal 313 (315) : 166 Ind Cas 788, *Rajani Nath* v. *Ennatali Howladar.*

('04) 8 Cal W N 690 (694, 695) (DB), *Girdhardas* v. *Ram Autar Singh.*
('09) 1 Ind Cas 683 (684) (DB) (Cal), *Woomesh Chandra Laskar* v. *Roma Nath Barman.*
('28) 107 Ind Cas 401 (409) (Mad), *Gurumoorthi Iyer* v. *Subramaniam.*
('25) 12 AIR 1925 Nag 21 (24) : 87 Ind Cas 264, *Narayan* v. *Syed Hafiz.*
('33) 20 AIR 1933 Nag 155 (156) : 30 Nag L R 164 : 144 Ind Cas 969, *Mohanlal* v. *Mohomed Sujat.*
('31) 18 AIR 1931 All 347 (348) : 130 Ind Cas 301, *Balbhadra Upadhya* v. *Sheomangal.* (Intention does not depend on the mortgagee's subsequent declaration but must be gathered from the facts of each case at the time the subsequent mortgage was executed.)
('94) 1894 Pun Re No. 38, *Ghanaya* v. *Pandit Chajju Ram.*
(1895) 1895 A C 11 (19) : 64 L J Ch 1 : 71 L T 852, *Thorne* v. *Cann.*
('31) 18 AIR 1931 All 76 (80) : 133 Ind Cas 142 (DB), *Fazal Rab* v. *Manzoor Ahmad.*
('30) 17 AIR 1930 Oudh 178 (180, 181) : 118 Ind Cas 835 : 5 Luck 53 (DB), *Mata Din* v. *Ifti Khar Husain.*
('07) 30 Mad 67 (69): 2 Mad L Tim 36 (DB), *Renga Srinivasachari* v. *Ganaprakash.* (Purchaser paying off mortgage as part of consideration for sale — Prior mortgage was extinguished.)
('91) 13 All 432 (437) (FB), *Matadin* v. *Kazim Hossein.*
('22) 9 AIR 1922 All 59 (60) : 66 Ind Cas 618 (DB), *Mohan Lal* v. *Premraj.*
('85) 7 All 568 (574) : 1885 All W N 112 (DB), *Sirbadh Rai* v. *Raghunath* (Affirmed on appeal in 8 All 105.)
('10) 7 Ind Cas 979 (980) (DB) (Cal), *Prayag Narain* v. *Chedi Rai.*
('38) 17 Pat 154 (162): 18 Pat L T 994 (DB), *Abu Mohammad Mian* v. *Deo Dutt.*
('25) 12 AIR 1925 Mad 338 (340) : 85 Ind Cas 349, *Srinivasa Ayyangar* v. *Vellayan Ambalam.*
('18) 5 AIR 1918 Mad 1260 (1261) : 38 Ind Cas 715 (DB), *Kuppuswami Aiyangar* v. *Narasimha Aiyar.*
('19) 6 AIR 1919 Mad 818 (819): 47 I. C. 882 (DB), *Rama Rao* v. *Mandachalugai.*
('14) 1 AIR 1914 Mad 693 (693) : 21 Ind Cas 978 (DB), *Subramania Pillai* v. *Palaniappa Mudali.*
('84) 7 Mad 127 (128) (DB), *Krishna* v. *Narayana.* (No intention to keep it alive —No subrogation.)
('37) 24 AIR 1937 Lah 665 (667) : I L R (1938) Lah 155: 147 Ind Cas 226 (DB), *Karam Chand* v. *Ram Singh.*
('21) 8 AIR 1921 Cal 781 (782) : 64 Ind Cas 266 (DB), *Ali Mahammad Khan* v. *Maharaj Bepari.*
('82) 6 Bom 64 (67) (DB), *Apaji* v. *Kavji.*
('28) 15 AIR 1928 All 77 (79) : 50 All 218 : 108 Ind Cas 728 (DB), *Maksud Ali Khan* v. *Abdullah Khan.*
('27) 14 AIR 1927 All 211 (212): 49 All 233 : 101 Ind Cas 409 (DB), *Madho Singh* v. *Pancham Singh.*
('30) 123 Ind Cas 687 (688) (DB) (All), *Ahmad Husain* v. *Ibrar Husain.* (The fact that money was left with the vendee to pay off both the encumbrances led to an inference that the intention was not to keep them alive.)
('09) 5 Ind Cas 177 (178) (DB) (All), *Mamraj* v. *Ramji Lal.*
('07) 1907 All W N 85 (85) : 4 All L J 349, *Baijnath* v. *Murlidhar.* (No intention to keep alive—Therefore no subrogation.)
('96) 1896 All W N 129 (129) (DB), *Kallu* v. *Sant Lal.*
('25) 12 AIR 1925 Rang 89 (92) : 85 Ind Cas 308, *Hla Ban U.* v. *Ramanathan.*
('25) 12 AIR 1925 Mad 1217 (1217) : 90 Ind Cas 767, *Thiruvengadam Pillai* v. *Sabapathi Pillai.*
('33) 20 AIR 1933 Nag 171 (173) : 144 Ind Cas 326 : 30 Nag L R 265 (DB), *Gadiram* v. *Punamchand.*

Section 92 Notes 2–3

The present S. 92 enacts the whole law of subrogation so far as it relates to mortgages. There is a legal subrogation in cases falling under the first paragraph irrespective of any intention to keep alive the prior mortgage paid off. There is conventional subrogation in cases under the third paragraph of the section. In view of this provision S. 74 was found unnecessary and has been omitted. The old S. 101 has been substituted by a new one providing a rule against merger.

Apart from the right given by this section, a right of subrogation cannot now be granted on equitable grounds in the case of mortgages.[11]

3. **This section and section 69, Contract Act.** — As seen in Note 1 the right of subrogation rests upon equitable principles and that one such principle is the principle of reimbursement found enacted in S. 69 of the Contract Act. That section provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other. Thus, a person paying off a prior mortgage may have two remedies :

(a) to proceed against the mortgagor under S. 69 of the Contract Act; and

(b) to exercise his right of subrogation.[1]

Section 69 of the Contract Act, however, confers only a *personal right*. The party claiming it can enforce it in his own right and not in the right of the prior mortgagee. Consequently, the right arises only on the date on which the person discharges the mortgage-debt. By the right of subrogation, on the other hand, the person paying off a mortgage acquires the rights and powers of the mortgagee whom he pays off. It is a claim which is enforced in the right of the original creditor. The subrogee does not acquire a new charge on payment. The charge is

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('27) 14 AIR 1927 Nag 345 (346) : 104 Ind Cas 358, *Lakhmichand* v. *Janardhan*.
[*See also* ('11) 10 Ind Cas 190 (192) (Oudh), *Kanchan Singh* v. *Jafri Begam*.
('26) 13 AIR 1926 Mad 1082 (1083) : 97 Ind Cas 932 (DB), *Prakasa Rao* v. *Ramanna*.
('14) 1 AIR 1914 Cal 318 (319): 20 Ind Cas 864 (DB), *Shib Narain* v. *Baikuntha Nath*.
('04) 8 Cal W N 385 (389) (DB), *Baranashi Pershad Chowdhury* v. *Johori Lal*.]

11. ('39) 26 AIR 1939 All 141 (151, 153) : I L R (1939) All 24 : 180 Ind Cas 699 (DB), *Behariji Maharaj* v. *Manmohan Das*.

Note 3

1. ('22) 9 AIR 1922 Pat 499 (501) : 1 Pat 780 : 68 Ind Cas 707 (DB), *Sibanand Misra* v. *Jagmohan Lal*.
('27) 14 AIR 1927 Cal 393 (394) : 101 Ind Cas 130 : 54 Cal 424 (DB), *Durga Charan* v. *Ambica Charan*.
('34) 21 AIR 1934 Nag 84 (86) : 30 Nag L R 148 : 148 Ind Cas 815 (DB), *Mt. Savitribai* v. *Nanhelal*.
('42) 29 AIR 1942 Nag 111 (113) : I L R (1942) Nag 393 : 201 Ind Cas 472, *Balchand* v. *Ratan Chand*.
[*See also* ('22) 9 AIR 1922 All 153 (154, 155) : 44 All 67 : 63 Ind Cas 604 (DB), *Bora Shib Lal* v. *Munni Lal*.
('25) 12 AIR 1925 Pat 201 (208, 209) : 77 Ind Cas 157 (DB), *Mt. Duljin Sona* v. *Bibi Ali Fatima*.]

already there. All that he acquires is the *right to enforce* that charge.[2] As to the periods of limitation for enforcing these rights, see Art. 132, Note 14 and Art. 61, Note 7 of the Authors' Commentaries on the Indian Limitation Act, 2nd (1942) Edn.

4. Law in the Punjab and N. W. F. Province. — The Transfer of Property Act is not in force in the Punjab and the North-West Frontier Province. But the principle underlying this section has been applied to these provinces.[1] The technicality in the third paragraph of the section requiring the agreement to be by a registered instrument is, however, not adhered to. Such an agreement may be either express or implied.[2] Where an agreement is not express, it may be implied from the intention of the parties to keep the prior mortgage alive.[3]

5. Section, whether retrospective. — This section was inserted in the Act by section 47 of the Transfer of Property (Amendment) Act, XX of 1929. There have been conflicting decisions upon the question whether or not the section has a retrospective effect. According to the High Courts of Allahabad,[1] Bombay[2]

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2. ('22) 9 AIR 1922 Pat 499 (501) : 1 Pat 780 : 68 Ind Cas 707 (DB), *Sibanand Misra* v. *Jagmohan Lal.*
('37) 24 AIR 1937 Nag 402 (406) : 174 Ind Cas 7, *Totaram* v. *Harischandra.*
('37) 24 AIR 1937 All 588 (591) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.*
('42) 29 AIR 1942 Nag 111 (113) : I L R (1942) Nag 393 : 201 Ind Cas 472, *Balchand* v. *Ratan Chand.* (The claim is enforceable in the right of the original creditor.)
[*See also* ('14) 1 AIR 1914 Mad 371 (374) : 22 Ind Cas 253 (DB), *Karuppan Ambalagaran* v. *Md. Sakuth Levvai.*
('34) 21 AIR 1934 Nag 84 (87) : 30 Nag L R 148 : 148 Ind Cas 815, *Mt. Savitribai* v. *Nanhelal.*]

Note 4

1. ('41) 28 AIR 1941 Lah 53 (55) : 194 Ind Cas 297, *Sham Lal* v. *Chhaju Ram.* (The Punjab.)
('36) 23 AIR 1936 Lah 390 (392) : 163 Ind Cas 114 (DB), *Punjab National Bank, Ltd.* v. *Jagdish Sahai.* (Do.)
('39) 26 AIR 1939 Pesh 34 (37) : 183 Ind Cas 833 (DB), *Moti Ram* v. *Basheshar Nath.* (N. W. F. P.)
('37) 24 AIR 1937 Pesh 5 (5) : 167 Ind Cas 698, *Gurdit Singh* v. *Kalumal.* (Do.)
2. ('36) 23 AIR 1936 Lah 390 (392) : 163 Ind Cas 114 (DB), *Punjab National Bank, Ltd.* v. *Jagdish Sahai.* (Oral agreement.)
('37) 24 AIR 1937 Pesh 5 (5) : 167 Ind Cas 698, *Gurdit Singh* v. *Kalumal.* (Implied agreement.)
3. ('41) 28 AIR 1941 Lah 53 (55) : 194 Ind Cas 297, *Sham Lal* v. *Chhaju Ram.* (Person advancing money to pay off a prior mortgage—No intention to keep alive the mortgage—*Held* no right of subrogation.)

Note 5

1. ('37) 24 AIR 1937 All 588 (597) : ILR (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.*
('40) 27 AIR 1940 All 237 (239) : ILR (1940) All 141 : 188 Ind Cas 328 (DB), *Chunni Lal* v. *Lakshmi Chand.*
('40) 27 AIR 1940 All 75 (77) : 187 Ind Cas 274 (DB), *Mangal Sen* v. *Kewal Ram.*
('36) 23 AIR 1936 All 33 (42) : 58 All 602 : 160 Ind Cas 541 (FB), *Alam Ali* v. *Beni Charan.*
('32) 19 AIR 1932 All 489 (492) : 54 All 897 : 139 Ind Cas 107 (FB), *Tota Ram* v. *Ram Lal.*
('34) 21 AIR 1934 All 1035 (1037) : 150 Ind Cas 937 (DB), *Umed Singh* v. *Babu Ram.*
2. ('38) 25 AIR 1938 Bom 115 (119) : 174 Ind Cas 188 (DB), *Isap Bapuji* v. *Umarji Abhram.*

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Calcutta,[3] Nagpur[4] and Patna[5] and the Chief Court of Oudh[6] the section has a retrospective effect except in proceedings pending on the 1st of April 1930. On the other hand, the High Courts of Madras[7] and Rangoon[8] have held that the section has no retrospective effect.

In *Raja Janki Nath* v. *Raja Pramatha Nath*[9] the question as to the retrospective effect of the section came up for decision before the Judicial Committee; but their Lordships did not find it necessary to express any opinion on the point.

6. Whether section applies to charges. — This section speaks of subrogation in the case of *mortgages*. "Mortgage" includes a simple mortgage and therefore by virtue of S. 100, a person who pays off a charge on a property is subrogated to the rights of the charge-holder.[1] It has, however, been held that a charge which a landlord has

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('42) 29 AIR 1942 Bom 227 (229) (DB), *Vishnu Balkrishna* v. *Shankareppa Gurlingappa.*

('38) 25 AIR 1938 Bom 508 (509) : 178 Ind Cas 974 (DB), *Subraya Kuppa* v. *Timmanna Subraya.*

3.('38) 42 Cal W N 1106 (1109, 1110), *Padma Lochan Roy* v. *Shaik Ajimaddin.*

4.('32) 19 AIR 1932 Nag 154 (155) : 28 Nag L R 247 : 141 Ind Cas 144, *Lakhmichand* v. *Janardhan.*

5. ('40) 27 AIR 1940 Pat 385 (393) : 19 Pat 752 : 189 Ind Cas 513 (FB), *Tika Sao* v. *Harilal.* (Manohar Lall, J., dissenting; AIR 1934 Pat 127 : 13 Pat 111 overruled.)

('36) 23 AIR 1936 Pat 60 (61) : 160 Ind Cas 933, *Ramdayal Sen* v. *Chakrapani Nandi.*

6. ('38) 25 AIR 1938 Oudh 127 (132) : 14 Luck 71 : 174 Ind Cas 714 (FB), *Kundan Lal* v. *Faqir Baksh.*

('40) 27 AIR 1940 Oudh 97 (101) : 15 Luck 175 : 185 Ind Cas 114 (DB), *Kishen Gopal* v. *Abdul Latif.*

('34) 21 AIR 1934 Oudh 213 (219) : 9 Luck 717 : 149 Ind Cas 84 (DB), *Mohammad Raza* v. *Bilqis Jehan Begam.*

('35) 22 AIR 1935 Oudh 399 (401) : 11 Luck 224 : 155 Ind Cas 905 (DB), *Sukhram Dass* v. *Mahbub Khan.*

('42) 29 AIR 1942 Oudh 449 (451) (FB), *Brij Bhukhan* v. *Bhagwan Datt.*

7. ('36) 23 AIR 1936 Mad 171 (173) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara Narayana Menon.* (Section 63 may be a provision *ex majore cautela.*)

('38) 25 AIR 1938 Mad 779 (781) : 182 Ind Cas 937 (DB), *Srinivasulu Naidu* v. *Damodaraswami.*

('31) 18 AIR 1931 Mad 110 (111) : 130 Ind Cas 506, *Pichiyappa Chetty* v. *Govindaraja Mudaly.*

('39) 26 AIR 1939 Mad 718 (719), *Subbarama Reddi* v. *Krishniah Chetty.*

8. ('38) 25 AIR 1938 Rang 306 (310) : 1938 Rang L R 430 : 177 Ind Cas 766 (FB), *Bank of Chettinad, Ltd.* v. *Maung Aye.*

('35) 22 AIR 1935 Rang 423 (425) : 161 Ind Cas 221 (DB), *M. S. Chettiar Firm* v. *Kaliamma.*

('38) 25 AIR 1938 Rang 65 (66) : 176 Ind Cas 923, *Ma E Khin* v. *P. S. Mohamed Ali.* (AIR 1936 Rang 152 : 14 Rang 494, followed.)

('36) 23 AIR 1936 Rang 152 (156) : 14 Rang 494 : 163 Ind Cas 645 (DB), *Bank of Chettinad Ltd.* v. *Ma Ba Lo.*

9. ('40) 27 AIR 1940 P. C. 38 (44) : ILR (1940) 1 Cal 291 : ILR (1940) Kar (PC) 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC).

Note 6

1. ('37) 24 AIR 1937 Pesh 5 (5) : 167 Ind Cas 698, *Gurdit Singh* v. *Kalumal.*

('34) 21 AIR 1934 Nag 84 (87) : 148 Ind Cas 815 : 30 Nag L R 148 (DB), *Mt. Savitribai* v. *Nanhelal.* (Maintenance charge.)

for rent under S. 65 of the Bengal Tenancy Act of 1885[2] or under S. 9 of the C. P. Tenancy Act of 1920[3] is peculiar to himself. The charge exists only for the landlord and, therefore, a person (other than the tenant) who pays rent to the landlord is not subrogated to the rights of the landlord. So also it has been held that the section does not apply to a statutory charge which the Government has under S. 7 of the Land Improvement Loans Act (XIX of 1883) for *tagai* advance.[4]

7. Right of subrogation arises on redemption. — A right of subrogation accrues only when the mortgage has been *redeemed*. Where there has been no redemption no question of subrogation can arise.[1]

The right of redemption, as provided in S. 60 can be exercised until it is extinguished by act of parties or by a decree of a Court. The decree of Court referred to is the final decree in a foreclosure suit under O. 34, R. 3 and the final decree in a redemption suit under O. 34, R. 8 of the Code of Civil Procedure.[2] When, therefore, payment is made to the mortgagee before a final decree is passed under O. 34, R. 3 or R. 8 declaring that the mortgagor is debarred from all right to redeem the mortgaged property, such payment will amount to the redemption of the mortgage and will give rise to the right of subrogation.

In regard to suits for sale of the mortgaged property there was a difference of opinion prior to 1929 as to whether a final decree for sale extinguished the right of redemption. In the undermentioned cases[3] which held that it was extinguished the right of subrogation was denied

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('34) 21 AIR 1934 Mad 353 (354) : 150 Ind Cas 930 (DB), *Aravamudhu Ayyangar* v. *Abiramavalli.*
[*See also* ('32) 19 AIR 1932 Nag 171 (171, 172) : 28 Nag L R 214 : 140 Ind Cas 532, *Manoharlal* v. *Kanhaiyalal.*]

2. ('34) 21 AIR 1934 Pat 70 (72) : 155 Ind Cas 663, *Ramnandan Prasad Singh* v. *Ram Das.*

3. ('40) 27 AIR 1940 Nag 156 (158): 190 I. C. 641 (DB), *Sitaram* v. *Krishnarao.*

4. ('41) 28 AIR 1941 Bom 153 (155): 194 Ind Cas 632 (DB), *Vithaldas Bhagwandas* v. *Tukaram Vithoba.*

Note 7

1. ('24) 11 AIR 1924 Rang 204 (205) : 1 Rang 714 : 79 Ind Cas 766 (DB), *Ma Lon* v. *Ma Nyo.*
('40) 27 AIR 1940 All 540 (543): 192 I. C. 58, *Rama Charan* v. *Raghubir Saran.*
('34) 21 AIR 1934 All 1035 (1037): 150 I. C. 937 (DB), *Umed Singh* v. *Babu Ram.*
('37) 24 AIR 1937 Cal 336 (337) : 173 Ind Cas 906, *In re Upendra Nath Kar.*
('85) 11 Cal 258 (260) (DB), *Lala Dilawar* v. *Dewan Bolakiram.*
('27) 14 AIR 1927 Nag 150 (153) : 100 Ind Cas 272, *Mulchand* v. *Radhakisan.*
('22) 9 AIR 1922 Pat 92 (94) : 65 Ind Cas 801 (DB), *Mahomed Musa* v. *Edal Singh.* (Per Das, J.)
('01) 4 Oudh Cas 273 (275), *Ghulam Maula Khan* v. *Mt. Banno Khanam.*

2. See Section 60, Note 26, Pt. 1.

3. ('23) 10 AIR 1923 All 171 (172) : 45 All 149: 79 Ind Cas 308 (DB), *Jagannath Prasad* v. *Mt. Chatur Kuer.*
('20) 7 AIR 1920 Oudh 253 (254) : 23 Oudh Cas 334 : 60 Ind Cas 213, *Rabnath Baksh* v. *Ganesh Prasad.*
('24) 11 AIR 1924 Oudh 85 (91) : 73 Ind Cas 113 (DB), *Lutar Ram* v. *Lal Ranjit Singh.*

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when payment was made after such decree. The under-noted cases,[4] however, which held that it was not extinguished, allowed the right of subrogation even when the payment was made after a final decree for sale.

By the amendment in 1929 of O. 34, R. 5, it is now perfectly clear that the right of redemption can be exercised until the *confirmation* of sale held in pursuance of a mortgage decree. A payment made before the date of confirmation of a sale will now be a redemption of the mortgage entitling the person paying to claim subrogation.[5]

8. There must be relationship of mortgagor and mortgagee. — The question of subrogation under this Act arises only on the *redemption of a mortgage.* This presupposes that there exists the relation of mortgagor and mortgagee between the person who is primarily liable for the payment and the person to whom the payment was made. If the relation of mortgagor and mortgagee does not exist between such persons no right of subrogation will arise in favour of any person.[1] In the undermentioned case[2] A mortgaged his property to B and then to C; B sued on his mortgage, obtained a decree and purchased the property himself. B then sold the property to D. A sued D for possession of the property contending that D's purchase was on his behalf. The claim was decreed on condition that A should pay to D certain amount. In order to pay that amount A raised money on mortgage from E and discharged the claim. In a suit by C, the subsequent mortgagee, E

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4. ('27) 14 AIR 1927 All 28 (32) : 97 Ind Cas 594 : 49 All 162 (DB), *Mohomed Abbas Ali Khan* v. *Chotey Lal.*
('26) 13 AIR 1926 All 744 (744) : 96 Ind Css 1054 (DB), *Chhotey Lal* v. *Dharajit.*
('12) 13 Ind Cas 939 (940) (DB) (All), *Kanhai Lal* v. *Hulas Singh.*
('26) 13 AIR 1926 Pat 23 (24) : 89 Ind Cas 822 (DB), *Lekh Raj Mahton* v. *Jang Bahadur Singh.*
('40) 27 AIR 1940 All 416 (419, 420) : ILR (1940) All 580 : 191 Ind Cas 647 (DB), *Jagarnath Prasad* v. *Chunni Lal.*
('26) 13 AIR 1926 Nag 21 (24) : 95 Ind Cas 979 : 23 Nag L R 86, *Premsukhdas* v. *Peerkhan.*
('14) 1 AIR 1914 Cal 866 (866): 24 I. C. 734 (DB), *Brahmadeo* v. *Sukuwar Dube.*
('06) 28 All 778 (781) : 1906 All W N 230 (DB), *Shyam Lal* v. *Bashiruddin.*
('97) 20 Mad 486 (487) : 7 Mad L Jour 198 (DB), *Purnamal Chund* v. *Venkata Subbarayalu.*
('06) 29 Mad 37 (39, 41) (DB), *Vanamikalinga Mudali* v. *Chidambara Chetty.*
[*See also* ('05) 2 Cal L Jour 202 (214) (DB), *Surjiram Marwari* v. *Barhmadeo Persad.*]

5. ('37) 24 AIR 1937 Nag 196 (197) : I L R (1939) Nag 310 : 171 Ind Cas 612, *Raghunath Narayan* v. *Krishnarao Shankarrao.*
('36) 23 AIR 1936 All 33 (42) : 160 Ind Cas 541 : 58 All 602 (FB), *Alam Ali* v. *Beni Charan.*
('36) 23 AIR 1936 All 62 (63) : 158 Ind Cas 643, *Shib Charan Das* v. *Muqaddam.*
('31) 18 AIR 1931 Oudh 295 (296) : 132 Ind Cas 542 (DB), *Rambilas* v. *Lachmi Narain.*

Note 8

1. ('16) 3 A I R 1916 All 44 (46) : 35 Ind Cas 647 (DB), *Umrai Lal* v. *Mt. Rukmin Kuar.*

2. ('29) 16 A I R 1929 Mad 890 (892) : 124 Ind Cas 194 (DB), *Audinatha Ayyangar* v. *S. S. Bharathi.*

claimed a right of subrogation on the basis of the advance to A for discharging D's claim. It was held that there was no relation of mortgagor and mortgagee between A and D and consequently no prior mortgage in discharge of which the payment was utilised and that therefore there was no right of subrogation in E's favour.

9. **"Other than the mortgagor."** — It is well settled that a mortgagor who has created more encumbrances than one cannot set a prior encumbrance which he has discharged against a later encumbrance. This is on the principle that a person cannot become his own creditor, and that in setting up the prior encumbrance which he has discharged against a second encumbrance, he would be derogating from his own grant.[1] Moreover, when a mortgagor pays off a prior encumbrance created by himself, he does nothing but perform his own obligation.[2] As has been seen in Note 2 an exception to the rule of intention against merger is that of payment by a person who is himself liable personally to pay the debt. Hence, even prior to the introduction of this section, the mortgagor discharging a prior debt was not entitled to be subrogated to the rights and remedies of his creditor.[3] This has now been expressly recognised by the Legislature in the present section by the use of the words 'other than the mortgagor.'[4] Thus, a mortgagor, under the present section also, cannot claim the right of subrogation[5] and, whenever he pays off a prior mortgage, the payment enures for the benefit of a subsequent mortgagee, and enlarges his security by rendering it more valuable.[6]

Note 9

1. ('39) 26 A I R 1939 Mad 949 (951) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

2. ('31) 18 A I R 1931 All 40 (42) : 52 All 1037 : 131 Ind Cas 599 (DB), *Narain Pershad* v. *Narain Singh.*
('36) 23 AIR 1936 Cal 42 (43) : 62 Cal 677 : 161 Ind Cas 48, *Mukaram Marwari* v. *Md. Hossain.*
('38) 25 AIR 1938 Mad 779 (783) : 182 Ind Cas 937 (DB), *Srinivasulu Naidu* v. *Damodaraswami.*
('20) 7 AIR 1920 Oudh 204 (208, 209) : 60 Ind Cas 560 (DB), *Mt. Jai Kishori* v. *Md. Ali Mohammad Khan.*

3. See cases in foot-note (2).

4. ('36) 23 AIR 1936 Cal 42 (43) : 62 Cal 677 : 161 Ind Cas 48, *Mukaram Marwari* v. *Md. Hossain.*

5. ('38) 25 A I R 1938 Bom 508 (509) : 178 Ind Cas 974 (DB), *Subraya Kuppa* v. *Thimmanna Subraya.*
('36) 23 AIR 1936 Oudh 47(49): 159 I.C. 54 (DB), *Nisar Ahmad* v. *Manzur Ahmad.*
('39) 26 AIR 1939 Mad 718 (719), *Subbarama Reddi* v. *Krishniah Chetti.*
('39) 26 A I R 1939 Mad 949 (951) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*
('42) 29 AIR 1942 Oudh 465 (472) : 203 Ind Cas 131 (FB), *Sheoraj Singh* v. *Gajodhar Prasad.*

6. ('07) 5 Cal L Jour 95 (101) (DB), *Bhaju Chowdhury* v. *Chuni Lal.*
('31) 18 AIR 1931 Mad 642 (643) : 132 Ind Cas 290 (DB), *Ramanathan Chettiar* v. *Audinatha Ayyangar.* (Mortgagor paying by purchasing in execution of a prior mortgage decree.)
('29) 16 A I R 1929 Mad 890 (891, 894, 895) : 124 Ind Cas 194 (DB), *Audinatha Ayyangar* v. *S. S. Bharathi.* (Do.)

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In the undermentioned case[7] it has been held that a mortgagor whose right to redeem a prior mortgage is extinguished can again acquire that right by subrogation if he redeems a subsequent mortgagee whose right to redeem the prior mortgage had not been so extinguished. It was also observed that "the new section does not state that the mortgagor can in no circumstances obtain the right of redemption which that mortgagee might have." It is submitted that this interpretation of S. 92 does not seem to be correct in view of the words 'other than the mortgagor.'

The term 'mortgagor' includes his successor-in-interest[8] and his agent.[9] As to whether it includes purchasers of equity of redemption, see Note 13.

10. Covenant to pay mortgage — Effect of. — It has been seen in Note 1 that the doctrine of subrogation rests on the equitable principle now found enacted in S. 69 of the Contract Act, that a person who is interested in the payment of money which *another is bound by law to pay*, and who therefore pays it, is entitled to be re-imbursed by the latter. It has also been seen in Note 2 that the equitable rule of intention to keep alive a charge which is paid off is not applicable where the person paying off the charge is *himself personally liable to pay it*. It follows that a person who has *covenanted* with the mortgagor to pay off a liability and who makes the payment in pursuance of the covenant, is merely performing his *own obligation* and is not paying any money which "another is bound to pay" and cannot therefore claim any right of subrogation.[1] Thus, where the purchaser of the equity of redemption[2]

(1884) 27 Ch D 246 (251) : 54 L J Ch 1145 : 32 W R (Eng) 918 : 51 L T 424, *Platt* v. *Mendel*.

('06) 29 Mad 113 (114) (DB), *Manjappa Roi* v. *Krishnayya*.

7. ('32) 19 AIR 1932 Nag 154 (155) : 28 Nag L R 247 : 141 Ind Cas 144, *Lakmichand* v. *Janardhan*.

8. ('15) 2 A I R 1915 All 242 (243) : 37 All 309 : 28 Ind Cas 973 (DB), *Badan* v. *Murari Lal*. (Person inheriting from mortgagor not entitled to subrogation.)

('19) 6 A I R 1919 Oudh 150 (151) : 22 Oudh Cas 72 : 52 Ind Cas 159, *Mahomed Mohsin* v. *Mohammad Abid*.

('20) 7 A I R 1920 Oudh 204 (209) : 60 Ind Cas 560 (DB), *Mt. Jai Kishori* v. *Mohammad Ali Mohammad Khan*.

9. ('31) 18 A I R 1931 All 40 (42) : 52 All 1037 : 131 Ind Cas 599 (D B), *Narain Pershad* v. *Narain Singh*. (Whether the person who pays is an agent is a question of fact.)

Note 10

1. ('05) 2 Cal L Jour 288 (298, 299) (DB), *Surjiram Marwari* v. *Barhamdeo Pershad*. (Quoting Jones on '*Mortgages*'.)

('27) 14 AIR 1927 Nag 150 (153) : 100 Ind Cas 272, *Mulchand* v. *Radhakisan*. (Jones on '*Mortgages*' quoted.)

2. ('34) 21 AIR 1934 Oudh 129 (130) : 147 Ind Cas 628, *Jai Devi Kuwar* v. *Sripal Singh*.

('36) 23 AIR 1936 Cal 42 (43) : 62 Cal 677 : 161 Ind Cas 48, *Mukaram Marwari* v. *Mahammad Hosain*.

('32) 19 AIR 1932 P C 99 (101) : 137 Ind Cas 475 (PC), *Jagmohan Das* v. *Jugal Kishore*.

('27) 14 AIR 1927 Nag 150 (153, 154) : 100 Ind Cas 272, *Mulchand* v. *Radhakisan*.

('05) 2 Cal L Jour 288 (299) (DB), *Surji Ram Marwari* v. *Barhamdeo Pershad*.

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or a subsequent mortgagee,[3] *covenants* to pay off the prior mortgage-debt, and pays off such debt, he merely performs his own obligation and therefore cannot claim subrogation.

A purchaser of mortgaged property *subject to the mortgage* cannot, however, be said to have *covenanted* to pay the mortgage-debt, and can, if he pays off the mortgage, claim to be subrogated to the rights of the mortgagee. In *Malireddi* v. *Gopalakrishnayya*,[4] the auction purchaser had purchased the property subject to the prior mortgages and it was held by their Lordships of the Privy Council that there was no personal covenant to pay the mortgage-debt in that case. So also in *Gokuldas* v. *Puranmal*,[5] the auction purchaser had purchased only the mortgagor's interest in the property and it was held by their Lordships of the Privy Council that "the appellant (auction purchaser) purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that (mortgage) debt. When he paid the bank (the prior mortgagee), some six months afterwards, it was not because he was under an obligation to do so." The undermentioned case[6] holding that an auction purchaser of property subject to mortgages must be taken to have agreed to discharge them and cannot therefore claim subrogation by payment thereof is, it is submitted, not correct.

Where a vendee or a mortgagee from the owner covenants to pay a *puisne mortgagee*, he cannot claim subrogation against such mortgagee, in respect of any *prior* mortgage which he might have paid off even though he might not have covenanted to pay off the prior mortgage. This is also based on equitable principles.[7] As was observed by Mukherjee, J., in *Bisseswar Prasad* v. *Lala Sarnam Singh*,[8] "just as a person who has satisfied a mortgage which he has undertaken to discharge, cannot claim to be subrogated to the rights of the mortgagee as against other incumbrancers, a person who has undertaken to discharge

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('36) 23 AIR 1936 Mad 901 (904) : 170 Ind Cas 762, *Muthusami* v. *Arasayee Ammal*.
[*See also* ('21) 62 Ind Cas 621 (622) (DB) (Pat), *Akhauri Prem Narain* v. *Kuldip Singh*.]

3. ('27) 14 AIR 1927 Nag 150 (153) : 100 Ind Cas 272, *Mulchand* v. *Radhakisan*.
('28) 15 AIR 1928 Nag 230 (231) : 110 Ind Cas 441, *Jagannath* v. *Radhakishan*.

4. ('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 79 Ind Cas 592 (PC).
[*See* ('34) 21 AIR 1934 Mad 268 (268, 269) : 148 Ind Cas 735 (DB), *Ramamurti Garu* v. *Bangaru*. (AIR 1924 P C 36 : 47 Mad 190 : 51 Ind App 140 (PC), followed.)]

5. ('84) 10 Cal 1035 (1044) : 11 Ind App 126 (PC).

6. ('16) 3 AIR 1916 Oudh 169 (176) : 36 Ind Cas 732 (DB), *Bhagwan Das* v. *Ahmad Jan*.

7. ('07) 6 Cal L Jour 134 (138, 139) (DB), *Bisseswar Prosad* v. *Lala Sarnam Singh*.
('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 79 Ind Cas 592 (PC), *Malireddi* v. *Gopalakrishnayya*.
('23) 10 AIR 1923 All 509 (511) : 74 Ind Cas 640 (DB), *Lala Makkhan Lal* v. *Nathi*.
('33) 14 Pat L Tim 371 (374) (DB), *Ramghulam Singh* v. *Janki Nath*.

8. ('07) 6 Cal L Jour 134 (138, 139) (DB).

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a mortgage, but has defaulted, cannot set up as against that mortgagee, a right of subrogation based on the discharge of another incumbrance."

Where a vendee or a mortgagee from a person covenants to pay off *two* mortgages on the property but pays off only the earlier of the two, he cannot, as against the second, claim to be subrogated to the rights of the mortgagee who has been paid off,[9] firstly, on the ground that in discharging the earlier mortgagee, he is merely performing his own obligation or covenant, and secondly, on the principle stated in *Bisseswar Prasad's case* referred to above.

11. Redemption by subsequent mortgagee.—A subsequent mortgagee is a person falling under cl. (a) of S. 91 and has, therefore, a right to redeem or institute a suit for redemption of the mortgaged property. On redemption by him, therefore, of a prior mortgage he is subrogated to the rights of the mortgagee whom he redeems under paragraph 1 of this section.[1] Even before the amendment in 1929, a subsequent mortgagee had, as has been seen in Note 2, a statutory right of subrogation under the old S. 74 of the Transfer of Property Act.[2]

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9. ('10) 7 Ind Cas 200 (201) : 33 All 101 (FB), *Muhammad Sadiq* v. *Ghaus Muhammad.*
('18) 5 AIR 1918 Mad 103 (104, 105) : 41 Mad 513 : 44 Ind Cas 753 (DB), *Muthammal* v. *Razu Pillai.*
('26) 13 AIR 1926 Nag 321 (322) : 93 Ind Cas 95 (DB), *Kasturchand* v. *Singhai Ratanchand.*
('16) 3 AIR 1916 Cal 801 (802) : 43 Cal 69 : 31 Ind Cas 22 (DB), *Har Shyam Chowdhury* v. *Shyam Lal Sahu.*
('09) 2 Ind Cas 207 (208) (All), *Dalip Rai* v. *Birnaik Rai.*
('94) 17 Mad 62 (65) : 4 Mad L Jour 17 (DB), *Narayanasami Naidu* v. *Narayana Rau.*
('27) 14 AIR 1927 Nag 150 (153) : 100 Ind Cas 272, *Mulchand* v. *Radhakisan.*
('05) 2 Cal L Jour 288 (291) (DB), *Surji Ram Marwari* v. *Barhamdeo Persad.*
('07) 6 Cal L Jour 134 (138, 139) (DB), *Bisseswar Prosad* v. *Lala Sarnam Singh.*
('10) 6 Ind Cas 781 (782) (DB) (Mad), *Govidaswami Thevan* v. *T. M. Doraiswami Pillai.*
('30) 17 AIR 1930 Mad 51 (54) : 53 Mad 188 : 124 Ind Cas 497 (DB), *Lakshumi Achi* v. *Narayanasami.*
('33) 20 AIR 1933 Mad 715 (719) : 149 Ind Cas 287 (DB), *Abdul Razak* v. *Abdul Rahiman.*
('36) 23 AIR 1936 Mad 171 (172) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara.* (Overruling AIR 1934 Mad 227.)
[*See also* ('23) 10 AIR 1923 All 509 (510) : 74 Ind Cas 640 (DB), *Lala Makkhan Lall* v. *Nathi.*]

Note 11

1. ('40) 27 AIR 1940 All 416 (418, 419) : ILR (1940) All 580 : 191 Ind Cas 647 (DB), *Jagarnath Prasad* v. *Chunni Lal.*
('40) 27 AIR 1940 Lah 269 (270, 271) : 190 Ind Cas 599, *Mt. Ghulam Fatima* v. *Mt. Gopal Devi.*
('37) 171 Ind Cas 423 (424, 425) (Oudh), *Narsingh Misra* v. *Raj Bahadur Singh.*
[*See* ('36) 23 AIR 1936 All 636 (637) : 58 All 912 : 164 Ind Cas 725 (DB), *Ram Sarup* v. *Bhagwati Prasad.*
('30) 17 AIR 1930 All 869 (871) : 129 Ind Cas 378 (DB), *Raghunandan Prasad* v. *Ajodhya Singh.*]
[*See also* ('36) 23 AIR 1936 Pat 60 (61) : 160 Ind Cas 933 (DB), *Ram Dayal Sen* v. *Chakrapani Nandi.*]

2. ('39) 26 AIR 1939 Mad 949 (953) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

As to the right of subrogation of the subsequent mortgagee paying off a prior mortgage out of the amount left with him by the mortgagor, see Note 22.

12. Redemption by prior mortgagee. — In the undermentioned case[1] A mortgaged his property to B and then to C. C brought a suit on his mortgage and impleaded B. B stated that he was a prior mortgagee and was willing to redeem C's mortgage. A preliminary decree for foreclosure was passed and B paid the decretal amount. B then filed a suit against A and sought to recover the amount paid in satisfaction of the mortgage in favour of C and the amount due on his own mortgage. It was argued that B who was a prior mortgagee could not, by redeeming the subsequent mortgage, claim subrogation to it. It was held that though under explanation to O. 34, R. 1, C. P. C., a prior mortgagee was not a necessary party to a suit on the subsequent mortgage, the explanation did not prohibit the subsequent mortgagee from joining the prior mortgagee as a party to his suit if he chose; after the prior mortgagee had decided that it was convenient for him to be joined in the suit on the subsequent mortgage and had allowed himself to be so joined, he was entitled to claim subrogation after redemption of the subsequent mortgage.

('36) 23 AIR 1936 All 636 (637) : 58 All 912 : 164 Ind Cas 725 (DB), *Ram Sarup* v. *Bhagwati Prasad.*

('22) 9 AIR 1922 All 153 (154, 155) : 44 All 67 : 63 Ind Cas 604 (DB), *Bora Shib Lal* v. *Munni Lal.* (Under S. 74 no doubt the subsequent mortgagee on redeeming the prior mortgage acquired the rights and powers of the mortgagee whom he redeemed but the fact of his redeeming the prior mortgage did not make him an assignee of the mortgage. His rights might be akin to those of an assignee but he was not the actual assignee.)

('29) 16 AIR 1929 All 296 (298) : 119 Ind Cas 507 (DB), *Saruju Kumar Mukerji* v. *Dwarka Prasad.*

('27) 14 AIR 1927 Pat 117 (121) : 98 Ind Cas 968 (DB), *Md. Tabarak Ali* v. *Dalip Narain.*

('25) 12 AIR 1925 Mad 1219 (1220) : 91 Ind Cas 577 (DB), *Kandasami* v. *Venkata.*

('19) 6 AIR 1919 Oudh 49 (50) : 55 Ind Cas 638, *Jagmohan Singh* v. *Ragho Ram.*

('31) 18 AIR 1931 Mad 110 (111) : 130 Ind Cas 506, *Pichaiyappa* v. *Govindaraju.*

('31) 18 AIR 1931 All 466 (479) : 134 Ind Cas 1 : 53 All 1023 (FB), *Ram Sanehi Lal* v. *Janki Prasad*

('32) 19 AIR 1932 Cal 126 (132) : 59 Cal 117 : 138 Ind Cas 177 (DB), *Kalipada Mukerji* v. *Basant Kumar.*

('20) 7 AIR 1920 Mad 389 (390) : 58 Ind Cas 493 (DB), *Mallireddi Ayya Reddi* v. *Gopala Krishnayya.*

('30) 17 AIR 1930 All 869 (871) : 129 Ind Cas 378 (DB), *Raghunandan* v. *Ajodhya.*

('34) 21 AIR 1934 Mad 256 (256) : 150 Ind Cas 1126 (DB), *Venkatachari* v. *Kuruppan Chetty.*

('30) 17 AIR 1930 Pat 570 (572) : 129 Ind Cas 664 : 10 Pat 197 (DB), *Dhana Koeri* v. *Ram Kewal.*

('23) 10 AIR 1923 Mad 349 (350) : 70 Ind Cas 286 (DB), *Nagayyar* v. *Govindayyar.*

('10) 6 Ind Cas 159 (161) : 37 Cal 589 (DB), *Hari Narain Banerji* v. *Shama Sundari Dasi.*

('17) 4 AIR 1917 Nag 152 (153) : 42 Ind Cas 796 : 13 Nag L R 217, *Nathuram* v. *Sheolal.*

Note 12

1. ('29) 16 AIR 1929 Nag 135 (136) : 25 Nag L R 171 : 118 Ind Cas 54, *Narsingh* v. *Nathuji.*

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Note 13

13. Redemption by purchaser. — Section 59A provides that the word "mortgagor" will, unless otherwise expressly provided, include persons deriving title from him. It has been seen in Note 3 on S. 91 that that section is one of such provisions inasmuch as it distinguishes between a "mortgagor" and persons deriving title from him. This section repeats that distinction and so provides an exception to the general rule laid down in S. 59A. A purchaser or an auction purchaser of mortgaged property is not the 'mortgagor' for the purposes of this section and has, therefore, a right of subrogation under the first paragraph of the section.[1] The contrary view taken in the undermentioned cases[2] is, it is submitted, not correct. Even before the amendment of 1929 it was held by their Lordships of the Privy Council in *Gokuldas* v. *Puranmal*[3] that an auction purchaser of the mortgagor's interest paying off a prior mortgage was not in the same position as the mortgagor.

As will be seen from the language of the first paragraph, the right of subrogation exists "against the mortgagor or any other mortgagee." Where the purchaser purchases the *whole* of the mortgaged property his right of subrogation will exist only against "any other mortgagee." As there is nothing left in the mortgagor he cannot exercise his right against the mortgagor. Where the purchaser purchases only a part of the property he can exercise his right of subrogation against the mortgagor or any other mortgagee as the case may be.

The law before the amendment of 1929 regarding the purchaser's right of subrogation was the same as it is after the amendment except that the Courts have not to consider the question of intention under the present section, which they had to go into before the amendment.[4] The

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Note 13

1. ('42) 29 AIR 1942 Bom 98 (99) : ILR (1942) Bom 169 : 199 Ind Cas 718 (DB), *Narayan Divakarappa* v. *Parameshvarappa.*
('34) 21 AIR 1934 All 1035 (1036) : 150 Ind Cas 937 (DB), *Umed Singh* v. *Babu Ram.*
('33) 20 AIR 1933 Pat 33 (35) : 140 Ind Cas 845 (DB), *Jhum Lal* v. *Sham Narayan Singh.*
('37) 24 AIR 1937 Nag 402 (406) : 174 Ind Cas 7, *Totaram Jawaharlal* v. *Haris-chandra Harkisan.*
('37) 24 AIR 1937 Oudh 493 (497) : 13 Luck 484 : 171 Ind Cas 233 (DB), *Parsotam Das* v. *Syed Ali Haidar.*
('36) 23 AIR 1936 Nag 207 (209) : ILR (1936) Nag 183 : 165 Ind Cas 76, *Narayan Vishnooram* v. *Maruti Nago.* (Sale for grossly inadequate consideration or fraudulent—Person purchasing has right of subrogation till sale is avoided under Section 53.)
('33) 14 Pat L Tim 371 (373) (DB), *Ramghulam Singh* v. *Janki Nath.*
[*See also* ('32) 19 AIR 1932 Cal 126 (133) : 59 Cal 117 : 138 Ind Cas 177 (DB), *Kalipada Mukerji* v. *Basanta Kumar.*

2. ('39) 26 AIR 1939 All 190 (192) : ILR (1939) All 185 : 180 Ind Cas 913 (DB), *Piarey Lal* v. *Dina Nath.*
('37) 24 AIR 1937 Nag 372 (374) : ILR (1938) Nag 206 : 172 Ind Cas 142 (FB), *Taibai Laxmanrao* v. *Wasudeorao Gangadhar.*
('18) 5 AIR 1918 Mad 103 (104) : 41 Mad 513: 44 Ind Cas 753 (DB), *Muthammal* v. *Razu Pillai.*

3. (84) 10 Cal 1035 (1046) : 11 Ind App 126 (PC).

4. See Note 2.

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Note 13

law applied was, as has been seen in Note 2, the rule of intention laid down in *Gokuldass* v. *Puranmal*[5] and affirmed by their Lordships in *Malireddi* v. *Gopalakrishnayya*.[6] In the latter case their Lordships observed as follows :

> "It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages, may if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee . . . . . It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, S. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit. So far therefore as Pingala or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed by counsel for the appellant, having regard to the decisions[7] of this Board."

The reason why a purchaser of equity of redemption is given a right of redemption is that unlike the mortgagor, he is not under any *personal obligation* to pay the mortgage-debt to the mortgagee.[8] He may, however, covenant with the mortgagor to pay the mortgage-debt personally in which case he cannot claim to be subrogated to the rights of the mortgagee whom he discharges.[9]

Where a person does not purchase only the equity of redemption but purchases the property free from encumbrances and then pays off the prior mortgage to protect his own interest, it is needless to say that he is subrogated to the rights of the mortgagee whom he redeems.[10]

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5. ('84) 10 Cal 1035 (1045, 1046) : 11 Ind App 126 (PC).

6. ('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 79 Ind Cas 592 (PC).

7. ('84) 10 Cal 1035 (1046): 11 Ind App 126 (PC), *Gokaldoss Gopaldoss* v. *Puranmal* v. *Premsukhdas.*
('02) 29 Cal 154 (165) : 29 Ind App 9 (PC), *Dinobundu Shaw Chowdry* v. *Jogmaya Dasi.*
('12) 39 Cal 527 (555): 39 Ind App 68 (P C), *Mahomad Ibrahim* v. *Ambika Pershad.*

8. ('42) 29 AIR 1942 Bom 98 (99) : ILR (1942) Bom 169 : 199 Ind Cas 718 (DB), *Narayan Divakarappa* v. *Parameshwarappa.*
('34) 21 AIR 1934 All 1035 (1036) : 150 Ind Cas 937 (DB), *Umed Singh* v. *Babu Ram.*
[*See* ('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 79 Ind Cas 592 (PC), *Malireddi Ayyareddi* v. *Gopalakrishnayya.*
('13) 18 Ind Cas 704 (705) (DB) (All), *Jamil-un-nissa* v. *Pitambar Das.*
('33) 14 Pat L Tim 371 (373) (DB), *Ramghulam Singh* v. *Janki Nath.*]

9. See Note 10.

10. ('39) 26 AIR 1939 Nag 217 (219) : ILR (1939) Nag 690 : 183 Ind Cas 439, *Sunderlal* v. *Amrut Rao.*

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Note 14

14. Redemption by surety. — A surety for the payment of the mortgage-debt is a person referred to in cl. (b) of S. 91. He has therefore a right of subrogation under the first paragraph of this section.[1] This is based on the English law. The Special Committee in giving the right of subrogation to a surety observe as follows:

> "A surety is obviously entitled to be subrogated to the rights of the creditor if he pays him off. To use the argument of Sir S. Romilly in *Craythorn* v. *Swinburn* (14 Ves. 160 at p. 162) 'a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having the right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.' The same principle has been incorporated in Ss. 140 and 141 of the Indian Contract Act, 1872."

The right of the surety to be subrogated to the position of the mortgagee was recognised in this country even before the passing of the Transfer of Property Act.[2] In *Heeralall* v. *Syed Oozeer Ali*,[3] a surety had paid off the mortgage-debt on default by the mortgagor and the question was whether the surety could proceed on the mortgage bond against the mortgagor. Markby, J., after pointing out that there was no authority on the subject in India observed:

> "Therefore we must decide the question by analogy of the law of other countries; and it appears to us clear that, by the law of England and the law of Scotland, and, as far as we are aware, by the general law of Europe, when a surety has paid off the debt of his principal, not only all the collateral securities are transferred to the surety, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. . . . . It seems to us, therefore, that the law of this country may be reasonably taken to be that which has been considered equitable in other countries, namely, that the surety is not debarred from proceeding against

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Note 14

1. ('32) 19 AIR 1932 Nag 171 (171, 172) : 28 Nag L R 214 : 140 Ind Cas 532, *Manoharlal* v. *Kanhaiyalal*.

2. (1874) 21 Suth W R 347 (347, 348) (DB), *Heera Lall* v. *Syad Oozeer*.
[*See also* (1863) 1 Bom H C R 135 (136) (DB), *Gorakı Kanoji* v. *Nathu Appaji*. (Certain property was mortgaged with a condition that if it be not redeemed within a certain time, the mortgage should be converted into a sale; a third person also stood as surety for the same, agreeing to pay the mortgage-money and to take the mortgaged property if it were not redeemed by the mortgagor within the time fixed — On default of the mortgagor, the surety paid the amount and took possession of the land and got it transferred to his name in the revenue books; —*Held* that the mortgagor was entitled to redeem the property from the hands of the surety, because the surety having paid the money to the mortgagee in his character as surety, cannot be regarded as holding the land absolutely as purchaser.)]

3. ('74) 21 Suth W R 347 (347, 348) (DB).

the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself."

Sections 140 and 141 of the Contract Act where an analogous provision is made are as follows:

"*Section 140.*—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

"*Section 141.* — A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

See also the undermentioned cases.[4]

15. Redemption by co-mortgagor. — Before the amendment of this section and of S. 95 by Act XX of 1929 there was a conflict of decisions as to the position of a co-mortgagor redeeming a mortgage. Some cases[1] held that the redeeming co-mortgagor stepped into the

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4. ('19) 6 A I R 1919 All 56 (58, 59) : 42 All 70 : 52 Ind Cas 684 (DB), *Rani Barkat-un-Nissa* v. *Mahboob Ali Mian*. (Under S. 140, Contract Act, when the surety has paid off the whole debt he is entitled to stand in the place of the creditor who has been so paid off and under S. 141, the surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of surety is entered into.)

('70) 7 Bom H C R A C 118 (120) (DB), *Narayan Govind* v. *Ganesh Atmaram*. (The rule is undoubted, and it is one founded on the plainest principle of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor and have all the rights which he has for the purpose of obtaining his reimbursement.)

(1860) 3 L T 313 (314) : 2 Giff 449 : 66 E R 188 : 128 R R 192, *Goddard* v. *Whyte*. (Where there is a person holding a security to satisfy the amount of a debt and another person whose liability is in the nature of suretyship, upon the surety satisfying the debt he is entitled to have the benefit of the security.)

(1872) 26 L T 848 (849) : 20 W R (Eng) 726 : 41 L J C P 161 : L R 7 C P 372, *Benchervaise* v. *Lewis*. (A surety has a right as against the creditor, when he has paid the debt, to have for re-imbursement the benefit of all securities which the creditor holds against the principal.)

(1869) 4 Ch App 204 (207) : 38 L J Ch 220 : 20 L T 131 : 17 W R (Eng) 385, *Green* v. *Wynn*. (The surety might call upon the debtor to pay the debt, and in default might himself pay the debt, and charge the debtor with the amount so paid.)

(1882) 19 Ch D 615 (621) : 51 L J Ch 690 : 30 W R (Eng) 652, *Forbes* v. *Jackson*. (A surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debt he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him.)

(1892) 1 Ch 621 (629) : 61 L J Ch 234 : 66 L T 315 : 40 W R (Eng) 327, *Walker In re*; *Sheffield Banking Co.* v. *Clayton*. (Surety who pays the debt is entitled to stand in the place of the principal creditor.)

Note 15

1. ('94) 16 All 254 (255) : 1894 All W N 72 (DB), *Gobardhan* v. *Sujan*.

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shoes of the mortgagee whom he redeemed. Other cases,[2] on the other hand, took the view that the redeeming co-mortgagor acquired only a *charge* on the shares of the co-mortgagors as from the date of the payment made by him. The amendment now makes it clear that a redeeming co-mortgagor is subrogated to the rights of the mortgagee whom he redeems.[3] The redeeming co-mortgagor stands in the position

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('91) 14 All 1 (2, 3) : 1891 All W N 211 (FB), *Ashfaq Ahmad* v. *Wazir Ali.*
[*See* ('10) 5 Ind Cas 123 (123) : 32 All 160 (DB), *Saiduddin Khan* v. *Ratan Lal.*
('92) 15 Mad 331 (332) (DB), *Arumuga* v. *Chokalingam.*]

2. ('01) 3 Bom L R 685 (690) (DB), *Vithal Moreshwar* v. *Dinkarrao Ramchandrarao.*
('02) 26 Bom 500 (503) : 4 Bom L R 178 (DB), *Vasudeo* v. *Babaji.*
('26) 13 AIR 1926 Lah 238 (238) : 92 Ind Cas 980, *Narain Das* v. *Saroj Din.*
('23) 10 AIR 1923 Lah 311 (312) : 71 Ind Cas 847, *Wazir* v. *Girdhari.*
('20) 7 AIR 1920 Lah 234 (235) : 55 Ind Cas 450, *Basanta* v. *Dhanna Singh.*
('31) 136 Ind Cas 264 (265) (DB) (Lah), *Ganda Ram* v. *Munshi Ram.*
('19) 6 AIR 1919 Cal 634 (635) : 46 Cal 111 : 45 Ind Cas 783 (DB), *Purna Chandra Pal* v. *Barada Prasunna.*
('27) 14 AIR 1927 Oudh 552 (553) : 2 Luck 686 : 105 Ind Cas 302 (DB), *Rameshwar* v. *Mt. Sheorani.*
('20) 7 A I R 1920 Oudh 204 (208) : 60 Ind Cas 560 (DB), *Mt. Jai Kishori* v. *Mohammad Ali Mohammad Khan.*
('27) 14 AIR 1927 Oudh 347 (349) : 2 Luck 618 : 104 Ind Cas 400, *Wajihuddin Ashraf* v. *Ahmad Ashraf.*
('06) 9 Oudh Cas 91 (93, 94) (DB), *Makhdum Khan* v. *Mt. Jadi.*
('21) 8 AIR 1921 Mad 326 (326) (DB), *Sinnanan Chetty* v. *Sivakami Ammal.*
('18) 5 AIR 1918 Mad 19 (23) : 41 Mad 650 : 45 Ind Cas 867 (DB), *Murajalli Hunia Goundan* v. *Ramasami Chetty.*
('31) 18 AIR 1931 Cal 251 (253) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali.*
('88) 11 Mad 416 (417, 418) (DB), *Moidin* v. *Oothumanganni.*
('29) 16 AIR 1929 Oudh 290 (291) : 117 Ind Cas 409, *Nakkoo Das* v. *Rab Saran Singh.*
('16) 3 AIR 1916 All 134 (136) : 38 All 138 : 34 Ind Cas 244 (DB), *Jai Kishen* v. *Budhanand.*
('84) 8 Bom 497 (500) (DB), *Vithal* v. *Vishwasrao.*
('24) 11 AIR 1924 Nag 238 (240) : 76 Ind Cas 57, *Parashram* v. *Bondrusa.*

3. ('36) 23 AIR 1936 Mad 752 (764) : 167 Ind Cas 980 (DB), *Chengalroya Reddi* v. *Udai Kavour.*
('41) 28 AIR 1941 Pat 147 (148) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukh Narain* v. *Ram Lochan Tiwari.*
('34) 21 AIR 1934 All 946 (947) : 153 Ind Cas 664, *Narottam Das* v. *Sanwal Dass.*
('33) 20 AIR 1933 All 228 (229) : 144 Ind Cas 152 (DB), *Ahmad Zaman Khan* v. *Baldeo Das.*
('30) 17 AIR 1930 Nag 300 (303, 304) : 27 Nag L R 152 : 127 Ind Cas 889, *Jairam* v. *Bhilaji.*
('34) 21 AIR 1934 Nag 97 (100) : 30 Nag L R 1 : 157 Ind Cas 466 (DB), *Ram Karan Hiralal* v. *Jageshwar Bhut.*
('35) 22 AIR 1935 Oudh 245 (248) : 10 Luck 690 : 154 Ind Cas 267 (DB), *Nisar Ahmad Khan* v. *Manzur Ahmad Khan.*
('38) 25 AIR 1938 Oudh 127 (133, 134) : 13 Luck 761 : 174 Ind Cas 714 (DB), *Kundanlal* v. *Faquir Bakhsh.*
('36) 23 AIR 1936 Oudh 47 (49) : 159 Ind Cas 54 (DB), *Nisar Ahmad* v. *Manzur Ahmad.*
('38) 25 AIR 1938 Lah 184 (185) : I L R (1938) Lah 103 : 178 Ind Cas 778 (DB), *Abdul Ghafur Khan* v. *Mangat Rai Ganga Sahai.*

of the mortgagee as regards the non-redeeming co-mortgagors *qua their shares*, but holds his own share free from the mortgage. This position is due to the fact that the co-mortgagors are, in the eye of the law, principal debtors in respect of their own shares of the debt and sureties in respect of the shares of the other co-mortgagors; and, as seen in Note 14, a surety satisfying the principal debt is entitled to stand in the position of the creditor and to hold the securities held by the creditor to realise the debt from the principal debtor.[4]

As has been seen in Note 17 to S. 82, S. 95 and S. 82 are not mutually exclusive, and apart from the right of subrogation, the redeeming co-mortgagor has a *charge* for contribution under section 82 enforceable within 12 years from the date of payment in excess of his share.[5]

For further discussion, see Notes on S. 82 and Note 3 on Art. 148 of the Authors' Commentaries on the Indian Limitation Act, 2nd (1942) Edn.

16. Redemption by volunteer. — A volunteer cannot claim the right of subrogation by paying off a mortgage-debt.[1] The reason is

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('31) 18 AIR 1931 Cal 251 (252) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali*.
('40) 27 AIR 1940 Oudh 97 (101) : 15 Luck 175 : 185 Ind Cas 114 (DB), *Kishen Gopal* v. *Abdul Latif*.
('33) 20 AIR 1933 All 21 (26) : 54 All 975 : 141 Ind Cas 91 (DB), *Jauhari* v. *Tunday*.
('40) 27 AIR 1940 Pat 620 (621) : 188 Ind Cas 417 (DB), *Mohan Prasad* v. *Govind Sahu*.
[*See also* ('34) 21 AIR 1934 Lah 248 (249) : 15 Lah 746 : 150 Ind Cas 366, *Jagannath* v. *Abdullallah*. (No inquiry as to an intention to keep the mortgage alive would be necessary where the co-mortgagor paying off a prior mortgage and the co-mortgagor who executed a subsequent mortgage are not the same.)]

4. ('33) 20 AIR 1933 All 21 (26) : 54 All 975 : 141 Ind Cas 91 (DB), *Jauhari* v. *Tunday*. (Per Mukerjee J.)
('40) 27 AIR 1940 Oudh 97 (101) : 15 Luck 175 : 185 Ind Cas 114 (DB), *Kishen Gopal* v. *Abdul Latif*.
('34) 21 AIR 1934 Lah 248 (249) : 15 Lah 746 : 150 Ind Cas 366, *Jagannath* v. *Abdullah*.
See also the Report of the Special Committee.

5. ('42) 29 AIR 1942 Oudh 449 (458) (FB), *Brij Bhukhan* v. *Bhagwan Datt*.

Note 16

1. ('09) 1 Ind Cas 913 (924): 36 Cal 193 (DB), *Gurdeo Singh* v. *Chandrika Singh*.
('25) 12 AIR 1925 Mad 129 (129) : 82 Ind Cas 846, *Avudai Ammal* v. *Ramasami Naick*.
('37) 24 AIR 1937 Mad 451 (453, 454) : 172 Ind Cas 47 (DB), *Kelu* v. *Cheppan*. (A trespasser or a volunteer who pays off a mortgage-debt is not entitled to the right of subrogation. But if a person believes in good faith that he is entitled to redeem the mortgage, either under the belief that he is the mortgagor or that he has some other right in the property which would entitle him to redeem, and pays off a mortgage-debt, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle.)
('36) 23 AIR 1936 Mad 264 (265) : 162 Ind Cas 34, *Venkatachalam Chettiar* v. *Alagarswami Chettiar*.
('25) 12 AIR 1925 Mad 1175 (1178) : 86 Ind Cas 737, *Piramu Ammal* v. *Serunatha Ammal*. (Where the heir-at-law who was entitled to certain property which was acquired by the deceased after the execution of the will and the legatee under the will were living together and the legatee discharged an encumbrance on

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that no one is entitled to officiously thrust a benefit on another and claim re-imbursement. As has been seen already, the doctrine of subrogation rests on the same equitable principle as that enacted in S. 69 of the Contract Act under which only a person interested in the payment of money which another is bound to pay, and who *therefore* pays it, is entitled to re-imbursement. As stated by Mukerjee, J., in *Gurdeo Singh* v. *Chandrika Singh*[2] :

"Subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for

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that property he cannot be considered a mere volunteer even though the said legatee had no real right to that property and the property would pass as undisposed of property to the heir-at-law; and the legatee will be entitled to a charge for the amount paid by him to discharge the encumbrance on the property.)

('28) 15 AIR 1928 Mad 541 (542) : 111 Ind Cas 690, *Velayudhan Pandaram* v. *Nallathambi Nadan.* (A person who claims under a sham transaction which is no transaction at all, has no interest in the property conveyed to him—He is only a volunteer and if he pays off a prior mortgage on the property he is not entitled to be subrogated to the rights of the mortgagee whose debt he pays off.)

('29) 16 AIR 1929 Mad 860 (861) : 123 Ind Cas 364 (DB), *Nangunni Kovilamma* v. *Nedungadi.* (The right of subrogation extends to strangers provided they are not mere volunteers, that is persons who pay off the other people's debts without having any concern in them — Where a member of a Malabar tarwad paid off a certain mortgagee of the tarwad properties it was held that he was not a mere volunteer and he was entitled to be subrogated to the rights of the mortgagee.)

('08) 31 Mad 439 (442) : 18 Mad L Jour 306 (DB), *Chama Swami* v. *Padala Anandu.*

('31) 18 AIR 1931 Mad 592 (596) : 54 Mad 708 : 131 Ind Cas 487 (DB), *Adari Sanyasi* v. *Nookalamma.*

('36) 23 AIR 1936 Mad 308 (309) : 161 Ind Cas 999, *Veetil Kelu* v. *Chakkara Chappan.*

('14) 1 AIR 1914 Mad 371 (372): 22 Ind Cas 253 (DB), *Karruppan Ambalagaram* v. *Muhammad Sakuth.* (A person in whose favour there was a collusive sale was held a volunteer.)

('07) 6 Cal L Jour 134 (137) (DB), *Bisseswar Prosad* v. *Lala Sarnam Singh.*

('31) 18 AIR 1931 All 40 (42) : 52 All 1037 : 131 Ind Cas 599 (DB), *Narain Pershad* v. *Narain Singh.*

('31) 18 AIR 1931 Pat 33 (36, 37) : 9 Pat 816 : 130 Ind Cae 168 (DB), *Brijmohan Singh* v. *Dukhan Singh.*

('34) 21 AIR 1934 Mad 256 (257) : 150 Ind Cas 1126 (DB), *Venkatachari* v. *Karuppan Chetty.*

('41) 28 AIR 1941 Oudh 226 (229) : 192 Ind Cas 712 (DB), *Raj Bahadur Singh* v. *Nar Singh.* (2 Ind App 131 (PC) referred.)

('24) 11 AIR 1924 Oudh 302 (303) : 27 Oudh Cas 56 : 83 Ind Cas 854(DB), *Akbar Husain* v. *Shahanshah Begam.*

('12) 15 Ind Cas 206 (210): 36 Mad 426 (DB), *Narayana Kutti Goudan* v. *Pechiammal.* (2 Ind App 131 (PC) followed.)

('35) 22 AIR 1935 Lah 523 (525) : 16 Lah 1065 : 158 Ind Cas 78 (DB), *Fateh Chand* v. *Moti Singh.* (AIR 1928 Mad 541 and AIR 1929 Mad 860 relied on.)

('37) 20 Nag L Jour 159 (171, 172) (DB), *Ishakalli* v. *Thakur Prasad.*

('31) 18 AIR 1931 Mad 110 (111) : 130 Ind Cas 506, *Pichaiyappa* v. *Govindaraja Mudaly.*

(1864) 1864 Suth W R 345 (346) (DB), *Dhoree Roy* v. *Buldeb Narain Singh.*

('24) 11 AIR 1924 All 834 (836) : 78 Ind Cas 1026, *Bijai Bahadur* v. *Parmeshwari Ram.*

2. ('09) 1 Ind Cas 913 (924) : 36 Cal 193 (DB).

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Note 16

the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debt of the succession . . . . Any one, who is under no legal obligation or liability to pay the debt, is a stranger and, if he pays the debt he is a mere volunteer."

The principle upon which the above proposition is based, namely, that a voluntary payment does not create any obligation to repay was laid down by their Lordships of the Privy Council in *Ram Tuhul Sing* v. *Biseswar Lall*[3] decided before the passing of the Transfer of Property Act. Their Lordships observed :

> "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, express or implied, to repay. *It is well settled that there is no such obligation in the case of a voluntary payment by* A *of* B's *debt.*"

The contrary view taken in the undermentioned cases[4] that a volunteer can claim to be subrogated to the position of the mortgagee whom he pays, is, it is submitted, wrong. These cases follow the English decision *Butler* v. *Rice*.[5] That case, no doubt, seems almost to go the length of holding that even a volunteer who pays off an existing mortgage would be entitled to the right of subrogation; but the two decisions *Patten* v. *Bond*[6] and *Chetwynd* v. *Allen*,[7] which the case of *Butler* v. *Rice*[8] takes as authority for the view taken in it, do not seem to warrant that conclusion. Those were cases in which payment was made by a third person on request and he was therefore rightly held to be subrogated. The undermentioned English cases[9] also support the view that a volunteer is not entitled to a right of subrogation. The learned author Sheldon in

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3. ('75) 23 Suth W R 305 (308, 309) : 2 Ind App 131 (PC).

4. ('16) 3 AIR 1916 Bom 302 (304) : 40 Bom 646 : 35 Ind Cas 794 (DB), *Tangya* v. *Trimbak.*
('31) 18 AIR 1931 Mad 720 (723) : 135 Ind Cas 529, *Govinda Kangani* v. *Murugesa Mudali.*
('29) 16 AIR 1929 Bom 139 (140) : 53 Bom 353 : 116 Ind Cas 225, *Shankar Mahadeo* v. *Bhikaji Ramchandra.*
('26) 13 AIR 1926 Cal 231 (232) : 89 Ind Cas 116 (DB), *Gobinda Chandra* v. *Parsa Nath.*

5. (1910) 2 Ch 277 (282, 283) : 79 L J Ch 652 : 103 L T 94.

6. (1889) 60 L T 583 (585, 586) : 37 W R (Eng) 373.

7. (1899) 1 Ch D 353 (353, 357) : 68 L J Ch 160 : 80 L T 110 : 47 W R (Eng) 200.

8. (1910) 2 Ch D 277 (282, 283) : 79 L J Ch 652 : 103 L T 94.

9. (1886) 34 Ch D 234 (241) : 56 L J Ch 707 : 56 L T 220 : 35 W R (Eng) 143, *Falcke* v. *Scottish Imperial Insurance Co.*
1899) 1 Ch D 440 (448, 449) : 68 L J Ch 270 : 6 Mans 218 : 80 L T 130 : 47 W R (Eng) 464, *In re Wrexham Mold and Connah's Quay Railway Co.* (Affirming (1898) 2 Ch D 663.)

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his book on *Subrogation*[10] also says :

> "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."

17. **Redemption by a person claiming under a void or voidable title.**—Where a person claiming under a title which is void *ab initio* discharges a prior mortgage, he is in the position of a mere volunteer and cannot claim to be subrogated to the rights of the mortgagee, whom he has discharged.[1] But where the person claims under a *voidable* title which is good for the time being, and pays off a prior mortgage, he can claim the right of subrogation, though afterwards the transaction under which he claims is declared invalid and set aside.[2]

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10. Sheldon on *Subrogation*, 2nd Edn., para. 240 Cited in AIR 1931 Mad 110 (111).

Note 17

1. ('36) 23 AIR 1936 Mad 264 (265, 266) : 162 Ind Cas 34, *Venkatachalam* v. *Alagarswami*. (A private purchaser from the judgment-debtor of property which has been actually sold in execution of a decree on a puisne mortgage, but before the confirmation of the sale, does acquire an interest in that property which he is entitled to protect by the discharge of a prior encumbrance before the confirmation of the court sale and can claim to be subrogated to the rights of the prior incumbrancer as against the court auction purchaser, as he is not a mere volunteer.)

('21) 8 AIR 1921 Mad 51 (53, 54) : 62 Ind Cas 291 (DB), *Govinda Padayachi* v. *Lokanatha Aiyar*. (A mortgagor's right to redeem and to sue for redemption is determined, when he ceases to be liable for any debt and to be interested in the security. An assignment from a mortgagor whose right has thus come to an end cannot be the basis of a claim for subrogation by the assignee by paying off the mortgage.)

('29) 16 AIR 1929 Mad 110 (114) : 117 Ind Cas 731 (DB), *Chinna Alagumperumal* v. *Vinayagathammal*.

('31) 18 AIR 1931 Mad 110 (111, 112) : 130 Ind Cas 506, *Pichaiyappa Chetty* v. *Govinda Rajulu Mudaly*.

('24) 11 AIR 1924 Oudh 302 (303, 304) : 27 Oudh Cas 56 : 83 Ind Cas 854 (DB), *Akbar Husain* v. *Shahanshah Begam*.

('09) 4 Ind Cas 706 (707) : 32 All 25 (DB), *Shiam Lal* v. *Ram Piari*.

('41) 28 AIR 1941 Oudh 226 (229) : 192 Ind Cas 712 (DB), *Raj Bahadur Singh* v. *Nar Singh*.

('36) 23 AIR 1936 Oudh 280 (285) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath* v. *Mahrani Kuar*.

('38) 42 Cal W N 1106 (1109), *Padma Lochan Roy* v. *Shaik Ajimaddin*. (Invalid mortgage.)

(1899) 1 Ch 440 (448, 449) : 68 L J Ch 270 : 80 L T 130 : 47 W R (Eng) 464 : 6 Mans 218, *In re Wrexham Mold, and Connah's Quay Railway*.

[See however ('16) 3 AIR 1916 Low Bur 113 (114) : 34 Ind Cas 47, *Ma Kyan* v. *Myang Shin*. (An unregistered purchaser of land, where part of the consideration was paid in discharge of a mortgage, does not step into the shoes of the mortgagee as against a subsequent registered purchaser unless there was an intention on his part to keep the mortgage alive.)]

2. ('26) 13 AIR 1926 P C 109 (110) : 97 Ind Cas 543 (PC), *Nasiruddin* v. *Ahmad Husain*.

(1874) 22 Suth W R 409 (411) : 2 Ind App 7 (PC), *Mohamed Shumsool* v. *Shewukram*. (In appeal from (1870) 14 Suth W R 315.)

There are, however, some cases[3] which have not kept in view the

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('26) 13 AIR 1926 P C 68 (72) : 48 All 443 : 53 Ind App 142 : 95 Ind Cas 898 (PC), *Ram Charan Lonia* v. *Bhagwan Das.*
('36) 23 AIR 1936 Mad 264 (265): 162 I.C. 34, *Venkatachalam* v. *Alagarswami.*
('31) 18 AIR 1931 Mad 110 (112) : 130 Ind Cas 506, *Pichaiyappa Chetty* v. *Govinda Rajulu Mudali.*
('37) 24 AIR 1937 Nag 330 (333) : ILR (1937) Nag 111 : 169 Ind Cas 675, *Mt. Nathibai Ramratan* v. *Wailaji Punjaji.*
('23) 10 AIR 1923 Nag 301 (304) : 78 Ind Cas 177, *Thakursa* v. *Behari.*
('11) 9 Ind Cas 789 (790) (DB) (Mad), *Balasubramanian* v. *Ramasami Chettiar.*
('12) 14 Ind Cas 741 (742, 743) (Mad), *Pasupuletti Venkamma* v. *Shaik Hamid.* (Obiter.)
('22) 9 AIR 1922 Pat 499 (500) : 1 Pat 780 : 68 Ind Cas 707 (DB), *Sibanand* v. *Jagmohan Lal.*
('28) 15 AIR 1928 Nag 246 (247) : 109 Ind Cas 777, *Ganpat Kadlaji* v. *Shamlal Bisandas.*
('34) 21 AIR 1934 Pat 127 (132) : 13 Pat 111 : 153 Ind Cas 602 (DB), *Jagdeo Sahu* v. *Mahabir Prasad.*
('84) 9 Bom 35 (39) (DB), *Nilo Pandurang* v. *Rama.*
('33) 20 AIR 1933 Lah 1000 (1001) : 145 Ind Cas 719, *Pal Singh* v. *Sunder Singh.*
('93) 17 Bom 741 (744) (DB), *Narayan Lakshman* v. *Bapu.*
('24) 11 AIR 1924 All 315 (316) : 46 All 38 : 75 Ind Cas 244 (DB), *Raghunandan Singh* v. *Tulshi Singh.*
('30) 17 AIR 1930 Oudh 397 (399): 127 Ind Cas 17 (DB), *Dwarka* v. *Ali Mahomed Khan.*
('06) 31 Bom 271 (289) : 8 Bom L R 652, *Ashidabai* v. *Abdulla.*
('10) 5 Ind Cas 33 (37, 38) : 33 Mad 334 (DB), *Palamalai Mudaliyar* v. *South Indian Export Co.* (Transfer to defraud creditors.)
('36) 23 AIR 1936 Nag 207 (208, 209) : I L R (1936) Nag 183 : 165 Ind Cas 76, *Narayan Vishnooram* v. *Maruti Nago.* (Do.)
('16) 3 AIR 1916 Mad 649 (651) : 29 Ind Cas 583 (DB), *Ummachakutti* v. *Ummirkutti.* (Do.)
('25) 12 AIR 1925 Nag 73 (74) : 21 Nag L R 21 : 82 Ind Cas 489, *Ramprasad* v. *Jaskaran.* (Transfer in fraud of creditors.)
('11) 12 Ind Cas 362 (363) : 35 Bom 438 (DB), *Sambu Hanmanta* v. *Nama Narayan.*
('93) 18 Bom 86 (90, 91) (DB), *Lomba Gomaji* v. *Vishvanath Amrit.*

3. ('37) 24 AIR 1937 Mad 451 (453, 454) : 172 Ind Cas 74, *Kelu* v. *Chekkara Cheppan.*
('37) 20 Nag L Jour 159 (171, 172) (DB), *Ishakalli* v. *Thakur Prasad.*
('12) 15 Ind Cas 206 (210) (DB) (Mad), *Narayana Kutti* v. *Pechiammal.*
('23) 10 AIR 1923 Mad 392 (394) : 74 Ind Cas 416 (DB), *Gopala Iyengar* v. *Mumachi Reddiar.* (Per Spencer, J.)
('97) 21 Mad 143 (144) (DB), *Syamalarayudu* v. *Subbarayudu.* (*A* mortgaged land to *B*—He then agreed to sell it to *C* but sold to *D* in whose favour he executed a conveyance bearing a date prior to the contract with *C*—*C* sued *A* and *D* to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour—During the pending of this suit *D* paid off *B* and then sued *A* and *C* to recover the money—*Held*, the payment was made *bona fide* and *D* stepped into the shoes of the mortgagee *B*.)
('11) 10 Ind Cas 556 (557) (DB) (All), *Kesri Mal* v. *Mobarak Hussain.*
('12) 16 Ind Cas 27 (28) (DB) (Mad), *Rayilu Patter* v. *Annakutti Mannadiar.*
('08) 31 Mad 439 (441) : 18 Mad L Jour 306 (DB), *Chama Swami* v. *Padala Anandu.*
('21) 8 AIR 1921 Mad 51 (54, 55) : 62 Ind Cas 291 (DB), *Govinda Padayachi* v. *Lokanatha Aiyar.* (Belief must relate to the *actual existence* of an interest in the property and not in future acquisition of it.)

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Note 17

distinction between void and voidable transactions, but have held that if a person believes in good faith that he is entitled to redeem the mortgage he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle. Some of them[4] rely upon the prior decision in *Nasiruddin* v. *Ahmad Husain*.[5] In that case A, a manager of a joint Hindu family, contracted to sell the family property to B. Subsequently, he sold the land to C. C discharged a prior mortgage on the property. B sued for specific performance of his contract. In granting the decree their Lordships observed :

> "It seems that the appellants (C) have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge, they are entitled to stand in the shoes of the mortgagees whom they have paid off."

It is submitted that there is nothing in the above decision to warrant the view that it proceeded on the ground of good faith, irrespective of whether the title was void or voidable.

A distinction should be made between a transaction which is void or voidable and a transaction which is only a sham or nominal one. A sham or nominal transfer is no transfer at all. A person claiming under such a transaction has no interest in the property and cannot claim the right of subrogation.[6]

Where a person entitled to the right of subrogation pays off a mortgagee in possession and obtains possession from the mortgagee, he is entitled to hold the mortgage as a shield to a claim for possession by the real owner and cannot be ousted unless and until he has been redeemed. But where such a person enters into possession by virtue of the *transfer* in his favour and the mortgage which he pays off does not give him any right to possession, he cannot use the payment of the mortgage-money as a shield to a suit for possession by the real owner

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('34) 21 AIR 1934 Pat 681 (683) : 155 Ind Cas 870 (DB), *Baban Misra* v. *Bishwanath Pande*. (In such a case, if the plaintiff reversioner does not impute bad faith on the part of the purchaser, the latter is not bound to allege or prove good faith.)

('73) 19 Suth W R 422 (442, 423) (DB), *Ramessur Pershad Narain Singh* v. *Dooli Chand*.

('27) 14 AIR 1927 Mad 204 (205, 206) : 99 Ind Cas 687, *Ponnammal* v. *Pichai Thevan*. (Belief must be in the actual existence of an interest in the property and not in future acquisition of an interest.)

('19) 6 AIR 1919 Mad 105 (107, 109) : 51 Ind Cas 57 (DB), *Ammani Ammal* v. *Ramaswami*,

4. ('37) 24 AIR 1937 Mad 451(453): 172 I.C. 74(DB), *Kelu* v. *Chekkara Cheppan*.
('37) 20 Nag L Jour 159 (172) (DB), *Ishakalli* v. *Thakur Prasad*.

5. ('26) 13 AIR 1926 P C 109 (110) : 97 Ind Cas 543 (PC).

6. ('28) 15 AIR 1928 Mad 541(542): 111 I.C. 690, *Velayudhan* v. *Nallathambi*.
('23) 10 AIR 1923 Mad 392 (399) : 74 Ind Cas 416 (DB), *Gopala Iyengar* v. *Mummachi Reddiar*. (Per Devadoss, J.)
('14) 1 AIR 1914 Mad 371 (372) : 22 Ind Cas 253 (DB), *Karuppan Ambalagaran* v. *Md. Sakuth Levvai*. (Nominal and collusive sale.)
('19) 6 AIR 1919 Mad 700 (703, 706) : 48 Ind Cas 799 (DB), *Nadhamuni Iyyan* v. *Appu Odayan*.

but must surrender it to him. He can, however, enforce his rights under the mortgage in proper proceedings taken for that purpose.[7]

18. Redemption by trespasser. — Mere possession is not sufficient to support a claim of subrogation unless that possession is accompanied by some interest in the property which the person in possession is entitled to protect.[1] A trespasser who is in wrongful possession of the mortgaged property, paying off a mortgage-debt has no such interest and therefore cannot claim subrogation.[2]

19. Third paragraph. — As seen in Note 1 this paragraph deals with what is known as *conventional* or *contractual* subrogation. This class of subrogation arises, where a person advances money to the mortgagor to pay off a prior mortgage or charge under an agreement that he should be substituted for the mortgagee or the charge-holder and the mortgage or charge has been so paid off. Thus, in conventional subrogation, it is the *mortgagor*, and not the person advancing money, who redeems the mortgage with the money advanced by the latter, and the person advancing money acquires a right of subrogation because there is an agreement in his favour by the mortgagor that he should obtain that right.

This paragraph has to be distinguished from the first paragraph of the section. The difference is that the first paragraph deals with a person redeeming the mortgage and the third paragraph deals with a person who advances money with which the mortgage is redeemed. A person advancing money may or may not be a person interested in the property. Where he has an interest in the property, but does not himself redeem the mortgage, he cannot claim subrogation under the first paragraph.

In *Hirasingh* v. *Jaisingh*[1] Sulaiman, C. J., stated the distinction between the first and the third paragraphs of the section as follows :

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7. ('37) 24 AIR 1937 All 119 (121) : I L R (1937) All 225 : 167 Ind Cas 648 (DB), *Chotey Lal* v. *Sudershan Lal.*
('33) 145 Ind Cas 277 (278) (DB) (All), *Muhammad Hasnain* v. *Rustom Ali.*
('75) 7 N W P H C R 201 (202) (DB), *Pana Ali* v. *Sadik Hossein.*
[*See* ('29) 16 AIR 1929 P C 288 (289) : 120 Ind Cas 650 (PC), *Bijai Saran* v. *Rudra Bageshwari Prasad.*]

Note 18

1. ('36) 23 AIR 1936 Mad 264 (265) : 162 Ind Cas 34, *Venkatachalam* v. *Alagarswami.* (This, however, may possibly be qualified if the discharge of the prior encumbrance was necessary to prevent an immediate dispossession.)
[*See also* ('31) 18 AIR 1931 Mad 207 (213) : 53 Mad 952 : 129 Ind Cas 463 (DB), *Saradamba* v. *Pattabhiramayya.* (Where a plaintiff's alleged title is found to have been false and he has not succeeded in showing that he held possession of the property in good faith believing it to be true, a payment made to discharge a mortgage-debt does not stand on any better footing than a payment made to discharge an unsecured debt.)]
2. ('37) 24 AIR 1937 Mad 451 (453) : 172 Ind Cas 47 (DB), *Moothachettiam Veetil Kelu* v. *Chekkara Cheppan.*

Note 19

1. ('37) 24 AIR 1937 All 588 (594, 595): I L R (1937) All 880 (892, 893) : 171 Ind Cas 153 (FB).

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Note 19

"The difference in the languages of the two paragraphs is obvious. The first paragraph refers to a person who redeems and who on redeeming the property acquires the rights of the person whose mortgage he redeems. The third paragraph refers to a person who has advanced to a mortgagor money, with which the mortgage has been redeemed who acquires the rights of the mortgagee whose mortgage has been redeemed. Thus, the third paragraph does not require that the person who has advanced to a mortgagor the money, should himself have redeemed. All that it requires is that the money advanced by him should have been utilized for the purpose of redeeming the mortgage. That is why instead of the words 'whose mortgage he redeems' as used in the first paragraph, we have the words 'whose mortgage has been redeemed.' Now, it is well known that subrogation can arise in two ways: (1) by agreement and (2) by operation of law. The first paragraph deals with subrogation arising by operation of law and the third paragraph deals with subrogation by agreement. It is necessary that there should be an agreement for subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two paragraphs overlap each other, for the third paragraph requires certain stringent conditions which are not found in the first paragraph. They must therefore be mutually exclusive. The basic difference underlying these two paragraphs consists in this that the first paragraph refers to a person redeeming property and the third paragraph to a person who advances money with which a mortgage is redeemed."[2]

Prior to the introduction of this paragraph in 1929, there was no provision dealing with conventional subrogation. But the right was recognised as existing, and was granted both where the agreement to subrogate was express[3] and where it was implied.[4] An agreement to

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2. *Also see the following cases :*
('32) 19 AIR 1932 Oudh 54 (56) : 7 Luck 237 : 134 Ind Cas 1093 (DB), *Ram Hait* v. *Pohkar.*
('39) 26 AIR 1939 Pat 375 (379) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamlapati Devi* v. *Jageshwar Dayal.*
('09) 1 Ind Cas 913 (924) : 36 Cal 193 (DB), *Gurdeo Singh* v. *Chandrikah Singh.*
('36) 23 AIR 1936 Rang 152 (156, 157) : 14 Rang 494 : 163 Ind Cas 645 (DB), *Bank of Chettinad Ltd.* v. *Ma Ba Lo.* (Legal subrogation.)

3. ('40) 27 AIR 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar (P C) 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC), *Janki Nath* v. *Pramatha Nath.*
('38) 25 AIR 1938 Bom 386 (387, 388): 177 Ind Cas 657 (DB), *Chunilal Deepchand* v. *Bibubai Gulam Husen.* (Express agreement—Case pending when S. 92 came into force — Subrogation allowed in the absence of a registered deed.)
('37) 24 AIR 1937 Cal 194 (199): 171 Ind Cas 747 (DB), *Pramoth Nath* v. *Janaki Nath,* (Affirmed in AIR 1940 P C 38: I L R (1940) 1 Cal 291 : I L R (1940) Kar (P C) 82 : 67 Ind App 82.)

4. ('34) 21 AIR 1934 Mad 256 (257) : 150 Ind Cas 1126 (DB), *Venkatachari* v. *Karruppan Chetty.* (AIR 1929 Mad 860 followed.)
('27) 14 AIR 1927 Mad 1180 (1181) : 107 Ind Cas 417 (DB), *Munuswami Mudali* v. *Jawarmal Sowcar.*

subrogate was implied where it could be gathered that the parties intended to keep the mortgage alive.[5] Where there was no such agreement express or implied, the mere fact that the money borrowed by a debtor was used to pay off a prior mortgage did not entitle the lender to the benefit of the discharged security.[6] In some cases[7] the

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('16) 3 AIR 1916 All 44 (46) : 35 Ind Cas 647 (DB), *Umrai Lal* v. *Mt. Rukmin Kuar.*
('19) 6 AIR 1919 All 138 (139) : 41 All 372 : 50 Ind Cas 375 (DB), *Gulzari Lal* v. *Aziz Fatima.*
('22) 9 AIR 1922 Pat 92 (95) : 65 Ind Cas 801 (DB), *Mohamad Musa* v. *Edal Singh.* (Per Bucknill, J.)
('25) 12 AIR 1925 Nag 21 (23) : 87 Ind Cas 264, *Narayan* v. *Syed Hafiz.*
('10) 7 Ind Cas 980 (981) (DB) (Cal), *Tara Sundari Debi* v. *Khedan Lal.*
('38) 25 AIR 1938 Mad 161 (162, 163) : 176 Ind Cas 976 (DB), *Oonamalai Ammal* v. *Narasimha Rao.*
('24) 11 AIR 1924 Oudh 85(90):73 I.C. 113(DB), *Lutar Ram* v. *Lal Ranjit Singh.*

5. See Note 2.
('33) 20 AIR 1933 Cal 482 (485) : 145 Ind Cas 295 (DB), *Sarat Chandra* v. *Promatha Nath.*

6. ('17) 4 AIR 1917 Low Bur 168 (171) : 36 Ind Cas 992 (DB), *Ma Pyu* v. *V. R. N.E. Chetty Firm.*
('32) 19 AIR 1932 Oudh 255 (260) : 8 Luck 40 : 139 Ind Cas 64 (DB), *Said Ahmad* v. *Partab Narain Singh.* (No intermediate encumbrance—Intention held to extinguish mortgage and no subrogation allowed.)
('17) 4 AIR 1917 Pat 417 (419) : 39 Ind Cas 500 (DB), *Mahabir Prasad* v. *Mt. Bibi Nagin.*
[*See also*('09) 4 Ind Cas 21 (22):12 Oudh Cas 285, *Sheo Nandan* v. *Shambhu Ratan.*]

7. ('10) 8 Ind Cas 657 (659) (DB) (Cal), *Ram Saran Singh* v. *Khakan Singh.*
('20) 7 AIR 1920 Mad 941 (943) : 58 Ind Cas 813 (DB), *Chidambara Nadan* v. *Muni Nagendrayyan.*
('13) 18 Ind Cas 487 (488) (DB) (Low Bur), *Nachiappa* v. *Periacarauppan.*
('33) 20 AIR 1933 Mad 398 (399) : 56 Mad 517 : 143 Ind Cas 780 (DB), *Krishnamurthi Chettiar* v. *Sathappa Chettiar.*
('24) 11 AIR 1924 Oudh 374 (376) : 81 Ind Cas 581, *Gokul Prasad* v. *Sukru.*
('23) 10 AIR 1923 Pat 199 (200) : 71 Ind Cas 940 (DB), *Jai Pragash Singh* v. *Rupmanjari Dasi.*
('32) 19 AIR 1932 Oudh 314 (317) : 7 Luck 26 : 139 Ind Cas 626 (DB), *Ram Sahai* v. *Kunwar Sah.*
('09) 4 Ind Cas 1032 (1034) : 5 Law Bur Rul 138 (DB), *Soobramania Chetty* v. *Aga Rajat Ali Khan.*
('20) 7 AIR 1920 Pat 251 (254) : 58 Ind Cas 489 (DB), *Baijnath Goenka* v. *Daleep Narain.*
('29) 16 AIR 1929 Pat 325 (327) : 8 Pat 360 : 118 Ind Cas 730 (DB), *Durga Missir* v. *Baijnath Saran.*
('28) 15 AIR 1928 Mad 703 (704, 705) : 111 Ind Cas 266 (DB), *Andi Thevan* v. *Nagayasami Chettiar.*
('09) 1 Ind Cas 264 (279) (DB) (Cal), *Debendra Nath* v. *Abdul Samed.*
('91) 13 All 581 (585) : 1891 All W N 193 (194) (SB), *Tulsa* v. *Khubchand.* (Intention was held to be to keep alive the mortgage.)
('18) 5 AIR 1918 Pat 299 (300): 44 I.C. 726 (DB), *Benode Behari* v. *Hira Singh.*
('85) 1885 All W N 21 (22) (DB), *Ajudhia Prasad* v. *Dulari Lal.*
('14) 1 AIR 1914 All 443 (444): 23 Ind Cas 827 (DB), *Har Narain* v. *Har Prasad.* (Simple mortgage to pay off prior usufructuary mortgagee out of the consideration —Mortgagor taking possession of property — *Held* there was no intention to keep alive prior mortgage for the benefit of simple mortgagee.)
('96) 1896 Bom P J 629 (629, 630) (DB), *Raoji* v. *Narayan.*

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question whether a person who advanced money to the mortgagor for paying off a prior mortgage was subrogated to the rights of the mortgagee, was held to be governed by the rule of intention referred to in Note 2 above. Under this section, there can be no subrogation in such cases unless there is an agreement therefor and the agreement is evidenced by a *registered instrument*.[8]

In cases where the person advancing money takes a mortgage or sale of the mortgaged property for the amount he has advanced, an agreement to subrogate can be effected by the same deed of mortgage or sale, by introducing a recital to that effect.[9]

20. Person who has advanced money to a mortgagor. — The words "who has advanced to a mortgagor money" will include not only a simple creditor[1] but also a mortgagee[2] or a

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('02) 29 Cal 25 (31) (DB), *Bhiku* v. *Shujat Ali.*

('06) 33 Cal 1133 (1154) : 4 Cal L Jour 121 (DB), *Jagatdhar Narain Prasad* v. *A. M. Brown.*

(1900) 4 Cal W N 769 (775) (DB), *Amar Chandra* v. *Goloke Chandra.*

('96) 19 Mad 105 (107) (DB), *Koopmia Sahib* v. *Chidambaram Chetti.*

('34) 21 AIR 1934 Lah 806 (806) : 154 Ind Cas 706, *Abdul Majid* v. *Bhagwat Kishore.* (Subsequent mortgagee paying off prior mortgage from out of consideration.)

('33) 20 AIR 1933 Lah 810 (811) : 146 Ind Cas 679 (DB), *Tulsi Ram* v. *Radha Kishen.*

[*See also* ('22) 9 AIR 1922 Pat 181 (182) : 1 Pat 332 : 67 Ind Cas 221 (DB), *Ram Narain Lal* v. *Sahdeo Singh.*]

8. ('38) 25 AIR 1938 Bom 115 (119) : 174 Ind Cas 188 (DB), *Isap Bapuji* v. *Umarji Abhram.*

('38) 25 AIR 1938 Bom 386 (387) : 177 Ind Cas 657 (DB), *Chunilal Deepchand* v. *Bibubai Gulam Husen.*

('36) 23 AIR 1936 Mad 171 (172) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara Narayana.*

('38) 25 AIR 1938 Pat 532 (533) : 17 Pat 666 : 176 Ind Cas 655 (DB), *Bansidhar Dhandhania* v. *Kalroo Mandar.*

('34) 21 AIR 1934 Oudh 213 (219) : 9 Luck 717 : 149 Ind Cas 84 (DB), *Mahomed Raza* v. *Bilqis Jehan Begam.*

('32) 19 AIR 1932 Oudh 54 (57) : 7 Luck 237 : 134 Ind Cas 1093 (DB), *Ram Hait* v. *Pohkar.*

('42) 29 AIR 1942 Mad 751 (752, 753), *Muthuswami* v. *Ramaswami.*

9. ('40) 27 AIR 1940 P C 38 (44) : ILR (1940) 1 Cal 291 : ILR (1940) Kar (P C) 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC), *Janki Nath* v. *Pramotha Nath.*

('42) 29 AIR 1942 Pat 166 (168, 169) : 198 Ind Cas 3 (DB), *Ram Lagan* v. *Ram Bilochan.*

('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

Note 20

1. ('37) 24 AIR 1937 All 588 (595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.*

('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

[*See also* (1879) 11 Ch D 1 (18): 48 L J Ch 168: 27 W R (Eng) 851 : 40 L T 640, *Cracknall* v. *Janson.* (Under English law, such person is treated as equitable assignee.)]

2. ('37) 24 AIR 1937 All 588 (595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.* (Impliedly overruling A I R 1936 All 336.)

vendee[3] who has advanced money to the mortgagor in consideration of his mortgage or sale as the case may be. According to a Full Bench case of the Nagpur High Court,[4] however, the expression will not apply to the case of a *vendee*, as, in the case of a sale, it cannot be said that the money has been *advanced*, the word really contemplating a loan and the relation of a debtor and creditor. Such an interpretation of the expression "advanced" is, it is submitted, against the general trend of the judicial decisions.

It was held in the undermentioned case[5] that the words do not refer to mortgagee who has advanced money on a subsequent mortgage for the purposes of redeeming a prior mortgage in his own favour. A contrary view, however, was expressed in *Kanhaiya Lal* v. *Gulab Singh*,[6] in which it was held that, on principle, it made no difference whether the money raised under a later mortgage was applied in satisfaction of the earlier mortgage of a third person or in satisfaction of an earlier mortgage of the subsequent mortgagee himself.

21. "Mortgage has been redeemed."—In *Janki Nath Roy* v. *Pramatha Nath Roy*[1] the Judicial Committee interpreted the expression "the mortgage has been redeemed" in the third paragraph as "payment off of the mortgage money." Negativing the contention that redemption was only complete when a re-conveyance or what in India takes the place of re-conveyance, is made, their Lordships observed as follows:

> "This contention, however, loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their Lordships' opinion, it is clear that the words in the section, "mortgage has been redeemed," refer merely to the payment off of the mortgage-money, and not to an extinction of the mortgagees' rights over the mortgaged property. If such rights had become extinguished, there would be none to which the person advancing the money, could be subrogated. The fourth paragraph moreover seems to contemplate that a mortgage may be redeemed in part, and this clearly shows that by redemption is meant no more than payment of the mortgage-money."

('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

('36) 23 AIR 1936 Mad 171 (172) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara Narayana Menon.* (Per Cornish, J.)

[*See also* ('40) 27 AIR 1940 Pat 620 (621): 188 Ind Cas 417 (DB), *Mohan Prasad* v. *Govind Sahu.*]

3. ('37) 24 AIR 1937 All 588 (595, 596) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.*

('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

4. ('37) 24 AIR 1937 Nag 372 (375): I L R (1938) Nag 206: 172 Ind Cas 142 (FB), *Taibai Laxmanrao* v. *Wasudeorao Gangadhar.*

5. ('40) 27 AIR 1940 Pat 64 (65) : 184 I.C. 825, *Surya Narain* v. *Ram Tarak.*

6. ('33) 20 AIR 1933 Oudh 9 (12) : 7 Luck 655 : 138 Ind Cas 206 (DB).

Note 21

1. ('40) 27 AIR 1940 P C 38 (44) : I L R (1940) 1 Cal 291 (307) : ILR (1940) Kar (P C) 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC).

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The fourth paragraph relates to the right of subrogation both under the first and the third paragraphs, and it is conceived that though the first paragraph uses the expression "on redeeming property subject to the mortgage" it must, in the light of the observations of their Lordships quoted above, be interpreted to mean nothing more than mere payment of the mortgage-money.

22. **Sale or mortgage to pay off prior mortgage — Whether the first or the third paragraph applies.** — The subject may be discussed with reference to the following illustrative classes of cases :

Illustration I.

A mortgages property worth Rs. 2000, to B for Rs. 1800 and then sells the property to C for Rs. 200 *subject to* B's *incumbrance.* C pays Rs. 1800 to B in discharge of the mortgage.

In this case, C as a purchaser of equity of redemption is a person interested in the property and pays B from his own pocket in order to protect his own interest. He comes under the first paragraph and is entitled to the right of subrogation, if he has not himself covenanted to pay the amount.[1]

Illustration II.

A mortgages property worth Rs. 2000, to B for Rs. 1800 and then *sells* the same to C for Rs. 2000 *free of incumbrances.* A receives the whole consideration of Rs. 2000 and pays B Rs. 1800 in discharge of his mortgage.

In this case, the mortgagor himself redeems the mortgage, and the question of subrogation under the first paragraph does not arise. C, however, may be entitled to a right of subrogation under the third paragraph, if A has by a registered instrument agreed that C should be so subrogated.[2] The right of subrogation under the first paragraph may also arise, if A fails to pay off B, and C is compelled to pay off B, in order to protect his own interest. In this case, C is a person interested in the property and is out of pocket to the extent of Rs. 1800 in excess of what he has paid to A as consideration for his sale.

Illustration III.

A mortgages property worth Rs. 2000 to B for Rs. 1800 and then *sells* the same to C for Rs. 2000, *free of incumbrance* but leaves Rs. 1800 in the hands of C for paying off B, and C accordingly pays him off.

In this case, what C pays to B is really part of the purchase-money, that is, A's money. It is, therefore, really A, the mortgagor, who redeems.[3] There can be no question of subrogation under the first

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Note 22

1. See Note 13.
2. See Note 19.
3. ('37) 24 AIR 1937 All 588 (595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh.*
('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*

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paragraph. But the money with which A pays off B comes from C. C is therefore a person who has advanced money to A, the mortgagor, and will be entitled to claim subrogation under the third paragraph, only if A has, by a registered instrument, agreed that C shall be so subrogated.[4]

Illustration IV.

A mortgages property worth Rs. 2000 to B for Rs. 1800 and then *mortgages* the same to C for Rs. 2000. A receives the whole consideration and pays off B.

In this case there can be no question of subrogation under the first paragraph inasmuch as the mortgagor himself has redeemed the mortgage. The right may arise under the third paragraph, if A agrees by a registered instrument that C should be subrogated to the rights of B. C will be entitled to claim subrogation under the first paragraph only if A fails to pay off B and he is required to redeem B in order to protect his own interest.[5]

In *Sitaram* v. *Kartar Singh*,[6] it was, however, held by the High Court of Lahore that the payment to the prior mortgagee (B) though by the hand of the mortgagor (A) must be regarded as having been made by C and that C could claim subrogation on the basis of the payment. It is submitted that this view is not correct on principle.

Illustration V.

A mortgages property worth Rs. 2000 to B for Rs. 1800 and then *mortgages* the same to C for Rs. 2000, A receiving only Rs. 200, and leaving the balance with C himself who pays off B with that amount.

In this case, when C pays to B, he pays only A's money, and not his own. It is, therefore, only A who redeems the mortgage, C being considered merely as the hand of A.[7] So, the question of subrogation

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('37) 24 AIR 1937 Nag 372 (375) : I L R (1938) Nag 206 : 172 Ind Cas 142 (FB), *Taibai Bobde* v. *Wasudeorao Deshpande*. (Overruling AIR 1936 Nag 32: 31 Nag L R Sup 154, according to which it was *C* who redeemed.)

('38) 25 AIR 1938 Pat 532 (533) : 17 Pat 666 : 176 Ind Cas 655 (DB), *Bansidhar Dhandhania* v. *Kalroo Mandar*.

4. ('37) 24 AIR 1937 All 588 (595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh*.

('39) 26 AIR 1939 Mad 949 (955): 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma*.

('38) 25 AIR 1938 Pat 532 (533) : 17 Pat 666 : 176 Ind Cas 655 (DB), *Bansidhar Dhandhania* v. *Kalroo Mandar*.

('41) 28 AIR 1941 Bom 153 (155) : 194 Ind Cas 632 (DB), *Vithaldas Bhagwandas* v. *Tukaram Vithoba*.

5. See Note 19.

6. ('33) 20 AIR 1933 Lah 416 (417) : 146 Ind Cas 239 (DB).

7. ('37) 24 AIR 1937 All 588 (594, 595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh*. (AIR 1932 All 489 : 54 All 897 (FB) overruled.)

('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma*.

('42) 29 AIR 1942 Bom 98 (100) : I L R (1942) Bom 169 : 199 Ind Cas 718 (DB), *Narayan Diwakarappa* v. *Parameshwarappa*.

('41) 28 AIR 1941 Lah 53 (55) : 194 Ind Cas 297, *Sham Lal* v. *Chhaju Ram*.

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under the first paragraph will not arise. C, however, may, as a person advancing money to A, be entitled to claim the right of subrogation under the third paragraph, if A has agreed by a registered instrument that C shall be so subrogated.[8]

According to a Full Bench of the High Court of Madras[9] the reason why C cannot claim subrogation under the first paragraph is not that the payment must be regarded as a payment by the mortgagor himself, but that that paragraph applies only where a person having a *pre-existing interest* in the mortgaged property pays off the mortgage, and not where he gets the interest for the first time by advancing money to the mortgagor to enable him to pay off the mortgage. Varadachariar, J., observed as follows:

> "There is a well established distinction between cases in which a person who has a pre-existing interest in property, pays off a prior charge on that property for the protection of his own interest, and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage-debt. It seems to me that cl. (1) of S. 92 must be held to relate to the first type of cases above referred to and cl. (3) to the second type."

It is submitted that this view introduces restrictions not warranted by the words of the section. A person advancing money and taking a sale or mortgage from the mortgagor is a person having an interest in the property and is entitled to redeem under S. 91; and if he is to be considered as redeeming the earlier mortgage with his own money (as the Full Bench assumes) there is no reason why the first paragraph should not apply. Again, suppose in the above illustration, C has to pay Rs. 2,200 instead of Rs. 1,800, to B. It is obvious that C cannot, if the distinction pointed out by the Full Bench is correct, claim subrogation even as regards Rs. 400 which he had paid over and above the amount undertaken to be paid by him, unless he has a registered agreement in his favour—a conclusion which is obviously not correct.[10]

It has also been held by a Full Bench of the Chief Court of Oudh[11] that C, in the above illustration, when he pays off B must be regarded as redeeming B with his own money and could, therefore, claim

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8. ('37) 24 AIR 1937 All 588 (596) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh*. (AIR 1932 All 489 : 54 All 897 (FB) and AIR 1936 All 336 overruled.)
('39) 26 AIR 1939 Mad 949 (956) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma*.
('40) 27 AIR 1940 All 237 (239) : I L R (1940) All 141 : 188 Ind Cas 328 (DB), *Chunni Lal* v. *Lakshmi Chand*.

9. ('36) 23 AIR 1936 Mad 171 (172, 174) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara*.
[*See also* ('42) 29 AIR 1942 Mad 751 (752), *Muthuswami Chettiar* v. *Ramaswami Samiyar*. (Following AIR 1936 Mad 171 : 59 Mad 359 (FB).)]

10. ('37) 24 AIR 1937 All 588 (594, 595) : I L R (1937) All 880 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh*.

11. ('42) 29 AIR 1942 Oudh 260 (261) : 200 Ind Cas 146 (FB), *Abdul Hamid* v. *Lala Ram Kumar*. (Per Full Bench; Bennett, J. *Contra*.)

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subrogation under the first paragraph of the section. The reason given is that the case of a mortgage differs from that of a sale, in that the unpaid consideration money in the hands of the mortgagee cannot be considered, as in the case of a sale, as belonging to the mortgagor. A similar view has also been taken in the undermentioned cases.[12] It is submitted that this view is not correct. It may, no doubt, be correct to say that as long as a portion of the consideration money in the hands of the mortgagee remains unpaid, it is the mortgagee's money, but still, when it is paid to the prior mortgagee, B, it is paid as mortgage consideration and therefore as the mortgagor's money. As has been rightly pointed out by Bennett, J., in his dissenting judgment in the Oudh Full Bench case, there is a very definite pronouncement as early as 1883 by their Lordships of the Privy Council in *Moheshlal* v. *Mohant Bawan Das*[13] on the question of title to the money left with the mortgagee for the purpose of paying off the prior mortgage; their Lordships in that case observed :

> "Although the money was paid by the plaintiff's (C's) *gomashta* to Lachminarain's (B's) estate, it was paid with the money borrowed from the plaintiff (C) by Mangal (A), and for which Mangal (A) was liable to him (B). The mortgage was therefore paid off by Mangal (A), and not by the plaintiff (C)."

In a recent case,[14] decided by the High Court of Bombay, A, who was a mortgagee in possession of some lands of B, sued B on a money claim and attached before judgment the above lands amongst others. Subsequently, B mortgaged the above lands to C and left a part of the consideration with C to redeem A's mortgage. On such redemption, C was himself to take possession of the mortgage lands. C deposited the amount in Court and presented an application under S. 83. A accepted the amount in full satisfaction of the mortgage-debt and delivered possession to C. Subsequently, A obtained a decree in his money suit and wanted to sell the mortgaged lands in execution. C claimed that the property should be sold subject to the prior charge acquired by subrogation under the first paragraph. On behalf of A, it was contended that as the money was left with C for redeeming A, the deposit was made only as an agent of the mortgagor. The first paragraph therefore

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12. ('37) 171 Ind Cas 423 (425) (Oudh), *Narsingh Misra* v. *Raj Bahadur Singh*. (Overruled in AIR 1941 Oudh 226 on different ground.)
('35) 22 AIR 1935 Oudh 399 (401) : 11 Luck 224: 155 Ind Cas 905 (DB), *Sukhram Dass* v. *Mahbub Khan*.
('33) 20 AIR 1933 Nag 155 (157) : 144 Ind Cas 217 : 30 Nag L R 164, *Mohanlal* v. *Md. Sujat*. (When an amount is specifically set apart for redemption of the first mortgage, it cannot be treated as absolutely belonging to the mortgagor for even if he himself had taken money he would have been bound to apply it to the discharge of the first mortgage.)
('31) 18 AIR 1931 Nag 138 (141) : 133 Ind Cas 395, *Harlal* v. *Lala Prasad*. (Mortgage to pay off prior mortgage — Money utilized for redeeming prior mortgagee — Subsequent mortgagee held acquired rights of subrogation under S. 74.)

13. ('83) 9 Cal 961 (977) : 10 Ind App 62 (PC).

14. ('42) 29 AIR 1942 Bom 227 (231) : 202 Ind Cas 392 (DB), *Vishnu Balkrishna* v. *Shankareppa Wagarati*.

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could not apply, nor could C claim subrogation under the third paragraph as there was no registered agreement. It was held that as A accepted the deposit from C as made by a person entitled under S. 91 to sue for redemption, he could not now be permitted to say that the deposit was not by C on his own behalf but as an agent of the mortgagor. C was therefore entitled to subrogation under the first paragraph.

23. **Fourth paragraph — Mortgage must be redeemed in full.** — The last paragraph of the section provides that the right of subrogation shall not be claimed unless the mortgage in respect of which the right is claimed has been *redeemed in full.*[1] The object of this provision is to avoid complications and difficulties in apportioning the claims arising from subrogation.[2] Before the introduction of this paragraph in 1929 there was no provision similar to this paragraph and the judicial decisions were not unanimous on the point. The general trend was that in order to entitle a person to a right of subrogation there must be complete discharge of the mortgage-debt and that a partial discharge of the prior mortgage was not sufficient.[3] A contrary

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Note 23

1. ('40) 27 AIR 1940 All 75 (77) : 187 Ind Cas 274 (DB), *Mangal Sen* v. *Kewal Ram.*

('40) 27 AIR 1940 P C 38 (44) : 67 Ind App 82 : I L R (1940) 1 Cal 291 : I L R (1940) Kar P C 82 : 186 Ind Cas 1 (PC), *Janki Nath Roy* v. *Pramatha Nath Malia.*

('38) 25 AIR 1938 Mad 779 (779) : 182 Ind Cas 937 (DB), *Srinivasulu* v. *Damodaraswami.*

('35) 22 AIR 1935 Oudh 245 (250) : 154 Ind Cas 267 (DB), *Nisar Ahmad Khan* v. *Manzur Ahmad Khan.*

('38) 25 AIR 1938 Oudh 22 (24) : 172 Ind Cas 301 (DB), *Durga Narain Singh* v. *Ram Kishen Das.*

2. See the Report of the Special Committee, printed on page 22 (63).

('40) 27 AIR 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar P C 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC), *Janki Nath* v. *Pramatha Nath.*

('09) 1 Ind Cas 913 (924) : 36 Cal 193 (DB), *Gurdeo Singh* v. *Chandrikah Singh.*

3. ('09) 1 Ind Cas 913 (924) : 36 Cal 193 (DB), *Gurdeo Singh* v. *Chandrikah Singh.*

('40) 27 AIR 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar P C 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC), *Janki Nath* v. *Pramatha Nath.*

('27) 14 AIR 1927 All 538 (540) : 49 All 640 : 101 Ind Cas 513 (DB), *Darbari Lal* v. *Mahbub Ali.*

('91) 1891 All W N 121 (123) (DB), *Sant Lal* v. *Kishun Sahai.*

('24) 11 AIR 1924 Rang 204 (205) : 1 Rang 714 : 79 Ind Cas 766 (DB), *Ma Lon* v. *Ma Nyo.*

('22) 9 AIR 1922 Mad 441 (443) : 95 Ind Cas 639 (DB), *Brahmandam Venkata Laksami Narayana Rao* v. *Allamneni Venkayya.*

('34) 21 AIR 1934 Mad 31 (37, 38) : 148 Ind Cas 467 (FB), *Rama Krishnayya* v. *Venkata Somayajulu.*

('32) 19 AIR 1932 Oudh 268 (271) : 8 Luck 103 : 139 Ind Cas 358 (DB), *Kanhaiya Lal* v. *Ikram Fatima.*

('30) 17 AIR 1930 Nag 166 (171) : 127 Ind Cas 881, *Sheoji* v. *Bhaskar.*

('18) 5 AIR 1918 Pat 668 (671) : 48 Ind Cas 779 (DB), *Mt. Dulhin Sonakuer* v. *Jamil Ahmed.*

('26) 13 AIR 1926 Pat 23 (24) : 89 Ind Cas 822 (DB), *Lekhraj Mahton* v. *Jang Bahadur Singh.* (Only partial redemption by subsequent mortgagee — No subrogation allowed.)

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view was however taken in the undermentioned cases.[4] In view of the express provisions in the present paragraph the latter view is no longer good law.

This paragraph assumes that the mortgage has not been split up. Where it is split up, the mortgage has to be looked upon as several distinct mortgages. Consequently, if there is a redemption of one independent portion in full, then the provisions of this paragraph are complied with so far as that part is concerned.[5] In the undermentioned case[6] A, who owned a one-tenth share, and B, who owned the remaining share in a property, jointly mortgaged it first to C, and then to D. C sued on his mortgage and obtained a decree under which A and D were entitled to redeem the one-tenth share on payment of Rs. 18,000 and B and D, to redeem the nine-tenth on payment of Rs. 4,000. D as a subsequent mortgagee, redeemed B's share by paying the amount and claimed to be subrogated in respect of the nine-tenth share of B. It was argued that as D had redeemed only a part of the mortgage, he could not claim subrogation. It was held that the mortgage was split up by the decree of the Court and that D having paid off the entire debt on B's share, could claim subrogation on the principle stated above. As to when a mortgage security is split up, see Note 41 on section 60.

The redemption of a mortgage in full does not mean that the *entire* amount due on the basis of the mortgage must have been paid. If the mortgagee agrees to let the mortgage be redeemed on payment of a lesser amount, such payment also will give rise to the right of

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('11) 12 Ind Cas 412 (412) : 35 Mad 183 (DB), *Hanumanthaiyan* v. *Meenatchi Naidu.* (Mortgage partly satisfied—No subrogation.)

('28) 15 AIR 1928 Mad 713 (718, 728) : 109 Ind Cas 872 (FB), *Thimmanayanim* v. *Venkatappa Nayanim.*

('23) 10 AIR 1923 Nag 301 (304) : 78 Ind Cas 177, *Thakarsa* v. *Behari.*

4. ('16) 3 AIR 1916 All 81 (82) : 38 All 502 : 35 Ind Cas 732 (DB), *Udit Narain* v. *Asharfi Lal.* (*Held* no longer good law in A I R 1940 All 75.)

('38) 25 AIR 1938 Mad 779 (781) : 182 Ind Cas 937 (DB), *Srinivasalu* v. *Damodaraswami.*

('22) 9 AIR 1922 Mad 249 (251, 253) : 70 Ind Cas 212 (DB), *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti.*

5. ('39) 26 AIR 1939 Nag 215 (216) : 183 Ind Cas 651 (DB), *Janardan Sadasheo* v. *Madanlal Mangulal.*

('26) 13 AIR 1926 Nag 21 (24) : 23 Nag L R 86 : 95 Ind Cas 979, *Premsukhdas* v. *Peerkhan.* (Release by mortgagee of a part of security on accepting part of the mortgage-debt splits up the mortgage security and hence partial redemption can be allowed.)

[*See also* ('40) 27 AIR 1940 Lah 247 (249) : 190 Ind Cas 673 (DB), *Ram Lal* v. *Bhagat Ram.* (Mortgage by *J* to *S*—Property sold by *J* to *M* and *M* mortgaging it to *B* and then selling to *R* — In suit by *S* on his mortgage *R* making certain payment in discharge of *S*'s mortgage — Suit by *B* on his mortgage — *R* held subrogated to rights of *S* and property could be sold in execution of *B*'s decree subject to *R*'s charge.)]

6. ('39) 26 AIR 1939 Nag 215 (216) : 183 Ind Cas 651 (DB), *Janardan Sadasheo* v. *Madanlal Mangulal.*

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subrogation.[7] Similarly, it is not necessary that the redemption must always be by payment in cash only. Where a mortgage was redeemed partly by paying cash and the balance by execution of a fresh mortgage[8] or by giving a hundee[9] in favour of the mortgagee, it was held that the mortgage had been redeemed in full.

It is unnecessary that the redemption should be by only one person. A, B, C can join together in redeeming the mortgage and when they do so each will be entitled to subrogation to the extent of the amount each has contributed towards redemption.[10] In such a case it is not necessary that all must pay simultaneously nor can it be said that it is only the person who paid last that has redeemed the mortgage and that he alone is entitled to subrogation.[11] Where a person advances money to the mortgagor to redeem a mortgage and the money advanced forms only a part of the amount that went towards redemption, the person advancing the money will be entitled to claim subrogation to the extent of the amount he advanced.[12]

24. Rights of subrogee. — Under this section a person entitled to subrogation enjoys, so far as regards redemption, foreclosure or sale of the mortgaged property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.[1] A subrogee, however, will not acquire any rights which the prior mortgagee might have acquired otherwise than as such mortgagee.[2] Thus, suppose A mortgages properties x and y to B and then property y alone to C. B and C obtain decrees for sale on their respective mortgages

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7. ('36) 23 AIR 1936 All 62 (63): 158 I.C. 643, *Shib Charan Das* v. *Muqaddam*.
8. ('38) 42 Cal W N 1106 (1110), *Padma Lochan* v. *Shaik Ajimaddin*.
9. ('20) 7 AIR 1920 Pat 678 (684) : 52 Ind Cas 964 (DB), *Premsukh Das* v. *Ram Bujhawan*.
10. ('37) 24 AIR 1937 All 588 (598) : ILR (1937) All 830 : 171 Ind Cas 153 (FB), *Hira Singh* v. *Jai Singh*.
('22) 9 AIR 1922 Mad 249 (251, 252) : 70 Ind Cas 212 (DB), *Pingali Venkataraman Reddi* v. *Kotigari Rangiah Chetti*.
11. ('41) 28 AIR 1941 Mad 563 (563, 564) : I L R (1941) Mad 924 : 198 Ind Cas 328, *Sinnaswami Goundan* v. *Rama Goundan*.
12. ('16) 3 AIR 1916 Mad 959 (960) : 29 Ind Cas 511 (DB), *Besinath Karumani* v. *Devi Doss*.
('33) 20 AIR 1933 Mad 715 (718) : 149 Ind Cas 287 (DB), *Abdul Razak* v. *Abdul Rahiman*.
('38) 42 Cal W N 1106 (1110), *Padma Lochan* v. *Shaik Ajimaddin*.
('29) 16 AIR 1929 All 621 (623) : 51 All 920 : 119 Ind Cas 84 (DB), *Ram Sarup* v. *Ram Richtapal*.
('39) 26 AIR 1939 Pat 375 (380) : 18 Pat 342 : 183 Ind Cas 400, *Kamlapati Devi* v. *Jageshwar Dayal*.

Note 24

1. ('42) 29 AIR 1942 Nag 111 (112) : I L R (1942) Nag 393 : 201 Ind Cas 472, *Balchand* v. *Ratanchand*. (Subrogation does not create fresh rights but merely puts the claimant in the shoes of the creditors.)
[*See* ('99) 22 Mad 332 (335) : 9 Mad L Jour 166 (DB), *Perianna Servaigaran* v. *Maduranayagam Pillai*. (The language of S. 74 makes it clear that the second mortgagee is, by tender of the mortgage money, to acquire no other rights than those possessed by the first mortgagee.)]
2. ('02) 24 All 185 (188) : 1902 All W N 7 (DB), *Delhi and London Bank* v. *Bhikari Das*.

without making each other a party to his suit, and purchase the property themselves. C then redeems B. C thus becomes entitled to the rights of B by subrogation, and the effect is that C as a purchaser of property y, having paid off B, becomes an absolute owner of property y. As regards property x, however, C has a mortgagee right only. B's rights as an auction purchaser of property x are not affected by C's redemption and hence B can redeem property x from C.[3]

Rights against mortgaged properties :

A subrogee can enforce his right of foreclosure or sale against the property against which the mortgagee, whom he has redeemed, could proceed. Thus, if A mortgages properties x and y to B and then mortgages y alone to C, C, on redeeming B, can foreclose or sell both the properties x and y in enforcement of his right of subrogation.[4] Similarly, where A and B owning property x jointly, mortgage it to C and subsequently A alone mortgages his share to D. D, on redeeming C, can exercise his right of subrogation by foreclosure or sale of the entire property x.[5]

A subrogee can, however, proceed against those properties only against which the prior mortgagee could proceed *on the date of* redemption by the subrogee and not necessarily against all the property which may originally have been comprised in the mortgage. Thus, suppose A mortgages his properties x, y and z to B. B releases property x from his mortgage. Subsequently, A mortgages property z to C who redeems B. C as a subrogee, can proceed only against properties y and z as these alone were subject to mortgage on the date of redemption by C and not x, y and z originally comprised in B's mortgage.[6]

Right to possession :

Where the mortgagee who is redeemed is entitled to remain in possession under his mortgage, the subrogee is also entitled to retain possession of the property until he is paid off.[7] But where the prior mortgage is a simple one and a subsequent usufructuary mortgagee redeems him, the latter cannot, when he is himself redeemed, resist delivery of possession on the ground of subrogation.[8] In the under-

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3. ('02) 24 All 185 (188) : 1902 All W N 7 (DB), *Delhi and London Bank* v. *Bhikari Das.*

4. ('41) 28 AIR 1941 Pat 276 (277) : 195 Ind Cas 428 (DB), *Tika Sao* v. *Hari Lal.*

5. ('27) 14 AIR 1927 Pat 379 (381) : 103 Ind Cas 703 (DB), *Md. Tabarak Ali Khan* v. *Dalip Narain.* (Appeal from A I R 1927 Pat 117—Mortgagee of an undivided share held in common who redeems the whole property is entitled to enforce the prior mortgage against the whole property.)

6. ('96) 18 All 189 (193, 194) : 1896 All W N 65 (DB), *Muhmmad Mahmud Ali* v. *Kalyan Das.*

7. ('31) 18 AIR 1931 Oudh 144 (145) : 132 Ind Cas 271 (DB), *Ram Kishan* v. *Mahomed Baquar.*
('13) 20 Ind Cas 275 (278) : 16 Oudh Cas 119 (DB), *Mt. Masato* v. *Aziz-ullah Khan.*

8. ('35) 22 AIR 1935 Mad 390 (393) : 159 Ind Cas 857, *Draviam Chettiar* v. *Ramaiya Chettiar.*
[*See* ('37) 24 AIR 1937 All 119 (121) : I L R (1937) All 225 : 167 Ind Cas 648 (DB), *Chotey Lal* v. *Sudershan Lal.*
('33) 145 Ind Cas 277 (278) (DB) (All), *Mohammad Hasnain* v. *Rustam Ali.*]

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mentioned case[9] a usufructuary mortgagee paid off a prior simple mortgage after the latter had obtained a decree for sale, and sought to bring the property mortgaged to sale for the purpose of recovering the amount of the simple mortgage, retaining his own lien as a usufructuary mortgagee. It was held by the Allahabad High Court that he was entitled to retain possession, under S. 72, of the mortgaged property as a usufructuary mortgagee until the amount due on both mortgages was discharged. No doubt, under the circumstances of the case, the subsequent mortgagee had under S. 72 a right to add the money spent by him to preserve the mortgaged property from sale to the principal money of his own mortgage and to retain possession thereof till the recovery of such amount. But, as has been seen under Notes on S. 72, the right under that section is only an *additional* one and not the *sole* remedy. It is, therefore, open to the usufructuary mortgagee as a *subrogee* under S. 92 to sell the mortgaged property for the recovery of the amount spent to redeem the prior mortgage.

Right to prior mortgagee's lease hold rights.

Where a mortgagee is redeemed all subsidiary rights created on the mortgaged property, such as lease hold rights, *ipso facto* come to an end. A subrogee, therefore, cannot get the prior mortgagee's rights as a landlord as against the tenants.[10] See however the undermentioned case[11] for a contrary view.

Extent of subrogation.

As the doctrine of subrogation rests on the doctrine of reimbursement, the subrogee can claim subrogation only to the extent to which his money has been utilised in relieving the burden of the prior mortgage.[12] If the *whole* of the prior mortgage has been discharged with his money, he will be subrogated to the entire mortgage rights of the prior mortgagee.[13] But if the amount advanced by him has gone only in part satisfaction of the prior mortgage, the balance being paid by the mortgagor himself, he will be subrogated only to the extent of the amount paid by him which has gone in satisfaction of the prior mortgage, and not to the entire rights of the mortgagee.[14]

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9. ('05) 27 All 403 (405) : 2 All L Jour 23 (DB), *Abdul Qayyum* v. *Sadruddin.*

10. ('21) 8 AIR 1921 Mad 393 (393) : 69 Ind Cas 651 (DB), *Alagirisami Mudali* v. *Akkalu Naidu.*

11. ('25) 12 AIR 1925 Nag 90 (95) : 82 Ind Cas 190, *Amar Chand* v. *Sardar Singh.*

12. *See* ('07) 6 Cal L Jour 46 (54, 55) (DB), *Hakim Lal* v. *Ram Lal.*

13. ('26) 13 AIR 1926 Nag 214 (214, 215) : 21 Nag L R 165 : 91 Ind Cas 1010, *Devidas* v. *Trimbak.*

('11) 11 Ind Cas 469 (471) (DB) (All), *Sundar Lal* v. *Amanatulla.*

('34) 21 AIR 1934 All 1035 (1037) : 150 Ind Cas 937 (DB), *Umed Singh* v. *Babu Ram.*

('93) 16 Mad 94 (96) (DB), *Seetharama* v. *Venkatakrishna.*

('39) 26 AIR 1939 Pat 375 (378) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamalapati Devi* v. *Jageshwar Dayal.*

14. ('26) 13 AIR 1926 All 744 (745) : 96 Ind Cas 1054 (DB), *Chhotey Lal* v. *Dharajit.*

('88) 11 Mad 345 (354) (DB), *Rupabai* v. *Audimulam.*

Where under the terms of the mortgage, a mortgagee is entitled to recover at the time of redemption, any amount spent by him on improvement of the mortgaged property, a subrogee to his rights making improvements is entitled to claim under the terms of the mortgage, the amount spent by him over improvements.[15]

Where out of the consideration of a sale a portion was left with the buyer to pay off a prior mortgage decree and owing to the delay on the part of the buyer the property was sold but the sale was set aside on payment of the decretal amount together with the auction purchaser's *solatium* under O. 21, R. 89 of the Civil Procedure Code, it was held that the buyer could not, as a subrogee, claim subrogation in respect of the auction purchaser's *solatium* inasmuch as the money did not go to the mortgagee.[16]

Right to claim interest :

A subrogee on redemption of a prior mortgagee stands in the shoes of the prior mortgagee and can claim interest on the amount paid by him to discharge the mortgage, in the circumstances in which the prior mortgagee could have claimed it.[17]

Where the purchaser of the equity of redemption redeems a prior simple mortgage and is in possession, there is a difference of opinion as to whether interest should be allowed to the subrogee on the amount spent by him towards redemption. One view is that, as he enjoys the usufruct, he cannot be allowed interest for the period of possession.[18] The second view is that an account of the profits enjoyed by the purchaser must be taken and if the profits fall short of the interest, only

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('31) 18 AIR 1931 Bom 545 (547) : 135 Ind Cas 489 (DB), *Alisaheb* v. *Sesho.*
('16) 3 AIR 1916 Mad 637 (637) : 38 Mad 548 : 28 Ind Cas 966 (DB), *Swaminatha Pillai* v. *Krishna Iyer.*

15. ('26) 13 AIR 1926 Lah 430 (431) : 7 Lah 212 : 94 Ind Cas 152 (DB), *Mehl Singh* v. *Amar Nath.*

16. ('32) 19 AIR 1932 P C 99 (101) : 137 Ind Cas 475 (PC), *Jagmohan Das* v. *Jugal Kishore.*

17. ('22) 9 AIR 1922 Nag 155 (156) : 17 Nag L R 200 : 65 Ind Cas 275, *Narayan* v. *Nathmal.*
('39) 26 AIR 1939 Pat 375 (378) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamlapati Devi* v. *Jageshwar Dayal.* (Interest allowed by a decree on prior mortgage redeemed by the subrogee — Subrogee entitled to interest at the rate of interest given by the decree.)
('35) 22 AIR 1935 Mad 660 (662) (DB), *Venkatesa Aiyangar* v. *Manikkavachakam Chetty.* (No interest allowed as the mortgagee who was redeemed was not entitled to it being a usufructuary mortgagee and hence could be redeemed by paying the principal only.)

18. ('03) 26 All 185 (187, 188) : 1903 All W N 219 (DB), *Sri Ram* v. *Kesri Mal.*
('11) 11 Ind Cas 649 (652) (DB) (Cal), *Sat Narain* v. *Sheobaran Singh.*
('22) 9 AIR 1922 All 185 (187) : 63 Ind Cas 738 : 44 All 9 (DB), *Anandi Prasad* v. *Krishna Chandra.*
('34) 21 AIR 1934 All 1035(1037): 150 I.C. 937(DB), *Umed Singh* v. *Babu Ram.*
[*See also* ('32) 19 AIR 1932 P C 99 (101) : 137 Ind Cas 475 (PC), *Jagmohan* v. *Jugal Kishore.* (The High Court disallowed interest on the ground of purchaser being in possession. The Privy Council affirmed this decision but whether the question of interest was raised before the Board or not does not appear from the very short judgment.)]

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then should the balance of interest be allowed.[19] The third view is that the purchaser is entitled to interest even though he is in possession. The reason given is that the purchaser has two distinct rights, namely, a right as owner of the equity of redemption, and a right as second mortgagee. By virtue of his first right, he is entitled to usufruct of the land. In his right as mortgagee he is entitled to interest, and neither of these rights must be made subservient to the other.[20] It is submitted that the last view is to be preferred. The first two views proceed on the assumption that the purchaser enjoys the possession and the usufruct in his capacity of a mortgagee. This is incorrect as the mortgage that is redeemed being a simple one, did not give the subrogee any right to possession and hence any right to the usufruct.

25. Right of subrogation is available to successors-in-interest. — The right of subrogation conferred by this section is not confined to the first person only who redeems the prior mortgage. Every other person, who succeeds to the entire right possessed by the subrogee by redemption, transfer or otherwise, will also be clothed with the right of subrogation.[1] In the undermentioned case,[2] a certain land was mortgaged to A, then to B and then to C. C's mortgage was effected to satisfy A's mortgage decree. C thus became subrogated to A's rights. In order to pay off C's mortgage decree, the land was sold to D, who borrowed the purchase money from P to whom he mortgaged it on the day of the sale. It was held that P's mortgage was entitled to priority over B's mortgage to the extent to which the loan secured thereby had gone to discharge A's mortgage.

26. Purchaser entitled to subrogation — Pre-emptor whether can claim that right. — Where a purchaser has, by redeeming a prior mortgage, obtained a right of subrogation, it has been held that the person who obtains the property from him by pre-emption is also entitled to the right of subrogation.[1]

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19. ('35) 22 AIR 1935 Mad 360 (362) : 159 Ind Cas 478 (DB), *Ramchandra Naidu* v. *Pavalayammal.* (AIR 1920 Mad 389 distinguished.)
('18) 5 AIR 1918 Mad 103 (105, 109) : 44 Ind Cas 753 (756) : 41 Mad 513 (DB), *Muthammal* v. *Razu Pillai.*

20. ('20) 7 AIR 1920 Mad 389 (390, 391) : 58 Ind Cas 493 (DB), *Malireddi Ayya Reddi* v. *Gopala Krishnayya.* (Affirmed in AIR 1924 P C 36 : 47 Mad 190 : 51 Ind App 140, but the question of interest was not raised before the Privy Council.)
('30) 17 AIR 1930 Mad 471(472): 125 I.C. 247, *Pichai Konar* v. *N. Rama Iyer.*
('34) 21 AIR 1934 Mad 268 (269) : 148 Ind Cas 735 (DB), *Ramamurti* v. *Rangayya.*

Note 25

1. ('40) 27 AIR 1940 Lah 269 (270) : 190 Ind Cas 599, *Gulam Fatima* v. *Gopal Devi.* (By redemption.)
('26) 13 AIR 1926 Nag 214 (214, 215) : 21 Nag L R 165 : 91 Ind Cas 1010, *Devidas* v. *Trimbak.* (Transferee from subsequent mortgagee subrogee.)
('34) 21 AIR 1934 Mad 256 (256) : 150 Ind Cas 1126 (DB), *Venkatachari* v. *Karuppan Chetti.*
('22) 9 AIR 1922 Mad 249 (253) : 70 Ind Cas 212 (DB), *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti.*
[*See also* ('20) 7 AIR 1920 Mad 585 (586) : 55 Ind Cas 658 (DB), *Abarthorman Kutti* v. *Ittikaparambilathan.*]

2. ('93) 16 Mad 94 (96) (DB), *Seetharama* v. *Venkatakrishna.*

Note 26

1. ('99) 1899 Pun Re No. 67, *Jhabar* v. *Singh Ram.*

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Note 27

27. Enforcement of rights acquired by subrogation.— The right of subrogation can not only be set up by way of defence[1] but can be enforced by a suit.[2] Where a mortgage has been redeemed before a decree has been obtained on it, the subrogee can enforce his right by way of a suit based on the redeemed mortgage.[3]

Where payment is made, after a preliminary decree has been passed on the mortgage, by a person competent to redeem under S. 91 who is a party to the suit, the subrogee is entitled to be substituted for the plaintiff-mortgagee and can apply for a final decree to be passed in his name.[4] Where, however, a final decree has been passed, it has been held that a payment of such a decree satisfies it and no one can proceed with its execution. The only remedy for the subrogee in such a case is by way of a suit. Such a suit is not barred by Ss. 11 or 47 or O. 2 R. 2 of the Code of Civil Procedure.[5] As to the starting point of limitation

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Note 27

1. ('32) 19 AIR 1932 P C 99 (101): 137 Ind Cas 475 (PC), *Jagmohan Das* v. *Jugal Kishore.*
('04) 27 All 308 (310) : 1904 All W N 268 (DB), *Kirat* v. *Debi Singh.*
('39) 26 AIR 1939 All 190 (191) : I L R (1939) All 185 : 180 Ind Cas 913 (DB), *Piarey Lal* v. *Dina Nath.*
('22) 9 AIR 1922 Mad 249 (256) : 70 Ind Cas 212 (DB), *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti.*
('06) 29 Mad 37 (42) (DB), *Vanmikalinga Mudali* v. *Chidambara Chetty.*
('40) 27 AIR 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar (P C) 82 : 67 Ind App 82 : 186 Ind Cas 1 (PC), *Janki Nath Roy* v. *Pramatha Nath Malia.*
('34) 21 AIR 1934 All 1035 (1037): 150 I.C. 937 (DB), *Umed Singh* v. *Babu Ram.*
('07) 6 Cal L Jour 46 (54) (DB), *Hakim Lal* v. *Ram Lal.*

2. ('40) 27 AIR 1940 Pat 385 (393) : 19 Pat 752 : 189 Ind Cas 513 (FB), *Tika Sao* v. *Hari Lal.*
('19) 6 AIR 1919 Mad 818 (819) : 47 Ind Cas 882 (DB), *Rama Rao* v. *Mandachalugai.*
('11) 12 Ind Cas 607 (608) : 34 All 102 (DB) *Gur Narain* v. *Shadi Lal.*

3. ('36) 23 AIR 1936 Mad 814 (815, 816) : 59 Mad 1042 : 163 Ind Cas 704 (DB), *Arumuga Bathan* v. *Semba Goundan.*
('34) 21 AIR 1934 All 1035 (1037): 150 I.C. 937 (DB), *Umed Singh* v. *Babu Ram.*

4. ('28) 15 AIR 1928 Nag 145 (146) : 24 Nag L R 119 : 109 Ind Cas 251, *Balaji* v. *Ballabhdas.* (Both under O. 1, R. 10 and O. 22, R. 10, C. P. C., the substitution of a subsequent mortgagee sued as one of the defendants to a foreclosure suit as a plaintiff is permissible.)
('33) 20 AIR 1933 Nag 163 (164): 146 Ind Cas 514 : 29 Nag L R 183, *Yamunabai* v. *Maroti.*
('25) 12 AIR 1925 Nag 15 (17) : 80 Ind Cas 283, *Shankar Rao* v. *Ganpat Rao.*
('02) 24 All 179 (183, 184) : 1902 All W N 3 (DB), *Bansidhar* v. *Gaya Prasad.*
[*See also* ('03) 26 All 185 (187) : 1903 All W N 219 (DB), *Sri Ram* v. *Kesri Mal.*
('39) 26 AIR 1939 All 190 (192) : I L R (1939) All 185 : 180 Ind Cas 913 (DB), *Piarey Lal* v. *Dina Nath.* (He cannot maintain a separate suit.)]

5. ('25) 12 AIR 1925 Mad 80 (84) : 81 Ind Cas 771, *Parvati Ammal* v. *Venkatarama Aiyar.*
('13) 18 Ind Cas 610 (611) (DB) (Mad), *Sundara Reddiar* v. *Subbiah Goundan.* (S. 11 and O. 2, R. 2 not bar.)
('25) 12 AIR 1925 Mad 129 (129, 130) : 82 Ind Cas 846, *Avudai Ammal* v. *Ramasami Naick.* (Section 47 is no bar.)

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for such a suit, see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edition, Article 132, Note 14.

Where a subsequent mortgagee pays off a prior mortgage and steps into the shoes of the prior mortgagee by subrogation, his position is the same as that of a person who holds two mortgages in his favour on the same property by the same mortgagor. As seen under Notes on S. 67A, if such a mortgagee has a right to obtain the same kind of decree in respect of both the mortgages, he will be *bound* to sue on both the mortgages together. The same consideration would apply where the subsequent mortgage is to pay off the prior mortgage and only part of the consideration is utilized to redeem the prior mortgage. In such a case, also, the person advancing money is in the position of the prior mortgagee in respect of the amount utilized to discharge his mortgage and in the position of a subsequent mortgagee in respect of the balance.

It has been held that a person advancing money on a mortgage to pay off a prior mortgage, can claim priority for his advance in a suit based on his own mortgage.[6]

28. Limitation. — See the following references in the Authors' Commentaries on the Limitation Act, 2nd (1942) Edition :

(1) Note 14 on Art. 132 (suit to enforce right of subrogation).

(2) Note 10 on Art. 132 (suit by redeeming co-mortgagor against the other co-mortgagors).

(3) Note 2 on Art. 148 (suit for redemption against subrogee.)

(4) Note 3 on Art. 148 (suit by non-redeeming co-mortgagor against redeeming co-mortgagor for recovery of his share). See also the undermentioned case.[1]

(5) Note 2 on Article 148 (suit for recovery of property from a volunteer who pays off a mortgage and gets into possession).

('22) 9 AIR 1922 All 153 (154) : 44 All 67 : 63 Ind Cas 604 (DB), *Bora Shib Lal* v. *Munni Lal.*

('05) 27 All 325 (332, 333) : 32 Ind App 123 (133) (PC), *Gopi Narain Khanna* v. *Babu Bansidhar.*

('34) 21 AIR 1934 Lah 248 (249) : 15 Lah 746 : 150 Ind Cas 366, *Jagan Nath* v. *Abdullah.*

[But see ('99) 9 Mad L Jour 177 (178) (DB), *Bavanna* v. *Balagurivi.*]

6. ('11) 12 Ind Cas 607 (608) : 34 All 102 (DB), *Gur Narain* v. *Shadi Lal.*

('06) 28 All 778 (781) : 3 All L Jour 630 (DB), *Shyam Lal* v. *Bashiruddin.*

('93) 16 Mad 94 (96) (DB), *Seetharama* v. *Venkatakrishna.*

('42) 29 AIR 1942 Pat 166 (168) : 198 Ind Cas 3 (DB), *Ram Lagan* v. *Ram Bilochan.*

('17) 4 AIR 1917 Lah 396 (397) : 1917 Pun Re No. 1 : 38 Ind Cas 893 (DB), *Amir Beg* v. *Ghulam Nabi.*

('05) 27 All 400 (403) : 2 All L Jour 13 (DB), *Tufail Fatima* v. *Bitolo.*

('97) 20 Mad 486 (487) : 7 Mad L Jour 198 (DB), *Purnamal Chand* v. *Venkata Subbarayalu.*

Note 28

1. ('41) 28 AIR 1941 Pat 147 (148, 149) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukh Narain* v. *Ramlochan Tiwari.* (Suit by other co-mortgagors for redemption is governed by Art. 148.)

29. Defence of subrogation is not barred even if suit to enforce it is time-barred. — Limitation only bars the remedy but does not generally destroy the right. Hence, although a suit to enforce a right may be barred by limitation, such right may be set up in defence. Thus, a person who is subrogated to the rights of a mortgagee may set up the mortgage as a shield although a suit for enforcing such mortgage may be barred by limitation.[1] A contrary view has been taken by a single Judge of the Madras High Court in the undermentioned case.[2] It is submitted that this view is not correct.

30. Res judicata. — Under the Explanation to O. 34, R. 1, Civil Procedure Code, 1908, a prior mortgagee is not a necessary party to a suit for foreclosure or sale by a puisne mortgagee; but a subsequent mortgagee is a necessary party to such a suit as being interested in the equity of redemption. Where a first mortgage is executed in favour of A, the second in favour of B and the third in favour of C and C redeems the mortgage in favour of A, C has dual capacity: (i) as a prior mortgagee, and (ii) as a subsequent mortgagee. He is a necessary party to a suit by B on his mortgage in his capacity as a subsequent mortgagee but not so in his capacity as a prior mortgagee. Where he is made a party to a suit on the mortgage by B but the prior mortgage is not impugned or sought to be postponed in any way, he need not set up the prior mortgage, as such a plea is a paramount claim not affecting the claim made on the puisne mortgage of B and therefore not a ground of defence.[1] Thus, if B admits the validity of the prior mortgage in his plaint C need not set up his rights under the first mortgage and a subsequent suit on the first mortgage by C is not barred as *res judicata*.[2] If, however, B impleads C only in his capacity as a *subsequent mortgagee*, thus impliedly negativing the priority under the first mortgage, C must, by way of defence, set up his priority under the first mortgage; otherwise he will be barred from doing so later on on the grounds of *res judicata*.[3]

Note 29

1. See Illustration 4 in Note 15 on S. 3 of the Authors' Commentaries on the *Limitation Act, 1908*, 2nd (1942) Edition.
('36) 23 AIR 1936 All 578 (581) : 58 All 1056 : 165 Ind Cas 7 (FB), *Ram Dhan* v. *Mt. Chunni Kunwari*.
('26) 13 AIR 1926 Nag 21 (23) : 23 Nag L R 86 : 95 Ind Cas 979, *Premshukdas* v. *Peerkhan*.
2. ('39) 26 AIR 1939 Mad 678 (679) : 189 Ind Cas 200, *Krishna* v. *Subba*.

Note 30

1. See sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11 of the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edition.
('31) 18 AIR 1931 All 76 (80): 133 I.C. 142(DB), *Fazal Rab* v. *Manzoor Ahmad*.
('36) 23 AIR 1936 All 578 (583) : 58 All 1056 : 165 Ind Cas 7 (FB), *Ram Dhan* v. *Mt. Chunni Kunwari*.
2. ('36) 23 AIR 1936 All 578 (583) : 58 All 1056 : 165 Ind Cas 7 (FB), *Ram Dhan* v. *Mt. Chunni Kunwari*.
3. See sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11 of the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edition.

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B sues on his mortgage in Munsiff's Court and impleads C as a *subsequent mortgagee.* C does not set up his rights as a subrogee in that suit. C then institutes a suit on the prior mortgage in the Court of Subordinate Judge as the claim exceeds the pecuniary limits of the jurisdiction of the Munsiff's Court. Such a suit is not barred, as the Munsiff was not competent to try the subsequent suit.[4]

See also Note 40 on S. 11; Note 10 on O. 2, R. 2, and Note 10 on O. 34, R. 1 of the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edition.

31. Plea of subrogation. — A transferee from the mortgagor who claims a right of subrogation against the plaintiff mortgagee by virtue of payment of certain prior mortgages must aver that the mortgagor in the prior mortgages was the mortgagor of the plaintiff, that the properties mortgaged were the same and that the payment had been made by or on behalf of himself.[1]

Section 93

[a]**93.** Prohibition of tacking. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

a. The original section as it stood in the year 1882 was repealed by the Civil Procedure Code, 1908; see now, Order 34, Rule 8. The present section was inserted by Section 47 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Legislative changes.
2. English and Indian law of tacking compared. See Note 1 on S. 79.
3. Scope.
4. "With or without notice."
5. "Intermediate mortgage."
6. "Subsequent advance"—Meaning of.
7. Except in the case provided for by Section 79. See Notes on S. 79.

Other Topics (miscellaneous)

Principle of the section applicable to intermediate purchasers. See Note 5.
Salvage payments. See Section 48 Note 11.

('12) 14 Ind Cas 496 (504) : 39 Ind App 68 : 39 Cal 527 (PC), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh.* (Appeal from 2 Cal L Jour 574.)

('36) 23 AIR 1936 All 578 (584) : 58 All 1056 : 165 Ind Cas 7 (FB), *Ram Dhan* v. *Mt. Chunni Kunwari.*

4. ('39) 26 AIR 1939 Pat 375 (377) : 18 Pat 342 : 183 Ind Cas 400 (DB), *Kamlapati Devi* v. *Jageshwar Dayal.*

Note 31

1. ('42) 29 AIR 1942 Cal 153 (164) : I L R (1942) 1 Cal 326 : 201 Ind Cas 353 (DB), *Suradindu Mukherjee* v. *Jahar Lall.*

1. Legislative changes. — The present section corresponds word for word with the old S. 80. The old S. 93 was repealed by Act V of 1908 and re-enacted as O. 34, R. 8 of the Code of Civil Procedure. The old S. 80 was re-numbered as S. 93 and inserted after S. 92 by the Transfer of Property (Amendment) Act, 1929. The reason for the change given in the Report of the Special Committee is: "As the principle of tacking is closely allied to subrogation, we propose to put S. 80 as S. 93."

2. English and Indian law of tacking compared.— See Note 1 on S. 79.

3. Scope. — This section deals with two classes of cases, namely, —

(1) where a mortgagee pays off an earlier mortgage with or without notice of an intermediate mortgage, and

(2) where a mortgagee makes a subsequent advance to the mortgagor with or without notice of an intermediate mortgage.

As to the first class of cases the section provides that the mortgagee cannot tack on his mortgage to the prior mortgage which he has paid off. As to the second class of cases it provides that the mortgagee cannot, except as provided by S. 79, tack on his subsequent advance to his mortgage.

The basis of this section is to be found in the general principle, enunciated by the maxim *qui prior est tempore, potior est jure* (where the equities are equal, the first in time shall prevail) and which is found enacted in S. 48. The effect of the section is, in fact, to state that the general principle cannot be defeated by the mortgagee claiming to tack his mortgage on to a prior mortgage paid off by him or to tack on to his mortgage a subsequent advance made by him, to the prejudice of intermediate mortgagees.[1] The section only enacts what had always been regarded before as settled law in India.[2]

4. "With or without notice." — Notice of the existence of an intermediate mortgage is immaterial under this section, except in cases falling under section 79.[1]

5. "Intermediate mortgage." — The section, in terms, applies only to the question of priority of an intermediate *mortgage* over a subsequent mortgage or a subsequent advance, where the mortgagee pays off a prior mortgage or the subsequent advance is made by the prior mortgagee. The principle on which the section is based is, however, applicable even to intermediate *purchasers* of the property. In *Bhagwan*

Section 93 — Note 3

1. ('12) 15 Ind Cas 5 (6) : 15 Oudh Cas 211, *Ram Kumar* v. *Dwarka Parshad.*
('04) 1904 Pun Re No. 30 : 1904 Pun L R No. 139 (DB), *Radha Ram* v. *Rala Ram.*
2. See Note 1 on Section 79.
[*See* ('76) 25 Suth W R 171 (174) (DB), *Mt. Woseeun* v. *Byjnath Singh.*]

Note 4

1. ('23) 10 AIR 1923 P C 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 : 76 Ind Cas 910 (PC), *Imperial Bank of India* v. *U Rai G. T. & Co. Ltd.*

Section 93 Notes 5–7

Das v. *Sham Das*[1] X mortgaged his property to A in February 1893, and *sold* a portion of the equity of redemption to B in August 1894. A subsequently advanced a further sum of money to X in 1895. B claimed to redeem the mortgage of 1893 and was met by the plea that he should pay up the subsequent advance also, before redemption. It was held by the High Court of Allahabad that to allow such a plea would violate the principle laid down in old S. 80 corresponding to this section.

6. "Subsequent advance"—Meaning of.—It has been held by their Lordships of the Privy Council in *The Imperial Bank of India* v. *U Rai Gyaw Thu & Co., Ltd.*,[1] that the word "subsequent" in this section must, from the context, be taken to mean subsequent to an intermediate mortgage and that an advance when made after another mortgage is granted becomes a "subsequent advance." A mortgaged his property to B in 1874. He subsequently mortgaged the same property to C in March 1877, and thereafter to B in November 1877. B obtained a decree on both his mortgages without impleading C, got the property sold in court auction, and took the sale proceeds in satisfaction of both the mortgages. C then sued on his mortgage, obtained a decree, and then claimed to recover the surplus proceeds of the said sale in the hands of B after satisfying the first mortgage of 1874. It was held that he was entitled to do so and that to allow B to retain the proceeds in satisfaction of *both* his mortgages would be against the provisions of old S. 80 corresponding to this section.[2]

7. Except in the case provided for by Section 79. — See Notes on S. 79.

Section 94

[a]**94.** Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

Rights of mesne mortgagee.

a. The original section as it stood in the year 1882 was repealed by the Civil Procedure Code, 1908; see now, Order 34, Rule 10. The present section was inserted by Section 47 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. History of the section.
2. Principle.
3. "The same rights . . . . as he has against the mortgagor."
4. Rights of persons deriving title from mesne or prior mortgagees.

Note 5

1. ('01) 23 All 429 (431) : 1901 All W N 121 (DB).

Note 6

1. ('23) 10 AIR 1923 P C 211 (215) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 : 76 Ind Cas 910 (PC).
2. ('90) 12 All 546 (547) : 1890 All W N 77 (DB), *Mittu Lal* v. *Kishan Lal*.

Other Topics (miscellaneous)

First mortgagee—Rights of. See Note 2.
Omission to implead puisne mortgagee does not affect his rights. See S. 67 Note 19.
Redeem up and foreclose down. See Note 2.
Rights of auction purchaser at sale in execution of mortgagee's decree if puisne mortgagee not a party. See S. 67 Note 20.
Rights of mortgagees *inter se*. See S. 67 Note 19.

1. History of the section. — The old S. 94 of the Act of 1882 dealt with the question of costs of the mortgagee in mortgage suits. It was repealed in 1908 and was re-enacted in the Civil Procedure Code, 1908, as Order 34, Rule 10.

This section is new and is a re-enactment of the latter portion of the old section 75 which ran as follows :

> "Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, *and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.*

The first portion of the above section is covered by Ss. 91 and 92 of the Act.[1]

The provisions of O. 34, R. 11 of the Code of Civil Procedure which corresponded to the repealed S. 75, have also been repealed by Act XXI of 1929.

2. Principle. — This section is an enactment in part of the well-known principle expressed by the phrase "redeem up and foreclose down."[1] It provides that a *mesne* mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.[2] The reason is that the posterior mortgagee whose interest has only been carved out of the mortgagor's interest remaining after the anterior mortgage, cannot, as against the latter, be in any better position than the mortgagor himself.[3]

Section 94 — Note 1

1. See Clause 46 of the Report of the Special Committee, printed on p. 22 (63).

Note 2

1. See Clause 46 of the Report of the Special Committee, printed on p. 22 (63).
See Snell, *Principles of Equity*, 11th Edn., page 307.
('11) 10 Ind Cas 748 (751)(Bom), *Hope Mills Ltd.* v. *Sir Cowasji J. Readymoney, Bart.*

2. ('91) 13 All 432 (459) (FB), *Mata Din Kasodhan* v. *Kazim Husain.*
('11) 10 Ind Cas 748 (751)(Bom), *Hope Mills Ltd.* v. *Sir Cowasji J. Readymoney, Bart.*
('11) 9 Ind Cas 403 (405, 406) : 14 Oudh Cas 217, *Ram Raghubir* v. *Imami Begam.* (The prior mortgagee's right to sell against the puisne mortgagee is paramount.)
('11) 9 Ind Cas 513 (516) (FB) (Mad), *Mulla Veetil* v. *Achuthan Nair.*
('26) 13 AIR 1926 Mad 101 (102): 90 Ind Cas 410, *Krishnaswami* v. *Thirumalai.*

3. *See the following cases which proceed upon this principle* :
('82) 6 Bom 404 (411, 412, 413) (FB), *Mulchand Kuber* v. *Lallu Trikam.*
('26) 13 AIR 1926 All 480 (482, 483) : 97 Ind Cas 4 (DB), *Lachmi Narain* v. *Hirdey Narain.*
('29) 16 AIR 1929 Lah 207 (208) : 117 Ind Cas 666, *Nand Lal* v. *Narain Singh.*

Section 94 Notes 2–3

The section, in terms, deals with the rights of *mesne* mortgagees. But it cannot be doubted that the same principle is applicable to the *first* mortgagee also who will have, against subsequent mortgagees, the same rights as he has against the mortgagor.[4] The words "second or other subsequent" occurred in the old S. 75, and the word "mesne" was used in the corresponding O. 34, R. 11 of the Civil Procedure Code as it stood before 1929. They were properly used in those provisions as the rights of a mortgagee were dealt with in relation to *prior* as well as *subsequent* mortgages. In the present section, the rights of mortgagees are dealt with as against *posterior* mortgagees alone. The word 'mesne' seems to have been inadvertently retained.

3. "The same rights . . . as he has against the mortgagor." — Sections 67 to 73 deal with the rights of mortgagees against mortgagors. This section provides that a mortgagee can also exercise all such rights against *mortgagees posterior to himself*. Thus, a prior mortgagee can require the subsequent mortgagee to redeem him or, in default, to submit to a foreclosure or sale of the property.[1] (Section 67.) Again where, under the terms of the prior mortgage the mortgagee is entitled to get possession of the mortgaged property under certain circumstances, he can, on the happening of such circumstances, sue a subsequent usufructuary mortgagee for recovery of possession.[2]

This section must, however, be read subject to the proviso to sub-s. (1) of S. 68. That proviso enacts that a transferee from the mortgagor shall not be liable to be sued for the mortgage-money in a case falling under cl. (a) of that sub-section. A prior mortgagee will not, therefore, be entitled to a personal decree for the mortgage-money, against the subsequent mortgagee, though he may be entitled to such a decree against the mortgagor.[3]

The "rights" referred to are the rights of the mortgagee, *under the mortgage*, that is, rights flowing from the terms constituting the mortgage. It will not include rights, for instance, on covenants by the mortgagor not to alienate his properties, which do not form part of the terms of the mortgage. See Note 18 on section 10.

As to the effect of joinder and non-joinder of prior and puisne mortgagees as parties to suits on mortgages, see Note 19 on S. 67 and the undermentioned cases.[4]

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4. ('29) 16 AIR 1929 Lah 207 (208) : 117 I.C. 666, *Nand Lal* v. *Narain Singh.*
(1900) 23 All 1 (3, 4) : 1900 All W N 176 (DB), *Baldeo Singh* v. *Jaggu Ram.*

Note 3

1. ('08)31 Mad 425 (428) : 18 Mad L Jour 298 (DB), *Venkataramana Iyer* v. *Gompertz.*
('12) 14 Ind Cas 449 (453) (DB) (Mad), *Venkatagiri Aiyar* v. *Sadagopachariar.*
2. ('12) 14 Ind Cas 735 (736) (Oudh), *Jangu Singh* v. *Ganesh Ram.*
('29) 16 AIR 1929 Lah 207 (208) : 117 Ind Cas 666, *Nand Lal* v. *Narain Singh.*
3. ('30) 17 AIR 1930 Lah 791 (792) : 126 Ind Cas 174 (DB), *Khazanchi Shah* v. *Nizam Din.*
4. ('42) 29 AIR 1942 Cal 138 (140): 202 Ind Cas 308 (DB), *Kaisar Khan* v. *Abdul Ghani.*
('40) 27 AIR 1940 Mad 646 (649), *Sengamuthu Gounder* v. *Thayarammal.*

Section 94 Note 4

4. Rights of persons deriving title from mesne or prior mortgagees. — By virtue of S. 59A, a person deriving title from a mesne or prior mortgagee will stand in the same position as the mortgagee himself in respect of the enforcement, against the mortgagor, of the rights under the mortgage. Thus, a *purchaser* from a prior or mesne mortgagee will have the same rights against posterior mortgagees as the prior or mesne mortgagee himself has against the mortgagor.

Section 95

Right of redeeming co-mortgagor to expenses.

[a]**95.** Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

a. This section was substituted for the original Section 95 by Section 48 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The original section ran as follows :

"*95.* Where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

Synopsis

1. Scope of the section.
2. "Redeems."
3. "Expenses properly incurred."
4. Interest.
5. Co-mortgagor's liability to contribute. See Notes 3 and 17 on S. 82.
6. Such proportion as is attributable to their share in the property.
7. Persons deriving title from the mortgagor.
8. Personal remedy.
9. Limitation.
10. Section, if retrospective.

Other Topics (miscellaneous)

Nature of right acquired by redeeming co-mortgagor. See Note 1; S. 82 Note 17 and S. 92 Note 15.
Section not restricted to possessory mortgages. See Note 1.

1. Scope of the section. — In cases arising prior to the Act it was held that a co-mortgagor redeeming the mortgage obtained a lien on the shares of the other co-mortgagors for their proportionate share of the mortgage-money with a right to retain possession until such share is paid by them.[1]

Section 95 — Note 1

1. ('82) 4 All 58 (60) (DB), *Pancham Singh* v. *Ali Ahmad.*
('84) 8 Bom 497 (500) (DB), *Vithal* v. *Vishvasrav.*
('81) 1881 Bom P J 57 (DB), *Pandjirav* v. *Naroji.*
('80) 1880 Bom P J 300 (DB), *Ganesh* v. *Raghunath.*
('79) 2 Mad 223 (225) (DB), *Asansab Ravuthan* v. *Vamana Rau.*

Section 95 Note 1

Section 95 of the Act gave legislative effect to this view and enacted as follows:

> "Where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

The section, however, gave rise to various interpretations as to the nature of the right acquired and the conditions requisite for the acquisition of the right. One set of cases[2] held that the redeeming co-mortgagor had only a *charge* on the property and another set of cases[3] held that the right acquired was one of subrogation of the rights of the mortgagee whom he had redeemed. According to a third set of cases[4] he was only a charge-holder with rights of priority over intermediate mortgagees or purchasers.

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2. ('02) 26 Bom 500 (503) : 4 Bom L R 178 (DB), *Vasudev* v. *Balaji.*
('31) 18 AIR 1931 Cal 251 (256) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali.*
('15) 2 AIR 1915 Cal 759 (761) : 27 Ind Cas 780 (DB), *Dhakeshwar Prosad Singh* v. *Harihar Prosad Narain Singh.*
('21) 8 AIR 1921 Mad 326 (326) (DB), *Sinnanan Chetty* v. *Siva Kami Ammal.*
('36) 23 AIR 1936 Mad 500 (502) : 162 Ind Cas 828, *Sreeramulu* v. *Ramakrishnayya.*
('29) 16 AIR 1929 Bom 139 (140) : 53 Bom 353 : 116 Ind Cas 225, *Shankar Mahadev* v. *Bhikaji Ramchandra.*
('22) 9 AIR 1922 Bom 150 (151) : 46 Bom 213 : 64 Ind Cas 205 (DB), *Chandbhai Mahmadbhai* v. *Hasanbhai Rahimutula.*
('16) 3 AIR 1916 All 134 (136) : 38 All 138 : 34 Ind Cas 244 (DB), *Jai Kishen* v. *Budhanand.*
('19) 6 AIR 1919 Oudh 39 (43) : 22 Oudh Cas 978 : 54 Ind Cas 269, *Lachmi Narayan* v. *Raj Narayan.*
('23) 10 AIR 1923 Lah 311 (312) : 71 Ind Cas 847, *Wazir* v. *Girdhari.*
('20) 7 AIR 1920 Lah 234 (235) : 55 Ind Cas 450, *Basanta* v. *Dhanna Singh.*
('34) 21 AIR 1934 Pat 612 (614) : 13 Pat 356 : 155 Ind Cas 756 (DB), *Birendra Keshri* v. *Bahuria Saraswati Kuer.*
('27) 14 AIR 1927 Oudh 552 (552) : 2 Luck 686 : 105 Ind Cas 302 (DB), *Rameshwar Mt. Sheorani.*
('27) 14 AIR 1927 Oudh 347 (349) : 2 Luck 618 : 104 Ind Cas 400, *Wajihuddin Ashraf* v. *Ahmad Ashraf.*
('30) 17 AIR 1930 Nag 300 (303) : 27 Nag L R 152 : 127 Ind Cas 889, *Jairam* v. *Bhilaji.*
('33) 20 AIR 1933 Lah 91 (92) : 141 Ind Cas 404, *Mt. Radha* v. *Ajudhia Prashad.*
('41) ILR (1941) Nag 434 (436) : 1941 Nag L Jour 439 (DB), *Abdul Sattar* v. *Bhikarilal.*
See also Note 17 on S. 82.

3. ('21) 8 AIR 1921 Cal 166 (169) : 57 Ind Cas 868 (DB), *Raj Kumari Debi* v. *Mukunda Lal.*
('99) 22 Mad 332 (335) : 9 Mad L Jour 166 (DB), *Perianna Servaigaran* v. *Marudainayagam Pillai.*
('24) 11 AIR 1924 Oudh 85 (89) : 73 Ind Cas 113 (DB), *Lutar Ram* v. *Lal Ranjit Singh.*
See also Note 15 on S. 92.

4. ('09) 1 Ind Cas 825 (826) : 31 All 166 (DB), *Har Prasad* v. *Raghunandan Prasad.*
('06) 4 Cal L Jour 79 (84) (DB), *Raushan Ali Khan* v. *Kali Mohan.*
('10) 5 Ind Cas 165 (168) (DB) (Cal), *Digambar Das* v. *Harendra Narain.*

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Note 1

There was also a difference of opinion as to the class of mortgages to which the section applied. It was held in some cases[5] that the section applied only to mortgages under which possession was obtained, while other cases[6] held a contrary view. Their Lordships of the Privy Council in *Ahmad Wali Khan* v. *Mussamat Shamsh-ul-Jahan Begum*[7] took the latter view and observed as follows :

> "That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and therefore, on redemption properly repasses. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption."

In cases of usufructuary mortgages it was held that a co-mortgagor should obtain possession and retain it in order to enable him to claim a charge.[8] If he obtained possession, he could retain it till he was paid by the co-mortgagors the amount representing their share of the

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('34) 21 AIR 1934 Pat 612 (615) : 13 Pat 356 : 155 Ind Cas 756 (DB), *Birendra Keshri* v. *Bahuria Saraswati Kuer.*

('28) 15 AIR 1928 Cal 593 (595) : 55 Cal 1193 : 109 Ind Cas 247 (DB), *Mohendra Nath* v. *Khetra Mohan.*

('19) 6 AIR 1919 Oudh 39 (42) : 22 Oudh Cas 278 : 54 Ind Cas 269, *Lachmi Narayan* v. *Raj Narayan.*

[But see ('25) 12 AIR 1925 Oudh 613 (615) : 92 Ind Cas 559, *Jahan Begam Qamar* v. *Munney Mirza.*

('06) 9 Oudh Cas 259 (267) (DB), *Raja Ali Mohammad* v. *Deputy Commissioner of Barabanki.*

5. ('99) 22 Mad 332 (335) : 9 Mad L Jour 166 (DB), *Perianna Servaigaran* v. *Marudainayagam Pillai.*

('05) 9 Cal W N 865 (867) (DB), *Jahan Ara Begum* v. *Shujauddin Bukht.*

('04) 26 All 407 (417) : 1 All L Jour 148 (FB), *Ibn Hasan* v. *Brijbhukan Saran.*

6. ('01) 4 Oudh Cas 273 (276), *Ghulam Maula* v. *Mt. Banno.*

('28) 15 AIR 1928 Mad 950 (951) : 51 Mad 810 : 112 Ind Cas 6 (DB), *Ramchandra* v. *Narayanaswami.*

('25) 12 AIR 1925 Oudh 613 (613) : 92 Ind Cas 559, *Jahan Begam Qamar* v. *Munney Mirza.*

('07) 3 Nag L R 92 (93), *Mohan Seith* v. *Kashinath.*

('04) 26 All 227 (232) : 1904 All W N 3 (DB), *Bhagwan Das* v. *Hardei.*

('18) 5 AIR 1918 Pat 322 (323) : 3 Pat L Jour 490 : 46 Ind Cas 479 (DB), *Mt. Hira Kuer* v. *Palku Singh.*

7. ('06) 28 All 482 (487) : 33 Ind App 81 (PC).

8. ('24) 11 AIR 1924 Oudh 209 (217) : 75 Ind Cas 579 (DB), *Mohan Singh* v. *Sewa Ram.*

('17) 4 AIR 1917 Oudh 50 (52) : 20 Oudh Cas 72 : 39 Ind Cas 186, *Jag Mohan Singh* v. *Sita Ram Singh.*

('06) 9 Oudh Cas 259 (266) (DB), *Raja Ali Mohammad* v. *Deputy Commissioner of Barabanki.*

('25) 12 AIR 1925 Oudh 629 (630) : 88 Ind Cas 544 (DB), *Hamid Ali Beg* v. *Dularey Lal.*

('33) 20 AIR 1933 Oudh 28 (31) : 140 Ind Cas 580 (DB), *Madho Singh* v. *Kalloo Singh.*

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mortgage-money.[9] He could not sue for sale.[10] See also the undermentioned cases.[11]

The conflict of opinion has now been set at rest by the present amended section, recognising the right of the redeeming co-mortgagor to subrogation under S. 92.[12] In enforcing such right of subrogation the redeeming co-mortgagor has, under this section, a right to add, to the mortgage-money recoverable from his co-mortgagors, such portion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Apart from the right of *subrogation* given by this section and S. 92, a redeeming co-mortgagor has a right to a *charge* for contribution against his co-mortgagors under S. 82 read with S. 100.[13] This charge cannot, however, like a right of subrogation, be enforced against a *bona fide* transferee without notice of the charge.

2. "Redeems."—As to the meaning of "redemption" generally, see Note 4 on S. 60. The payment of the *balance* due upon a mortgage is as much a redemption as the whole sum due in a case where there has been no part payment previously. So where one of several

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9. ('92) 1892 Bom P J 412 (DB), *Naro* v. *Ragho.*
('31) 18 AIR 1931 All 76 (82) : 133 Ind Cas 142 (DB), *Fazal Rab* v. *Manzoor Ahmad.*
('05) 27 All 178 (182) : 1 All L Jour 579 (DB), *Rugad Singh* v. *Sat Narain Singh.*
('35) 22 AIR 1935 Oudh 245 (248) : 154 Ind Cas 267 (DB), *Nisar Ahmed Khan* v. *Manjur Ahmad Khan.*

10. ('14) 1 AIR 1914 Oudh 234 (235) : 22 Ind Cas 918, *Mamola* v. *Kedar Nath.*

11. ('15) 2 AIR 1915 All 450 (452) : 28 Ind Cas 677, *Shafat-ullah* v. *Izzat-ullah.* (He could sue for possession.)
('19) 6 A I R 1919 Mad 284 (285) : 49 Ind Cas 460 (DB), *Iyathurai Aiyar* v. *Kuppamuthu Padayachi.* (He can only enforce the charge.)
('88) 11 Mad 416 (418) (DB), *Moidin* v. *Oothumanganni.* (He can enforce charge as well as sue for possession.)
('28) 15 A I R 1928 Mad 950 (951) : 51 Mad 810 : 112 Ind Cas 6 (DB), *Ramachandra* v. *Narayanaswami.* (Puisne mortgagee paying off prior mortgage has a charge under S. 95.)
('22) 9 AIR 1922 All 153 (154) : 44 All 67 : 63 Ind Cas 604 (DB), *Bora Shib Lal* v. *Munni Lal.* (Puisne mortgagee paying off prior mortgage is entitled to subrogation under S. 74.)
('28) 15 A I R 1928 All 241 (244) : 50 All 569 : 109 Ind Cas 38 (DB), *Aziz Ahmad Khan* v. *Chote Lal.* (Do.)
('27) 14 A I R 1927 Pat 117 (121) : 98 Ind Cas 968 (DB), *Muhammad Tabrak* v. *Dalip Narain.* (Do.)
('31) 18 A I R 1931 Cal 251 (253, 254, 255) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali.* (Do.)

12. ('39) 26 A I R 1939 Mad 949 (953) : 189 Ind Cas 435 (DB), *Subbarayudu* v. *Lakshminarasamma.*
('31) 18 A I R 1931 Cal 251 (252) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali.*
See the Report of the Special Committee, clause 47 printed on page 22 (63, 64).

13. ('42) 29 AIR 1942 Oudh 449 (457) : 203 Ind Cas 285 (FB), *Brij Bhukhan* v. *Bhagwan Datt.*
('42) 29 A I R 1942 Nag 111 (113) : I L R (1942) Nag 393 : 201 Ind Cas 472, *Balchand Pyarelal* v. *Ratanchand Dhannalal.*

co-mortgagors pays off the balance due on the mortgage he would be entitled to the rights given by this section.[1]

3. "Expenses properly incurred." — The redeeming co-mortgagor can, under this section, claim a proportion of such expenses only as have been *properly incurred*.[1] The *solatium* of five per cent. on the purchase money paid to the auction purchaser in order to set aside a sale under O. 21, R. 89 of the Code of Civil Procedure is, it is conceived, not an expense that can be said to have been properly incurred.[2] This section has now resolved the doubt that existed before as to whether the words "expenses properly incurred" meant only the expenses of redemption or included the mortgage-money also,[3] by treating the expenses of redemption as independent of the mortgage-money and by enacting that the expenses so incurred should be added to the mortgage-money recoverable from the other co-mortgagors.

4. Interest. — The old section did not contain any provision for payment of *interest* on the proportionate share of the redemption amount attributable to the other co-mortgagors. It was held in some cases arising thereunder that the redeeming co-mortgagor was not placed completely in the position of the mortgagee whom he redeemed, and that the question of payment of interest on the redemption amount and of the date from which it was payable was a matter of *discretion* of the Court.[1] In other cases[2] it was held that the redeeming co-mortgagor

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Note 2

1. ('18) 5 AIR 1918 Pat 322 (323) : 3 Pat L Jour 490 : 46 Ind Cas 479 (DB), *Mt. Hira Kuer* v. *Palku Singh.*

Note 3

1. ('12) 15 Ind Cas 500 (500)(DB)(Bom), *Bhaiji Shamrao* v. *Haji Miya Mahamad.*
('28) 15 AIR 1928 Nag 246 (248) : 109 Ind Cas 777, *Ganpat* v. *Shamlal.*

2. See Note 24 on Section 92.
[*See also* ('31) 18 AIR 1931 Pat 394 (402) : 10 Pat 528 : 134 Ind Cas 139 (DB), *Bhagwati Saran* v. *Maiyan Murat.* (Case, however, under Ss. 69 and 70 of the Contract Act.)]

3. ('31) 18 AIR 1931 Cal 251 (253) : 58 Cal 1167 : 130 Ind Cas 889 (FB), *Umar Ali* v. *Asmat Ali.*
('06) 9 Oudh Cas 259 (266) (DB), *Raja Ali Mohammad Khan* v. *Deputy Commissioner, Bara Banki.*

Note 4

1. ('34) 21 AIR 1934 Pat 612 (614) : 13 Pat 356 : 155 Ind Cas 756 (DB), *Birendra Keshri Prasad* v. *Bahuria Saraswati Kuer.* (6 per cent., was awarded from the date on which he became entitled to the charge.)
('10) 5 Ind Cas 165 (168) (DB) (Cal), *Digambar Das* v. *Harendra Narain.*
('98) 1898 All W N 39 (40) (DB), *Rani* v. *Amir Bakhsh.* (Redeeming co-mortgagor is entitled to reasonable interest from the date of redemption.)
('06) 4 Cal L Jour 79 (83) (DB), *Raushan Ali* v. *Kali Mohan.* (12 per cent., rate higher than that provided in the document.)
('19) 6 AIR 1919 Nag 80 (80) : 49 Ind Cas 230, *Jago* v. *Arjun.* (Interest at 12 per cent. was awarded.)
('06) 28 All 482 (487) : 33 Ind App 81 (PC), *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam.* (Interest at six per cent. awarded.)
('28) 15 AIR 1928 Nag 246 (248) : 109 Ind Cas 777, *Ganpat* v. *Shamlal.*

2. ('25) 12 AIR 1925 Bom 484 (485) : 49 Bom 591 : 88 Ind Cas 658 (DB), *Gafur Imam* v. *Amir Isab.*

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was not entitled to claim any interest before suit unless he had *demanded* interest by notice to the other co-mortgagors. In the undermentioned case[3] the Chief Court of Oudh held that Art. 115 of the Limitation Act applies to a claim for such interest and that therefore no interest for a period over three years prior to date of suit could be awarded.

Under the present section the redeeming co-mortgagor is entitled by "subrogation" under S. 92 to the rights of the mortgagee paid off and, will, it is conceived, be entitled to claim interest in the same way as the prior mortgagee could have done. See Note 24 on S. 92.

5. Co-mortgagor's liability to contribute. — See Notes 3 and 17 on S. 82.

6. **Such proportion as is attributable to their share in the property.** — The proportion attributable to the co-mortgagor's share in the property must be ascertained by reference to S. 82. The redeeming co-mortgagor has to contribute *pro tanto* to the extent of the value of his share and can recover only the balance from the other co-mortgagors.[1] This right to recover the balance is, however, not a right to recover from all the other co-mortgagors *in solidum* the mortgage-money. He has to split up his claim into a claim against each co-mortgagor in consonance with S. 82.[2] He is not entitled to a sale of the other co-mortgagors' shares jointly on their failure to pay their proportion of the mortgage-debt. As each co-mortgagor's liability is separate, the redeeming co-mortgagor is entitled to separate decrees against each of the co-mortgagors in default of payment of their proportionate shares.[3]

A co-mortgagor satisfying a mortgage *decree* and obtaining an *assignment* of the decree is, however, entitled to execute the decree as a transferee of the decree against the other co-mortgagors and, in the execution proceedings, the matters relating to contribution based upon the values of their respective property cannot be urged.[4]

7. **Persons deriving title from the mortgagor.** — Under the old section there was some difference of opinion as to whether the section was restricted to mortgagors in the sense of persons who have actually executed the mortgage or whether it included cases where the

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('29) 16 AIR 1929 Oudh 290 (292) : 117 Ind Cas 409, *Nakkoo Das* v. *Rab Saran Singh.*

('31) 18 AIR 1931 Pat 394 (402) : 10 Pat 528 : 134 Ind Cas 139 (DB), *Bhagwati Saran* v. *Maiyan Murat.*

3. ('25) 12 AIR 1925 Oudh 613 (614) : 92 Ind Cas 559, *Jahan Begam* v. *Munney Mirza.*

Note 6

1. ('32) 19 AIR 1932 All 250 (252) : 137 Ind Cas 86 (DB), *Collector of Farrukhabad* v. *Kishore Mohan.*

2. ('31) 18 AIR 1931 Cal 251 (255) : 130 Ind Cas 889 : 58 Cal 1167 (FB), *Umar Ali* v. *Asmat Ali.*

('28) 15 AIR 1928 All 241 (244, 245) : 109 Ind Cas 38 : 50 All 569 (DB), *Aziz Ahmad Khan* v. *Chhote Lal.*

3. ('01) 4 Oudh Cas 273 (276), *Ghulam Maula Khan* v. *Mt. Banno.*

4. ('39) 26 AIR 1939 Cal 425 (427) : 183 Ind Cas 792 (DB), *C. K. Bezbarua* v. *Golak Chandra.*

mortgage is originally made by a single mortgagor but subsequently the equity of redemption vests in several persons by devolution or transfer. The general trend of opinion was that the section included the latter class of cases,[1] some cases, however, taking the contrary view.[2] The introduction of S. 59A by the amending Act of 1929 now makes the position clear. "Mortgagor" under that section includes persons deriving title from him and where the equity of redemption vests in several persons, such persons would be "several mortgagors" within the meaning of this section.[3]

A *lessee* or an assignee of a *mokurrari* interest of one of several mortgagors cannot however be considered "one of several mortgagors" and cannot claim relief under this section.[4]

A vendee of a *sham* title from the mortgagor gets no interest by the transfer, and cannot claim any rights under this section.[5]

8. Personal remedy. — There is a difference of opinion as to whether one co-mortgagor can sue for a *personal decree* for contribution against the other co-mortgagors under Ss. 69 and 70 of the Contract Act. See Note 14 on S. 82 and the undermentioned cases.[1] As to whether such a suit is cognizable by a Court of Small Causes, see Note 27 on that section.

Note 7

1. ('14) 1 AIR 1914 Oudh 234 (235): 22 Ind Cas 918, *Mt. Mamola* v. *Kedar Nath.* (One of several heirs of mortgagor redeeming mortgage.)
('28) 15 AIR 1928 Mad 950 (951) : 51 Mad 810 : 112 Ind Cas 6 (DB), *Ramchandra* v. *Narayanaswami.* (A purchaser of a portion of the mortgage property must be deemed to be one of the mortgagors.)
('28) 15 AIR 1928 Cal 593 (596) : 109 Ind Cas 247 : 55 Cal 1193 (DB), *Mahendra Nath* v. *Khetra Mohan.* (Do.)
('19) 6 AIR 1919 Oudh 267 (269) : 22 Oudh Cas 112 : 52 Ind Cas 91, *Narotam Prasad* v. *Shankar Singh.* (Do.)
('15) 2 AIR 1915 Cal 759 (762) : 27 Ind Cas 780 (DB), *Dhakeshwar Prosad* v. *Harihar Prosad.* (Do.)
('06) 9 Oudh Cas 259 (265) (DB), *Raja Ali Muhammad* v. *Deputy Commissioner.* (Do.)
('07) 3 Nag L R 92 (93), *Mohan Seith* v. *Kashinath.* (Do.)
('27) 14 AIR 1927 All 626 (626, 627) : 103 Ind Cas 84 (DB), *Mahomed Faridud-din* v. *Nand Ram.* (Do.)

2. ('05) 9 Cal W N 865 (867) (DB), *Nawab Jahan Ara* v. *Mirza Shujauddin.* (The words 'one of several mortgagors' do not cover one of several representatives of a deceased mortgagor.)
('29) 16 AIR 1929 Mad 860 (862) : 123 Ind Cas 364 (DB), *Nangunni Kovilamma* v. *Nedungadi.* (Mortgage by deceased karnavan—Member of Tarwad owning property is not one of several mortgagors.)

3. ('36) 23 AIR 1936 Oudh 47 (49): 159 Ind Cas 54 (DB), *Nisar Ahmad* v. *Manzur Ahmad.*

4. ('06) 4 Cal L Jour 79 (85) (DB), *Raushan Ali Khan* v. *Kali Mohan Moitra.*

5. ('23) 10 AIR 1923 Mad 392 (396) : 74 Ind Cas 416 (DB), *Gopala Iyengar* v. *Mummachi Reddiar.*

Note 8

1. ('31) 18 AIR 1931 Cal 251 (253, 256) : 130 Ind Cas 889 : 58 Cal 1167 (FB), *Umar Ali* v. *Asmat Ali.* (Can claim personal remedy against co-mortgagors under S. 69, Contract Act.)

Section 95 Notes 9-10

9. Limitation.— See Note 15 on S. 92, Notes 10 and 14 on Art. 132 of the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., and the undermentioned cases.[1]

10. Section if retrospective. — It has been held by the Chief Court of Oudh that the section is retrospective in operation.[1]

Section 96

Mortgage by deposit of title-deeds.

[a]**96.** The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

a. The original section as it stood in the year 1882 was repealed by the Civil Procedure Code, 1908; see now Order 34 Rule 12. The present section was inserted by Section 48 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. History of the section.
2. Scope.

1. History of the section. — This section is new. It has been inserted by S. 48 of the Transfer of Property (Amendment) Act, XX of 1929. Before the amendment, the Act did not define a mortgage by deposit of title-deeds. The only provision relating to equitable mortgages was that contained in the last paragraph of the old S. 59 of the Act, by which the legal formalities required in respect of other mortgages were dispensed with in the case of a mortgage by deposit of title-deeds in certain towns.

The law in relation to such mortgages as administered prior to 1929, was neither uniform nor clear. The High Courts followed the practice observed in their own Courts.[1] The High Court of Bombay held that an equitable mortgagee was entitled to maintain an action for foreclosure or sale governed by the 60 years' period of limitation under Art. 147 of the Limitation Act.[2] The High Court of Calcutta, though it allowed a suit for foreclosure or sale to be instituted, granted a decree

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('78) 4 Cal 369 (373) (DB), *Mothooranath* v. *Kristokumar.* (Do.)
('05) 9 Cal W N 865 (867, 868) (DB), *Nawab Jahan Ara Begum* v. *Mirza Shujauddin.* (Do.)

Note 9

1. ('33) 20 AIR 1933 Bom 114 (118) : 144 Ind Cas 8 : 57 Bom 134 (DB), *Ramchandra* v. *Ganesh.* (Enforcement of charge governed by Art. 132.)
('10) 5 Ind Cas 165 (166) (DB) (Cal), *Digambardas* v. *Harendra Narain.*
('17) 4 AIR 1917 Nag 75 (76) : 45 Ind Cas 904, *Tuka Ram* v. *Arjuna.* (Charge enforceable although the personal remedy under S. 69, Contract Act, is barred.)

Note 10

1. ('42) 29 AIR 1942 Oudh 449 (456) : 203 Ind Cas 285 (FB), *Brij Bhukhan* v. *Bhagwan Datt.*

Section 96 — Note 1

1. ('90) 14 Bom 269 (273) (DB), *Maneckji Framji* v. *Rustomji Naserwanji.*
('97) 24 Cal 348 (350) : 1 Cal W N 225, *Srinath Roy* v. *Godadhur Das.*
2. ('90) 14 Bom 269 (272, 273) (DB), *Maneckji Framji* v. *Rustomji Naserwanji.*

only for *sale*.[3] In Madras,[4] Rangoon,[5] and Sind,[6] the procedure relating to simple mortgages was being followed. In the undermentioned cases[7] a *bona fide* purchaser for value of property subject to an equitable mortgage, without notice of the mortgage, was held entitled to the property free of the equitable mortgage.

With a view to remove these anomalies, a new definition of a mortgage by deposit of title-deeds was inserted in S. 58, cl. (f), and the present section was enacted making the provisions relating to simple mortgages applicable to equitable mortgages.[8]

In order to provide against hardships likely to be caused by this section in provinces where a different view had been taken, S. 15, sub-s. (2) of the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, provided as follows :

> "Notwithstanding anything contained in S. 9 of this Act, in the Presidency of Bombay and such other territories as the Central Government may, by notification in the Official Gazette, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the date of the commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable."

Section 96 of the Transfer of Property Act, 1882, was repealed in 1908, by the Code of Civil Procedure, 1908, as it related to procedure, and a corresponding provision was inserted in that Code in the chapter relating to suits on mortgages. (See O. 34, R. 12.)

As a result of the enactment of this section, O. 34, R. 15 of the Code of Civil Procedure has been newly added making applicable, to equitable mortgages, the provisions of the Code relating to simple mortgages.

2. Scope. — This section makes such of the provisions of Ss. 59 to 95 as relate to simple mortgages, applicable to mortgages by deposit of title-deeds. But these provisions would be applicable only 'so far as may be' to mortgages by deposit of title-deeds. Thus, the second

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3. ('86) 13 Cal 322 (326) (DB), *Oo Noung* v. *Moung Htoon Oo.*
('97) 24 Cal 348 (350) : 1 Cal W N 225, *Srinath Roy* v. *Godadhur Das.*

4. ('28) 15 AIR 1928 Mad 909 (913) : 112 Ind Cas 278 (DB), *Sundaramma* v. *Seeta Ramayya.*
('28) 15 AIR 1928 Mad 919 (922) : 109 Ind Cas 170 (DB), *Kirmany and Sons* v. *Aga Ali Akbar.*

5. ('29) 16 AIR 1929 Rang 107 (109) : 118 Ind Cas 407, *V. M. R. V. Chettyar Firm* v. *Asha Bibi.*

6. ('28) 15 AIR 1928 Sind 17 (20) : 105 Ind Cas 765 : 22 Sind L R 222, *Punjab National Bank, Ltd.* v. *Mulji Morarji.*

7. ('69) 1 N W P H C R 166 (168) (DB), *Bunseedhur* v. *Heera Lall.*
(1862) 9 Moo Ind App 303 (322, 323) (PC), *Varden Seth Sam* v. *Luckpathy Royjee.*

8. See Clause 47 (now clause 49) of the Select Committee Report and Section 48 of Act XX of 1929.

Section 96 Note 2

paragraph of S. 59 of the Act requires a simple mortgage for less than Rs. 100 to be effected only by a registered instrument signed by the mortgagor and attested by two witnesses. Again, section 60 entitles a mortgagor on redemption to require the mortgagee to deliver the *mortgage deed* and to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, in addition to the return of all the documents relating to the property mortgaged, in his possession. These two provisions obviously cannot be made applicable to mortgages by deposit of title-deeds, inasmuch as no deed at all is necessary to be executed in such cases.

Section 97

97. [Application of proceeds.] *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*

See now the Code of Civil Procedure, O. 34, Rr. 12 and 13.

Anomalous Mortgages.

Section 98

98. In the case of [a][an anomalous mortgage] the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Rights and liabilities of parties to anomalous mortgages.

a. These words were substituted by Section 49 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The old section ran as follows :

"*98.* In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage."

Synopsis

1. Scope of the section.
2. Provisions of Section 60 apply to anomalous mortgages.
3. Applicability of other provisions of Act where contract is silent on the point.
3a. Applicability of general provisions of law.
4. Mortgagee entitled under deed to foreclosure and sale — Discretion of Court to grant decree for sale. See Note 18 on Section 67 and the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edn., O. 34, R. 4, N. 9.
5. Combination of a simple mortgage and a usufructuary mortgage.
6. Combination of a usufructuary mortgage and a mortgage by conditional sale.
7. Kanom.
8. Otti.
9. Peruarthum.
10. Iladarawara.

Other Topics (miscellaneous)

Amendment, whether retrospective. See Note 5.

Anomalous mortgages governed by local usage — Instances. See Notes 1 and 7 to 10.

Section 98
Note 1

1. Scope of the section. — Prior to the amendment in 1929, there was no definition in the Act of an anomalous mortgage, but the old S. 98 dealt with certain classes or types of anomalous mortgages. The amending Act of 1929 introduced in S. 58, cl. (g) a definition of "anomalous mortgage" and the present section now deals only with rights and liabilities of the parties to such a mortgage.[1]

Under this section the rights and liabilities of the parties under an anomalous mortgage are to be determined by their contract as evidenced in the mortgage deed, and so far as such contract does not extend, by local usage.[2] Thus, the question whether a mortgagee under an anomalous mortgage has a right to claim a decree for sale or for foreclosure or for both, or a personal decree for the mortgage-money, will depend upon the terms of the particular contract of mortgage.[3] He cannot claim any right expressly or impliedly negatived by the contract.[4] Or if those rights, though given, are controlled or limited by the contract to a particular state of circumstances, he will be entitled to claim those rights only subject to such limitations.[5]

Section 98 — Note 1

1. See the Report of the Special Committee, under Cl. 19 and Cl. 48 printed on page 22 (48, 64).

2. ('01) 26 Bom 252 (258) : 3 Bom L R 778 (F B), *Tukaram* v. *Ramchand.*
('25) 12 AIR 1925 Mad 881 (882) : 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
('90) 12 All 203 (205, 206) : 1890 All W N 87 (DB), *Hikmatullah Khan* v. *Imam Ali.* (Anomalous mortgage — Mortgagee entitled to possession — Possession not delivered—Mortgagee held entitled to sue for mortgage money.)
[*See also* ('15) 2 AIR 1915 Oudh 16 (22, 23) : 18 Oudh Cas 10 : 28 Ind Cas 161 (DB), *Sunder Dei* v. *Baldeo Baksh.*]

3. ('10) 6 Ind Cas 795 (796) (DB) (All), *Salamat Ullah* v. *Pratab Singh.* (A provision giving the usufructuary mortgagee power to sell by institution of suit takes the mortgage out of the category of usufructuary mortgage in S. 58 (d) and the provision is given effect to.)
('27) 14 AIR 1927 Cal 836 (840) : 104 Ind Cas 833 : 54 Cal 687 (DB), *Solema Bibi* v. *Hofez Mahomed.* (Foreclosure.)
('37) 24 AIR 1937 Pat 261 (262) : 169 Ind Cas 75 (DB), *Beni Madho* v. *Janki Pandey.* (Personal decree.)
[*See also* ('85) 11 Cal 237 (244) : 12 Ind App 1 (P C), *Deputy Commissioner of Rae Barelli* v. *Rampal Singh.*]

4. ('19) 6 AIR 1919 P C 121 (123) : 15 Nag L R 134 : 56 Ind Cas 717 (P C), *Madhorao* v. *Gulam Mohiuddin.* (If the intention appears that sale was not contemplated, the mortgagee has no right to a judicial sale.)
('03) 6 Oudh Cas 167 (173, 174), *Tikam Singh* v. *Makrand Singh.* (*Held* on construction that mortgagee had right to obtain possession only and not of sale.)
('28) 15 AIR 1928 Mad 226 (226) : 107 Ind Cas 511 (DB), *Narayana Murthi* v. *Prudhvisinghi Santo.* (Right to be in possession only, not of sale.)

5. ('19) 6 AIR 1919 Oudh 418 (419) : 21 Oudh Cas 341 : 50 Ind Cas 220, *Kalka* v. *Mathura Das.* (A deed of anomalous mortgage did not contain any independent covenant to pay except the usual stipulation for repayment after the fixed term; there was, however, a personal remedy against the debtor available to the creditor if the whole of the debt could not be satisfied out of the sale proceeds of the mortgaged property. *Held* that the creditor could not get a simple money decree, as that covenant could be availed of only in a certain contingency which had not arisen.)
('24) 11 AIR 1924 Cal 592 (594) : 81 Ind Cas 768 (DB), *Gajadhar Agarwalla* v. *Sibananda Predhani.* (Right of sale only on failure to redeem after expiry of 8 years—*Held*, the right did not arise before 8 years had expired.)

Section 98 Notes 1–3

In so far as the contract does not extend, the section says that the rights and the liabilities will be governed by the local usage. The instances of anomalous mortgages in which the rights and liabilities are governed by local usage are provided by the various customary mortgages prevalent in different parts of India, such as *Kanom* and *Otti* in Malabar and *Iladarawara* in South Kanara.

2. Provisions of S. 60 apply to anomalous mortgages. — As seen in Note 29 on S. 60 the provisions of S. 60 apply also to anomalous mortgages and therefore, stipulations in a deed of anomalous mortgage amounting to a clog on the equity of redemption are invalid.[1] The contrary view expressed in the undermentioned cases[2] is no longer good law.

3. Applicability of other provisions of Act where contract is silent on the point.—As has been seen already in Note 1, if the contract of anomalous mortgage expressly or impliedly negatives any right or remedy given to the parties under other provisions of this Act, such provisions cannot be applied.[1] But if the contract of mortgage is *silent* on any particular point and the application of the other provisions of this Act is not inconsistent with the contract, there is no reason why such provisions should not be applied. In the undermentioned case of the Lahore High Court[2] where, in an anomalous

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Note 2

1. ('22) 9 AIR 1922 P C 17 (19) : 44 All 185 : 25 Oudh Cas 8 : 49 Ind App 60 : 66 Ind Cas 853 (PC), *Mahomed Sher Khan* v. *Swami Dayal.* (Appeal from AIR 1915 Oudh 109 : 18 Oudh Cas 105.)

('25) 12 AIR 1925 Mad 366 (366) : 82 Ind Cas 809, *Chellakutti Naiken* v. *Vengappa Pillai.*

('18) 5 AIR 1918 Cal 638 (639) : 40 Ind Cas 894 (DB), *Badal Molla* v. *Chemai Mondal.*

('18) 5 AIR 1918 Upp Bur 32 (33) : 39 Ind Cas 377 : 2 Upp Bur Rul 141, *Nga Po Nyun* v. *Mi Yin.*

2. ('21) 8 AIR 1921 Mad 12 (15, 18) : 57 Ind Cas 724 : 43 Mad 589 (FB), *Venkiah* v. *Pallayi.*

('14) 1 AIR 1914 Mad 42 (44) : 38 Mad 667 : 22 Ind Cas 54 (DB), *Srinivasa Aiyangar* v. *Radhakrishna Pillai.* (Per Sadashiva Aiyar, J.)

('24) 11 AIR 1924 Rang 83 (85) : 1 Rang 419 ; 76 Ind Cas 665 (DB), *Ma Min Bya* v. *Maung Chit Pe.* (AIR 1922 P C 17 : 25 Oudh Cas 8 : 44 All 185 : 49 Ind App 60 (PC), Not referred.)

('16) 3 AIR 1916 Mad 841 (842, 844) : 30 Ind Cas 569 : 39 Mad 1010 (DB), *Patte Muhamad* v. *Davood.*

('18) 5 AIR 1918 Mad 509 (511) : 43 Ind Cas 989 (DB), *Kuttikatta* v. *Kunhikavamma.*

Note 3

1. ('32) 19 AIR 1932 Oudh 178 (179) : 139 Ind Cas 61 (DB), *Ram Sarup* v. *Gaya Prasad.* (Section 68 not applied as there was a contract to the contrary.)

('04) 7 Oudh Cas 11 (12), *Ram Parshad* v. *Umrao.* (Right of sale not intended to be given—S. 68 not applied.)

('97) 21 Mad 1 (3) : 8 Mad L Jour 113 (DB), *Visvalinga Pillai* v. *Palaniappa Chetti.*

2. ('35) 22 AIR 1935 Lah 103 (104) : 16 Lah 612 : 158 Ind Cas 206 (DB), *Qadir Parast Khan* v. *Mehr Nur Mohammad.*

mortgage there was a *covenant to pay*, but the contract was silent about the mode of enforcing such covenant, it was held that it could be enforced under S. 68 (1) (a) of the Act. The High Court of Calcutta seems, however, to be of the opinion that the moment the mortgage in question is found to be an anomalous one, Ss. 67 and 68 cannot be applied at all.[3]

3a. Applicability of general provisions of law. — It has been held by the Patna High Court that the section does not prevent the application of general principles of law, such as the doctrine of substitution of securities, to anomalous mortgages.[1] In that case there was nothing in the contract of mortgage inconsistent with the application of the doctrine. If the contract expressly or impliedly negatives any such right of substitution it is clear that the principle cannot be applied in opposition to the contract.

4. Mortgagee entitled under deed to foreclosure and sale—Discretion of Court to grant decree for sale. —See Note 18 on S. 67 and the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edn., O. 34 R. 4, Note 9.

5. Combination of a simple mortgage and a usufructuary mortgage. — There was a conflict of opinions before the amendment of this section in 1929, as to whether a combination of a simple mortgage and a usufructuary mortgage was an anomalous mortgage. The general view was that it was not an anomalous mortgage[1] though some cases regarded it as an anomalous mortgage.[2]

There was also a difference of opinion prior to the amendment in 1929 as regards the *rights* and *liabilities* of the parties to such a combined mortgage. According to one view which did *not* regard it as an anomalous mortgage, the rights and liabilities of the parties were determined by the provisions of the Act itself.[3] The other view was that

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3. ('24) 11 AIR 1924 Cal 592 (594) : 81 Ind Cas 768 (DB), *Gajadhar Agarwalla* v. *Sibananda Predhani.*

Note 3a

1. ('37) 24 AIR 1937 Pat 345 (347) : 170 Ind Cas 134, *Ganga Prasad* v. *Dulari Saran.*

Note 5

1. ('29) 16 AIR 1929 P C 139 (141) : 4 Luck 363 : 56 Ind App 299 : 116 Ind Cas 414 (PC), *Narsingh Partab* v. *Md. Yaqub Khan.*
('13) 19 Ind Cas 748 (748) : 16 Oudh Cas 90, *Lalta Prasad* v. *Horilal.*
('04) 7 Oudh Cas 11 (12), *Ram Parshad* v. *Umrao.*
('18) 5 AIR 1918 Mad 572 (573) : 42 Ind Cas 438 (DB), *Pandiyan Pillai* v. *Vellayappa Rowther.* (Per Sadashiva Aiyar, J.).

2. See Note 35 on S. 58. Also see :
('03) 27 Bom 600 (607) : 5 Bom L R 537 (DB), *Amarchand Lakhmaji* v. *Kila Morar.*

3. ('29) 16 AIR 1929 P C 139 (141) : 4 Luck 363 : 56 Ind App 299 : 116 Ind Cas 414 (PC), *Narsing Pratab* v. *Md. Yaqub Khan.*
('14) 1 AIR 1914 Mad 42 (44) : 38 Mad 667 : 22 Ind Cas 54 (DB), *Srinivasa Ayyangar* v. *Radha Krishnam Pillai.* (Per Sadashiva Aiyer, J.)
('04) 27 Mad 526 (528) : 14 Mad L Jour 61 (FB), *Kangaya Gurukal* v. *Kalimuthu Annavi.*

Section 98
Note 5

though such mortgages were *not* anomalous ones, the rights and liabilities of the parties were to be determined by the terms of the mortgage-deed.[4] A third view was that such a combination constituted an anomalous mortgage within the meaning of S. 98 and hence the rights and liabilities were governed by the terms of the contract and not by the provisions of the Act.[5]

The amendment in 1929 has put an end to the above conflict by including such a mortgage in the definition of an anomalous mortgage. It is clear that the rights and liabilities of the parties to such a mortgage would now be governed by the terms of the contract as evidenced by the mortgage-deed and, so far as such contract does not extend, by local usage.[6] In the undermentioned cases[7] the amendment has been held not to be retrospective.

A mortgagee under such a mortgage has a right of sale[8] and also a right to obtain a decree for the mortgage-money on the basis of the personal covenant in the mortgage.[9]

See also Note 41 on section 58.

('24) 11 AIR 1924 Cal 592 (594) : 81 Ind Cas 768 (DB), *Gajadhar Agarwalla* v. *Sibananda Predhani.*

('18) 5 AIR 1918 Mad 572 (573) : 42 Ind Cas 438 (DB), *Pandiyan Pillai* v. *Vellayappa Rowther.*

('92) 15 Mad 366 (370) (DB), *Ramunni* v. *Brahma Dattan.*

('29) 16 AIR 1929 Sind 235 (237) : 120 Ind Cas 91 (DB), *Parumal Thawerdas* v. *Abdul Rauf.*

[*See also* ('16) 3 AIR 1916 Mad 841 (843) : 39 Mad 1010 : 30 Ind Cas 569 (DB), *Patte Muhammad* v. *Sheikh Davood.* (Obiter.)]

4. ('39) 26 AIR 1939 Pat 540 (542, 543) : 182 Ind Cas 132 (DB), *Butto Kristo Roy* v. *Gobindram Marwari.*

5. ('03) 27 Bom 600 (607) : 5 Bom L R 537 (DB), *Amarchand Lakhmaji* v. *Kila Morar.*

6. ('34) 21 AIR 1934 Rang 159 (159) : 152 Ind Cas 494, *Chan Yin Sein* v. *Mg. Aung Thein.*

7. ('34) 21 AIR 1934 Oudh 255 (256) : 10 Luck 10 : 148 Ind Cas 1167 (DB), *Ram Lochan* v. *Bachchu Choube.*

('39) 26 AIR 1939 Pat 540 (543) : 182 Ind Cas 132 (DB), *Butto Kristo Roy* v. *Gobindram Marwari.*

8. ('27) 14 AIR 1927 P C 32 (36) : 50 Mad 180 : 54 Ind App 68 : 100 Ind Cas 86 (PC), *Ramarayanimgar* v. *Maharaja of Venkatagiri.*

('13) 19 Ind Cas 748 (749) : 16 Oudh Cas 90, *Lalta Prasad* v. *Hori Lal.*

('34) 21 AIR 1934 Oudh 255 (256) : 10 Luck 10 : 148 Ind Cas 1167 (DB), *Ram Lochan* v. *Bachchu Choube.* (Express provision giving power of sale is not necessary for simple mortgage—Personal covenant carries with it power of sale by implication—Mortgagee entitled to take possession on default of mortgagor—This does not take away power of sale.)

('13) 18 Ind Cas 286 (287) (Oudh), *Har Kishen* v. *Mahabir.*

('21) 8 AIR 1921 Pat 403 (405) : 63 Ind Cas 297 (DB), *Jainandan Prasad* v. *Baijnath Saran.*

('04) 27 Mad 526 (528) : 14 Mad L Jour 61 (FB), *Kangaya Gurukal* v. *Kalimuthu Annavi.*

('35) 22 AIR 1935 Lah 103 (104) : 16 Lah 612 : 158 Ind Cas 206 (DB), *Qadir Parast Khan* v. *Mehr Nur Mohammad.*

9. ('04) 27 Mad 526 (528) : 14 Mad L Jour 61 (FB), *Kangaya Gurukai* v. *Kalimuthu Annavi.*

6. Combination of a usufructuary mortgage and a mortgage by conditional sale. — Prior to the amendment of this section in 1929, a combination of a mortgage by conditional sale and a usufructuary mortgage was not regarded as an anomalous mortgage.[1] Under the present definition of an anomalous mortgage as contained in S. 58, cl. (g), however, such a combination will clearly be an anomalous mortgage and the rights and liabilities of the parties thereto will be governed by the terms of the contract or by local usage as the case may be.

A mortgagee under this class of mortgages has a right of foreclosure.[2] Such a mortgage does not generally contain a covenant to pay and therefore, the mortgagee is not entitled to a personal decree.

7. Kanom. — A *kanom* is a customary mortgage prevalent in Malabar. It is a combination of a usufructuary mortgage and a lease,[1] and has been recognised as an anomalous mortgage.[1a] The mortgagor who is known as a *jenmi* makes a lease in favour of the mortgagee, known as kanom-holder or *kanomdar*, at a fixed rent out of which mortgagee is entitled to retain the interest due on the mortgage-debt the balance only being paid to the mortgagor. As to the rights and liabilities of the parties under this class of mortgages, see the Malabar Tenancy Act (XIV of 1930) and the undermentioned cases.[2]

('35) 22 AIR 1935 Lah 103 (104) : 16 Lah 612 : 158 Ind Cas 206 (DB), *Qadir Parast Khan* v. *Mehr Nur Mohammad.*

Note 6

1. ('24) 11 AIR 1924 Rang 83 (85) : 1 Rang 419 : 76 Ind Cas 665 (DB), *Ma Min Bye* v. *Maung Chit Pe.*

2. ('13) 21 Ind Cas 457 (458) (DB) (All), *Manohar Singh* v. *Lachman Singh.*

Note 7

1. ('19) 6 AIR 1919 Mad 320 (320) : 49 Ind Cas 312 (DB), *Govinda Menon* v. *Kuppan Nambudripad.*
('26) 13 AIR 1926 Mad 650 (651): 95 Ind Cas 3, *Visvanatha Iyer* v. *Chimmukutti Amma.*
('21) 8 AIR 1921 Mad 243 (245) : 44 Mad 344 : 62 Ind Cas 386 (DB), *Kanna Kurup* v. *Varma Raja.*
('03) 26 Mad 727 (729) : 13 Mad L Jour 374 (FB), *Kelu Nedungadi* v. *Krishnan Nair.*

1a. ('26) 13 AIR 1926 Mad 650 (651): 95 Ind Cas 3, *Visvanatha Iyer* v. *Chimmukutti Amma.*
('21) 8 AIR 1921 Mad 243 (245) : 44 Mad 344 : 62 Ind Cas 386 (DB), *Kanna Kurup* v. *Varma Raja.*
('14) 1 AIR 1914 Mad 317 (318) : 24 Ind Cas 127 (DB), *Kaderkutti* v. *Muhamad.*
('07) 30 Mad 300 (302, 303) : 17 Mad L Jour 189 (DB), *Gopalan Nair* v. *Kunhan Menon.*
('33) 20 AIR 1933 Mad 876 (879): 148 Ind Cas 1115, *Moidunni Haji* v. *Madhavan Nair.*

2. ('81) 3 Mad 382 (383) (FB), *N. V. Silapani* v. *V. M. Ashtamurti.*
('07) 30 Mad 300 (302, 303) : 17 Mad L Jour 189 (DB), *Gopalan Nair* v. *Kunhan Menon.*
('80) 2 Mad 193 (193) (DB), *Shekhara Paniker* v. *Raru Nayar.* (Kanom expressly providing for the surrender of the property demised *on demand*—Grantor held could redeem without waiting for any fixed number of years.)
('87) 10 Mad 192 (193) (DB), *Ahmed Kutti* v. *Kunhamed.*

Section 98
Notes 7–8

As a *kanom* partakes the nature of a usufructuary mortgage, the *kanomdar* has no right to bring the property to sale.[3] His only right is to remain in possession for the period of twelve years and thereafter until he is paid the *kanom* amount together with the value of improvements, if any, effected by him.[4] He does not forfeit his right to hold for twelve years by allowing the rent to fall into arrears.[5]

An *ubhayapattam* is equivalent to a *kanom* mortgage.[6]

8. **Otti.** — An *otti* is another form of anomalous mortgage prevalent in Malabar, the incidents of which are governed by local usage. As to the rights and liabilities of the parties under the local usage applicable in this class of mortgages, see the undermentioned cases.[1]

('80) 2 Mad 45 (46) (DB), *Keshava* v. *Keshava.*
('82) 5 Mad 310 (313) : 6 Ind Jur 466 (DB), *Kanara* v. *Govindan.* (Kanom containing stipulations as to compensation for improvements — Clause also to the effect that land was to be surrendered "whenever the amount advanced is ready" — *Held*, mortgagor not entitled to redeem before expiry of 12 years — Words construed as referring to period subsequent to 12 years.)
('90) 14 Mad 76 (77) (DB), *Mahomed* v. *Ali Koya.*
(1863) 1 Mad H C R 445 (446) (DB), *Ramen Nayar* v. *Kandapuni Nayar.*
(1864) 2 Mad H C R 109 (110) (DB), *Mayavanjari* v. *Nimini.*
(1864) 2 Mad H C R 161 (161) (DB), *Kellu Eradi* v. *Puapalli.*
('03) 27 Mad 26 (27, 28) (DB), *Raman Nair* v. *Vasudevan.*

3. ('99) 22 Mad 350 (351) : 9 Mad L Jour 108 (109) (DB), *Sridevi* v. *Virarayan.*
('26) 13 AIR 1926 Mad 650 (651) : 95 Ind Cas 3, *Visvanatha Iyer* v. *Chimmukutti Amma.*
('14) 1 AIR 1914 Mad 317 (318): 24 Ind Cas 127 (DB), *Kader Kutti* v. *Muhamad.*
[But see ('92) 15 Mad 366 (370) (DB), *Ramunni* v. *Brahma Dattan.* (Kanom is a combination of a simple mortgage and a usufructuary mortgage—Kanomdar therefore has a right of sale.)]

4. ('26) 13 AIR 1926 Mad 650 (651) : 95 Ind Cas 3, *Visvanatha Iyer* v. *Chimmukutti Amma.*
[*See also* ('82) 6 Mad 140 (145) (DB), *Marikar* v. *Parameswaran.*]

5. (1862) 1 Mad H C R 112 (112) (DB), *Shaikh Rautan* v. *Kandangot Shupan.*
(1862) 1 Mad H C R 113*n* (113*n*) (DB), *Kunju Velan* v. *Manavikrama.*

6. ('07) 30 Mad 61 (65) : 16 Mad L Jour 462 (DB), *Murthi Khandan* v. *Anantanarayana.*

Note 8

1. (1863) 1 Mad H C R 261 (262) (DB), *Kumini Amma* v. *Parkam Kolusheri.* (Cannot be redeemed before lapse of 12 years.)
(1863) 1 Mad H C R 122 (123) (DB), *Edathil Itti* v. *Kopashon Nayar.* (Do.)
('80) 2 Mad 45 (45) : 3 Ind Jur 64 (DB), *Keshava* v. *Keshava.* (Do.)
('82) 4 Mad 113 (118) (DB), *Perlathail Subba Rau* v. *Mankudi Narayana.* (Do.)
(1864) 2 Mad H C R 161 (161) (DB), *Kellu Eradi* v. *Puapalli.* (Ottidar forfeits right by denying jenmi's title.)
('81) 3 Mad 74 (75, 76) (DB), *K. T. P. Kunhali* v. *V. V. Kinathe.* (Do.)
('82) 5 Mad 198 (199) (DB), *Ramapurath* v. *Ramapurath.* (Ottidar can claim pre-emption.)
('90) 13 Mad 490 (491) (DB), *Kanharankutti* v. *Uthotti.* (Do.)
('11) 12 Ind Cas 626 (627) (DB) (Mad), *Subramanian Embrandiri* v. *Krishnan Embrandiri.* (In South Canara Ottidar cannot claim pre-emption.)
('91) 1 Mad L Jour 485 (487) (DB), *Keeran Avulla* v. *Chendrasekharan.* (Ottidar has a prior right to make further advances to mortgagor.)
('81) 3 Mad 246 (247) (DB), *Kunhamu* v. *A. Keshavan Nambudri.* (Do.)
('83) 6 Mad 140 (144, 145) (DB), *Marakar* v. *Parmeshwaran.*

Section 98 Notes 9-10

9. Peruarthum. — A *peruarthum* is also a customary anomalous mortgage prevailing in certain parts of Malabar. Under the local usage governing it such a mortgage is redeemable on payment, not of the amount for which the land is mortgaged, but of its market value.[1]

10. Iladarawara. — An *iladarawara* mortgage is a customary anomalous mortgage in vogue in South Canara. It is usually for a long term of years. It is also a lease of the property for the term agreed upon. Repayment of the loan is not permissible under the custom before the expiry of the term.[1]

Section 99

99. [Attachment of mortgaged property.] *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*

See now the Code of Civil Procedure, O. 34, R. 14.

Charges.

Section 100

100. Where immoveable property of one
Charges. person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [a][which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [b][and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].

a. These words were substituted by Section 50 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929) for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge."

b. These words were inserted by Section 50 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

(1863) 1 Mad H C R 356 (357) (DB), *Ali Husain* v. *Nillakanden.*
('86) 9 Mad 371 (373) (DB), *Ambu* v. *Raman.*
('84) 7 Mad 442 (452) (DB), *Kundu* v. *Impichi.*

Note 9

1. ('78) 1 Mad 57 (59) (DB), *Shekari Varma* v. *Mangalom Amugar.*

Note 10

1. ('82) 4 Mad 113 (118) (DB), *Perlathail Subba Rau* v. *Mankudi Narayana.*

Section 100
Note 1

Synopsis

1. Scope of the section.
2. Liens and charges under the English law.
3. Charge on moveables.
4. Charge on future property.
5. "Made security."
6. Property must be specified.
7. "By act of parties."
8. Security bond charging immovable property.
9. Contingent charge.
10. Floating charge.
11. "By operation of law."
12. Charge under Rent Acts.
13. "And the transaction does not amount to a mortgage."
14. Transfer invalid as a mortgage whether operates as a charge.
15. Mortgage or charge.
16. Creation of charge—Writing and registration whether necessary.
17. Rights and liabilities of a charge-holder.
18. Priority as amongst several charges.
19. Assignment of a charge.
20. Section does not apply to a charge of a trustee.
21. "Save as otherwise expressly provided by any law for the time being in force."
22. Transferee for consideration without notice.
23. Subsequent transferee from a transferee, if protected.
24. Charge whether binds auction purchaser.
25. Enforcement of charge.
26. Personal liability.
27. Sale in execution of a charge decree — Whether extinguishes the charge.
28. Charge created by a decree.
29. Payments in the nature of salvage.
30. Hindu widow's right of maintenance.
31. Debts of a deceased Muhammadan.
32. Nankar and dahyak rights.

Other Topics (miscellaneous)

Attachment, whether a charge. See Note 11.
Attestation, whether necessary. See Note 16.
Charge against whom enforceable. See Notes 22 to 24.
Charge and lien distinguished. See Note 2.
Decretal charge. See Note 28.
Enforcement of charge against purchaser without notice. See Note 22.
Mortgage and charge distinguished. See Note 13.
Property must be secured. See Note 5.
Salvage liens. See Note 29.
Section, whether exhaustive of all kinds of charges. See Note 1.
Specified property. See Note 6.
Statutory charges. See Notes 11 and 12.
Trustee's charge. See Note 20.

1. Scope of the section.— This section defines 'a charge' and states what provisions of the Act apply thereto and against whom it is enforceable.

A person, according to this section, is said to have a charge on the immovable property belonging to another when —

(1) such property is *made security for the payment of money* due by the latter, *and*

(2) such transaction *does not amount to a mortgage.*

A mortgage, as defined in S. 58, is a transfer of an interest in specific immovable property for the purpose of *securing the payment of loan.* Thus, in the case of a mortgage as well as in a charge, the property of another person is made security for a loan or debt; but whereas a mortgage is a *transfer of an interest* in property, a charge,

as defined above, does not involve the transfer of any interest in property.[1] Section 100 Note 1

According to Sir John Salmond a charge is the best type of security. He observes:

> "The best type of security is that which combines the most efficient protection of the creditor with the least interference with the rights of the debtor, and in this latter respect the mortgage falls far short of the ideal. The true form of security is a lien, leaving the full legal and equitable ownership in the debtor, but vesting in the creditor such rights and powers (as of sale, possession, and so forth) as are required, according to the nature of the subject-matter, to give the creditor sufficient protection, and lapsing *ipso jure* with the discharge of the debt secured."[2]

A charge under the section may be created either by *act of parties* or by *operation of law*. It is stated in the Preamble that this Act is one 'to define and amend certain parts of the law relating to the transfer of property by *act of parties*' and in view of that statement, it is not easy to understand why charges created by operation of law have been included in this section. "But for the fact that there are some sections in the Act which refer to such charges," observes Lort-Williams, J., of the Calcutta High Court, "one would have thought that they had been included by inadvertence."[3]

There is a difference of opinion on the question whether this section is exhaustive of all kinds of charges. One view is that it is exhaustive of all charges and that a Court is not justified in introducing new conceptions of charges not supported by the statutes in India.[4] The other view is that the section is not exhaustive and that there are certain kinds of charges which are not included within the purview of this section.[5] There are charges created by a decree of Court,[6] or by an

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Section 100 — Note 1

1. See Note 4 on S. 58.
[*See also* ('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain*].
2. Sir John Salmond, "*Jurisprudence*," 7th Edn., 1924, Page 464.
3. ('34) 21 AIR 1934 Cal 862 (863, 864) : 61 Cal 1047 : 153 Ind Cas 972 (DB), *Corporation of Calcutta* v. *Kumar Arun Chandra*.
4. ('26) 13 AIR 1926 Mad 55 (56, 57) : 90 Ind Cas 725 : 48 Mad 821 (DB), *Venkatacharyulu Ayyavarlam* v. *Venkatasubba Rao*.
5. ('40) 27 AIR 1940 Nag 163 (166) (DB), *Ghasiram* v. *Mt. Kundanbai*.
('37) 169 Ind Cas 169 (171) (Nag), *Mt. Maina* v. *Ahsan Hussain*.
('39) 26 AIR 1939 All 579 (580) : 184 Ind Cas 626 (DB), *Durga Prasad* v. *Mt. Tulsa Kuar*.
6. ('11) 10 Ind Cas 481 (486) (SB) (All), *Rameshar* v. *Subbakaran*.
('29) 16 AIR 1929 P C 174 (176) : 56 Ind App 254 : 8 Pat 926 : 117 Ind Cas 10 (PC), *Quasim Husain* v. *Habibur Rahman*.
('20) 7 AIR 1920 Mad 722 (722) : 43 Mad 800 : 59 Ind Cas 398 (DB), *Somasundaram Chetti* v. *Unnamalai Ammal*.
('25) 12 AIR 1925 Mad 1101 (1103) : 88 Ind Cas 648 (DB), *Ramaswami Naidu* v. *Subbaraya Thevar*.
('07) 30 Mad 478 (481) : 16 Mad L Jour 354 (DB), *Joti Kuruvetappa* v. *Izari Sirasappa*.

Section 100
Note 1

award[7] and charges created on the grounds of equity.[8] As to whether these are charges, falling under this section, see the Notes that follow.

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7. ('26) 13 AIR 1926 All 527(528, 529): 96 I.C. 39(DB), *Kanhaiya Lal* v. *Jangi.*
('28) 15 AIR 1928 Lah 440 (441) : 109 I. C. 279 (DB), *Manohar Lal* v. *Ratanlal.*
('22) 9 AIR 1922 All 410 (411): 77 I.C. 113(DB), *Surat Singh* v. *Umrao Singh.*

8. ('93) 15 All 304 (310): 20 Ind App 108(PC), *Bhagwati Prasad* v. *Radhakishen.*
('03) 13 Mad L Jour 228 (230) (DB), *Subbammal* v. *Muthu Pathan.*
('94) 18 Bom 86 (91) (DB), *Lomba Gomaji* v. *Vishwanath Amrit.* (*A* mortgaged property to *B*. *C* purchased equity of redemption in execution of a money-decree against *A*. Subsequently, *A* mortgaged the property usufructuarily to *D* who had no knowledge of *C*'s purchase. *A* paid off the mortgage in favour of *B* with the money of *D*. It was held that at the date of the mortgage in favour of *D*, *A* had no right to mortgage the property as *C* had already purchased the equity of redemption; but as the money advanced by *D* had been utilized to pay off the mortgage in favour of *B*, which would have been a burden on *C* as purchaser of the equity of redemption, *D* had an *equitable charge* on the property for the amount paid.)
('92) 19 Cal 401 (410,411)(DB), *Jamuna Pershad* v. *Gunga Pershad.* (*A*, *B* and *C* were undivided coparceners. *A* and *B* executed a mortgage in favour of *D* in respect of the joint property without the consent of *C* in order to raise money for the benefit of themselves. Subsequently, all of them executed a mortgage in favour of *E*. *D* obtained an *ex parte* decree against *A*, *B* and *C* and *F* purchased the property in execution. *E* also obtained an *ex parte* decree and *G* purchased the property in execution of his decree. *G* sued for a declaration that the mortgage in favour of *D* was invalid. It was held that though *A* and *B* had no authority, without the consent of *C*, to mortgage their undivided shares yet *G* who derived his title from *A*, *B* and *C* was not entitled to recover the shares without paying to *F*, who had by his auction purchase acquired the rights of *D*, the money advanced on *D*'s mortgage which should be considered an equitable charge on the shares.)
('12) 16 Ind Cas 405 (406) (DB) (Mad), *Angadipeedi Koyil Eroth* v. *Vallantakula Ibrayam Haji.* (Mortgage by karnavan—Only a portion of consideration utilised for the benefit of tarwad — Mortgage declared not binding on other members but mortgagee held entitled to a charge in equity for the portion of consideration used for the benefit of tarwad.)
('14) 1 AIR 1914 Mad 698 (700) : 24 Ind Cas 246 (DB), *Kunhanna Shetty* v. *Timmaju.* (Transfer by Ejman of an aliasanthanam family of family property — Only a portion used for benefit of family—Transfer declared not binding on the family, but charge was given in equity for the portion of consideration.)
('12) 14 Ind Cas 14 (15) (Oudh), *Ram Bharose* v. *Mata Prosad.* (A mortgagee advancing money to a guardian on the security of a minor's property but not acting under the authority of the Court, cannot prove necessity for raising the whole money—The contract of mortgage is voidable and is liable to be set aside at the option of the minor but the mortgagee will be entitled to a charge on the property for the necessary amount where a portion of the money has been spent for the minor's benefit.)
('84) 1884 Pun Re No. 52, *Muhammad Baksh* v. *Nawab.* (Where part of the consideration money was required for necessary purposes, held, that the vendee was entitled to a charge on the estate for such amount.)
('18) 5 AIR 1918 Cal 804 (805) : 41 Ind Cas 736 (DB), *Badal Mirza* v. *Tinkori Koley.* (A mokarari maurasi lease of wakf property by a mutwalli is void if there is no urgent necessity for granting it but the lessee is entitled to a refund of the amount of salami paid by him which would be a charge upon the wakf property, but he has no personal claim against the mutwalli.)
[*See also* ('39) 26 AIR 1939 Nag 132 (134) : 185 Ind Cas 33, *Mt. Renukabai* v. *Bheosan.* (Agreement providing that in default of a certain payment for maintenance by one party to the other the latter will be at liberty to cultivate a field and maintain herself—Equitable lien is created—But such a charge cannot be enforced by sale of the land.)]

Section 100
Note 2

2. Liens and charges under the English law.— In England a 'lien,' in its *primary* sense is a right in one man to *retain that which is in his possession* but which belongs to another until certain demands of the person in possession are satisfied.[1] In this sense it is given by law and not by contract, and subject to some exceptions, does not arise until possession of the property is obtained.[1a] It is only a right of defence, not a right of action and, consequently, can be claimed in respect of a statute-barred debt. It does not, except in special circumstances, give any right to sell the thing retained, and is not capable of being assigned.[2]

A lien, in its *secondary* sense, where the person claiming the lien has not got possession of the thing in respect of which the lien is claimed, is either judicial, equitable or statutory. Judicial liens are obligations established by judgments or orders of Courts of justice binding the property, but giving no right of possession. Equitable liens are founded on the consideration of a duty or implied intention on the part of the owner to make property answerable for a specific claim.[3] An equitable lien has been defined as an equitable right conferred by law upon one man, to a charge upon the real or personal property of another until certain specific claims have been satisfied.[4]

An equitable charge is a security which does not create a legal estate in land but only gives a right to payment out of the property. It entitles the holder to have the property comprised therein sold to raise the money charged thereon, but it does not, in the absence of any express provision to that effect, amount to an agreement to give a legal mortgage, and the mode of enforcing it is by sale and not by foreclosure.[5]

An equitable lien differs from an equitable charge in that the latter is a right founded on contract while the equitable lien is founded on the principle of equity. But in so far as their effect is concerned, there is no distinction between an equitable lien and equitable charge and both are liable to be defeated under the statutes of limitation.[6]

An equitable lien differs also from the common law lien in that the latter is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment whereas the former which exists irrespective of possession confers on the holder the right to a judicial sale.[7]

Note 2

1. Halsbury, *Laws of England*, (Hailsham Edition), Vol. 20, Para. 695. (1917) 1 Ch 99 (103, 104) : 86 L J Ch 204 : 115 L T 700 : 1917 H B R 97 : 61 S J 131, *Dyson* v. *Peat*.

1a. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 695.

2. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 696.

3. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 698.

4. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 714.

5. Halsbury, *Laws of England* (Hailsham Edition), Vol. 23, Para. 352.

6. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 714.

7. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 714.

Section 100
Notes 3-5

3. **Charge on moveables.**—This section deals with charges on immovable property. It does not apply to a charge created on moveable property.[1] The creation of a charge on moveables need not be in writing.[2] It has been held that for creating a charge on moveables the property must be specifically indicated.[3] It has, however, been held that a charge on moveable property which might come into existence at a future date is valid as an *agreement* to charge such property.[4]

4. **Charge on future property.**— In order to create a present charge it is, of course, necessary that the property charged must be in existence. A document creating a charge on property which may come into existence in the future does not create any charge *in præsenti*. It may, however, operate as an *agreement* to create a charge when the property comes into existence in the future. As has been seen in Note 2 on S. 43, when it does come into existence, equity, treating that as done which ought to be done, fastens upon the property and the agreement to create a charge will become a completed charge.[1]

5. **"Made security."**— In order to create a charge it is not necessary to employ any technical or any particular form of words. All that is required is that there must be a clear intention to make a particular property, a security for the payment of money.[1] As observed in *Nathan Lal* v. *Durga Das*[2]:

Note 3

1. ('29) 16 AIR 1929 Lah 274 (275) : 115 Ind Cas 762 (D B), *Mangat Ram* v. *Piyara Lal Sundar Lal.*
2. *See* ('16) 3 AIR 1916 Lah 54 (55) : 1916 Pun Re No. 32 : 34 Ind Cas 932 (DB), *Steward* v. *Bank of Upper India, Ltd.* (If made orally, it is as effectual (except in cases provided by S. 48 of the Registration Act) as if it were effected by an instrument in writing.)
3. ('24) 11 AIR 1924 Nag 360 (361) : 78 Ind Cas 380, *Tulsiram* v. *Anusuya.*
4. ('29) 16 AIR 1929 Lah 274 (275) : 115 Ind Cas 762 (DB), *Mangat Ram* v. *Piyara Lal Sundar Lal.*

('33) 20 AIR 1933 Cal 154 (159) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *H. V. Low & Co., Ltd.* v. *Pulinbiharilal Singha.*

Note 4

1. ('38) 25 AIR 1938 All 22 (25) : ILR (1938) All 63 : 173 Ind Cas 130 (DB), *Kabul Chand* v. *Badri Das.*

('14) 1 AIR 1914 Bom 267 (268) : 27 Ind Cas 34 (DB), *Keshavlal Hira Lal* v. *Girdhari Lal Uttamram.*

[*See also* (1855) 69 E R 462 (463) : 1 K & J 277 (279): 1 Jur (N S) 750 : 103 R R 79, *Riccard* v. *Prichard.*]

Note 5

1. ('40) 27 AIR 1940 Cal 93 (95) : 186 Ind Cas 843 (DB), *Bhola Nath* v. *Sarba Mangala Debi.*

(1894) 70 L T 718 (718) : 1894 W N 88, *Craddock* v. *Scottish Provident Institution.* (Affirming (1893) 69 L T 380 on appeal.)

('39) 26 AIR 1939 Nag 118 (119) : 182 Ind Cas 102, *Ganga Prasad* v. *Ratan Chand.*

('29) 16 AIR 1929 Oudh 539 (540) : 121 Ind Cas 81 (DB), *Narain Dass* v. *Murli Dhar.*

('15) 2 AIR 1915 Mad 664 (672) : 27 Ind Cas 283 (DB), *Rajarajeswara* v. *Sundarapandiyaswami.*

[*See also* ('13) 19 Ind Cas 478 (479) (DB) (Mad), *Sivanna* v. *Venkatakrishnamurthy.*]

2. ('31) 18 AIR 1931 All 62 (64) : 52 All 985 : 130 Ind Cas 489 (DB).

Section 100
Note 5

"A charge does not involve the transfer of the interest in the property subject thereto and arises from the circumstance that certain property, moveable or immovable, or any interest in such property, is indicated with certainty as the fund out of which a certain claim is to be met or satisfied, the fund so indicated being the security for the claim."

Where the property is not intended to serve as security, there can be neither a mortgage nor a charge.[3]

In cases where the transaction is reduced to writing, the cardinal rule of construction is that the intention of the parties should be gathered from the language used by the parties in such deeds.[4] Where, however, the language of the deed is not itself precise or is ambiguous, the surrounding circumstances may be looked to, for the purpose of ascertaining such intention.[5] In considering whether a particular deed or document does or does not create a charge, cases as regards other deeds are not always a good guide.[6]

Ordinarily when the parties refer in a document to particular properties as the source from which a debt is to be paid or by the sale of which a debt is to be realized, there is some indication of an intention to make the property more directly liable than on a mere enforcement of a personal liability.[7] For instance in maintenance cases, where in the absence of a specific agreement the maintenance will only be a kind of indefinite charge upon the family property, even a slight indication to convert it into a definite charge may suffice.[8] This will be *a fortiori*

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3. ('92) 19 Cal 584 (593) : 19 Ind App 95 (PC), *Omrao Begum* v. *Secy. of State.* (Taking all the deeds, granting maintenance, which were purported to create charge, held parties had no intention to create any.)
('18) 5 AIR 1918 Cal 557 (566) : 40 Ind Cas 865 (DB), *Syam Peary* v. *Eastern Mortgage and Agency Co., Ltd.*
('36) 1936 R D 365 (365), *Jagwa* v. *Ram Peare.*
('36) 23 AIR 1936 Mad 709 (712, 713) : 164 Ind Cas 697 (DB), *Taluk Board, Koilpatti* v. *Chinnathambiar.*
[*See also* ('69) 12 Suth W R 491 (492) (DB), *Rameswar Singh* v. *Ramtanu Ghose.*]

4. See Note 20 on S. 8, and also the undermentioned cases :
('11) 12 Ind Cas 146 (146) (DB) (Mad), *President, Taluk Board* v. *Chilakamani.*
('25) 12 AIR 1925 Oudh 550 (552) : 85 Ind Cas 331, *Chhotey Lal* v. *Iqbal Narain.*

5. See Note 20 on S. 8, and also the undermentioned cases :
('15) 2 A I R 1915 Mad 664 (672) : 27 Ind Cas 283 (DB), *Rajarajeswara* v. *Sundarapandiyaswami.* (Per Seshagiri Aiyer, J. — View upheld in A I R 1918 P C 156 : 42 Mad 581 : 46 Ind App 64 (PC).)
('31) 18 A I R 1931 Mad 140 (145, 146) : 54 Mad 163 : 135 Ind Cas 17 (DB), *Venkata Jagannatha Rao* v. *Venkatakumara.*
('29) 16 AIR 1929 Oudh 80 (82) : 3 Luck 446 : 110 Ind Cas 56 (DB), *Deputy Commissioner* v. *Mt. Munni.*

6. ('26) 13 AIR 1926 All 171 (171) : 90 Ind Cas 787 (DB), *Jeut Koeri* v. *Mathura Koeri.*
('41) 28 A I R 1941 Nag 102 (103) : I L R (1942) Nag 263 : 194 Ind Cas 761 (DB), *Dau Bhairoprasad* v. *Jugalprasad.*

7. ('35) 22 AIR 1935 Mad 17 (19) : 154 Ind Cas 736, *Ayyappa Naicker* v. *Thayammal.*

8. ('35) 22 A I R 1935 Mad 17 (19) : 154 Ind Cas 736, *Ayyappa Naicker* v. *Thayammal.*

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Note 5

so in a case where the party claims to be entitled to succeed to or to share in a certain property and that claim is settled by a provision for maintenance payable out of that property.[9] Again, where a property is already subject to a mortgage, and a later document between the same parties relating to a fresh advance provides that the previous mortgage shall not be redeemed before the later debt is paid or that the later debt shall be paid at the time of redeeming the prior mortgage, it has been held that the parties must have intended that the security under the first mortgage should be available for the fresh advance as well.[10]

('40) 27 A I R 1940 Cal 93 (95) : 186 Ind Cas 843 (DB), *Bhola Nath* v. *Sarbamangala Debi.* (Where a certain allowance was to be paid out of the estate left it was held that a charge was created.)

('32) 19 AIR 1932 Oudh 168 (170) : 138 Ind Cas 128 (DB), *Har Narain* v. *Mt. Bibi Rup Kuar.* (Certain maintenance allowance was to be paid from "*riayasat taluka*". It was held that the deed created no personal liability on the holder of the estate for it, but only a charge for the allowance on the estate.)

('36) 23 AIR 1936 Sind 16 (18) : 161 Ind Cas 547 (DB), *Rambhabai* v. *Doongersi.*

('23) 10 AIR 1923 Cal 27 (30) : 50 Cal 266 : 72 Ind Cas 1019 (DB), *Jatindra Mohan* v. *Ghanesyam.*

('20) 7 AIR 1920 Cal 986 (987) : 64 Ind Cos 518 (DB), *Rajendra Mohan* v. *Upendra Nath.* (Provision in a deed granting an annuity that it is to be paid out of the estate of the grantor creates a charge.)

9. ('18) 5 AIR 1918 Cal 557 (565) : 40 Ind Cas 865 (DB), *Syam Peary* v. *Eastern Mortgage and Agency Co. Ltd.*

('83) 9 Cal 945 (950, 951) : 10 Ind App 45 (P C), *Mahomed Hossain* v. *Mahomed Nehaluddin.*

('18) 5 AIR 1918 P C 156 (157) : 42 Mad 581 : 46 Ind App 64 : 49 Ind Cas 704 (PC), *Raja of Ramnad* v. *Sundara Pandiyasawmi.*

('35) 22 AIR 1935 Mad 17 (19) : 154 I. C. 736, *Ayyappa Naicker* v. *Thayammal.*

10. ('35) 22 AIR 1935 Mad 17 (19) : 154 Ind Cas 736, *Ayyappa Naicker* v. *Thayammal.*

('30) 17 AIR 1930 P C 176 (177) : 5 Luck 365 : 57 Ind App 173 : 123 Ind Cas 191 (PC), *Aditya Prasad* v. *Ram Ratan.*

('08) 32 Bom 386 (390) : 10 Bom L R 575 (DB), *Janardana* v. *Anant.*

('26) 13 AIR 1926 All 171 (172) : 90 Ind Cas 787 (DB), *Jeut Koeri* v. *Mathura Koeri.*

('09) 2 Ind Cas 859 (860) : 31 All 482 (DB), *Ranjit Khan* v. *Ramdhan Singh.*

('09) 1 Ind Cas 345 (346) (DB) (All), *Bhikham Singh* v. *Shankar Dayal.* (Mortgagor taking further advances from mortgagee under the bond, covenanting that whenever he would redeem the first mortgage, he would also pay money borrowed under the bond—Bond held created a charge.)

('72) 4 N W P H C R 161 (164) (DB), *Bhugwan Dass* v. *Mahomed Jafer.*

('10) 6 Ind Cas 165 (166) (DB) (All), *Mt. Pancho* v. *Deo Karan.*

('27) 14 AIR 1927 Oudh 510 (511) : 3 Luck 113 : 105 Ind Cas 581 (DB), *Lal Bahadur Singh* v. *Rameshwar Prasad.*

('25) 12 AIR 1925 Oudh 506(507): 89 I. C. 563, *Ashraf Ali* v. *Chandrapal Singh.*

('16) 3 AIR 1916 Oudh 329 (331) : 32 Ind Cas 740, *Chauharaja Baksh* v. *Ram Harakh.*

[*See also* ('12) 15 Ind Cas 851 (852) (All), *Bhagwati Singh* v. *Sarup Singh.*

('05) 8 Oudh Cas 227 (230) (DB), *Chandrika Pershad* v. *Jagannath.*]

[See however ('12) 16 Ind Cas 222 (223) (DB) (All), *Ramparshad Rai* v. *Nawab Chowdhury.* (*A* executed a usufructuary mortgage in favour of *B* in 1864 and four days later, he executed another document in favour of the mortgagee in which he promised to pay Rs. 500 with interest before he redeemed the mortgage —The document was described as a Tamasuk — *Held* that the document was neither a mortgage nor a charge—It was merely a money bond and the suit on it in 1910 was either barred by time or was premature.)

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Note 5

So also, where the parties entering into a partition arrangement say that if the parties thereto do not carry out their respective obligations, any loss incurred by one of them shall be recovered out of the properties of the others, no other connection between the properties and the enforcement of the liability can be thought of except that the properties are intended to be security.[11] But a mere direction in a partition decree asking one to pay some compensation to the other sharer in order to equalize the share was held in the undermentioned case[12] not to create a charge over his share.

A document under which a sum of money is payable out of the profits of a particular property constitutes a charge upon that property.[13]

('23) 10 AIR 1923 Oudh 24 (25) : 70 Ind Cas 66, *Gaya Prasad* v. *Rachpal.*

('25) 12 AIR 1925 Oudh 593 (594) : 85 Ind Cas 328, *Kandhiya Bakhsh* v. *Ram Charitar.* (A deed with a similar provision but styled as tamasuk zar mazid and giving no details of the property but a mere reference to the original mortgage held could not be regarded as a deed of further charge—It created only a personal covenant against the mortgagor.)

('34) 21 AIR 1934 Lah 938 (940) : 155 Ind Cas 288 (DB), *Hakam Singh* v. *Gajja Singh.* (A subsequent bond merely stating that the bond has been executed separately and the amount of the bond will be paid before mortgage deed, held did not create a charge.)

('04) 26 All 559 (564) : 1 All L Jour 282 (DB), *Sheo Shankar* v. *Parma Mahton.* (Provision in a later bond that the mortgaged property should not be redeemed until the principal money and interest under the bond had been paid, held created no charge on the mortgaged property.)

('05) 27 All 178 (181) : 1 All L Jour 579 (DB), *Rugad Singh* v. *Satnarain.* (Do.)]

11. ('35) 22 AIR 1935 Mad 17 (19) : 154 Ind Cas 736, *Ayyappa Naicker* v. *Thayammal.*

('33) 20 AIR 1933 Mad 715 (716) : 149 Ind Cas 287 (DB), *Abdul Razak* v. *Abdul Rahim.*

('85) 1885 All W N 19 (21) (DB), *Bunyadi Begam* v. *Muhammad Ashgar Ali.* (Charge however was held inoperative for want of registration.)

('26) 13 AIR 1926 All 527 (529) : 96 Ind Cas 39 (DB), *Kanhaiya Lal* v. *Jangi.*

('08) 32 Bom 386 (390) : 10 Bom L R 575 (DB), *Janardan* v. *Anant.*

12. ('26) 13 AIR 1926 Oudh 230 (231) : 91 Ind Cas 1009, *Chob Singh* v. *A. J. Williams.*

13. ('37) 24 AIR 1937 Oudh 420 (421) : 13 Luck 35 : 167 Ind Cas 52 (DB), *Sharif Ahmad* v. *H. Hunter.*

('32) 19 AIR 1932 Oudh 336 (338) : 8 Luck 168 : 143 Ind Cas 692 (DB), *H. Hunter* v. *Abdul Ali.*

('82) 5 All 11 (14) : 1882 All W N 159 (DB), *Kanhia Lal* v. *Md. Husain Khan.*

('35) 22 AIR 1935 Oudh 309 (313) : 155 Ind Cas 40, *Akbar Husain* v. *Mt. Husain Jahan Begum.*

('04) 7 Oudh Cas 108 (110), *Mumtaz Ali* v. *Wazir Khan.* (Decree awarding out of annual profits of village a sum equal to 10 per cent. on the Government revenue—Decree held created a charge on that village.)

('36) 23 AIR 1936 Oudh 52 (54) : 11 Luck 575 : 159 Ind Cas 117 (DB), *Parshadi Lal* v. *Brij Mohan Lal.* (Under a will, part of the income assigned to the expenses of religious rites and ceremonies—Charge held was created on the property.)

('83) 7 Mad 23 (24, 26) (DB), *Chalamanna* v. *Subbamma.*

(1835) 58 E R 738 (742) : 4 L J Ch 119 : 7 Sim 3 : 40 R R 57, *Ravenshaw* v. *Hollier.*

[*See also* ('29) 16 AIR 1929 Oudh 80 (82) : 3 Luck 446 : 110 Ind Cas 56 (DB), *Deputy Commissioner* v. *Mt. Munni.*

('16) 3 AIR 1916 Oudh 129 (131) : 19 Oudh Cas 49 : 33 Ind Cas 461, *Deputy Commissioner, Fyzabad* v. *Jagjiwan Baksh.* (Decretal charge.)]

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Note 5

A mere covenant by a party not to alienate the property was held not by itself sufficient to create a charge.[14] The use of the word 'thanaka' after the expression "all my moveable and immovable property" has been held as not sufficient to justify the inference that a charge or mortgage was intended to be created.[15] An agreement between A and B that A should give a regular mortgage of his immovable property for money advanced by B, does not constitute a mortgage or charge upon such property.[16] So also, an agreement to sell does not create any interest or charge on the property.[17]

Illustrations.

1. By an agreement between A and B who were brothers, it was agreed that B should waive his claims to succeed to his

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14. ('13) 19 Ind Cas 478 (479) (DB) (Mad), *Sivanna* v. *Venkatakrishna Murthy.*
('34) 21 AIR 1934 Mad 713 (714) : 152 Ind Cas 772 (DB), *Rangampudi* v. *Venkateswarlu.*
('81) 7 Cal 196 (198) : 8 Cal L R 454 (DB), *Najibulla Mulla* v. *Nusir Mistri.*
('28) 15 AIR 1928 Lah 440 (441) : 109 Ind Cas 479 (DB), *Manohar Lal* v. *Ratan Lal.*
('80) 2 All 449 (451) (DB), *Bhupal* v. *Jag Ram.*
[*See also* ('34) 21 AIR 1934 Pat 495 (495, 496) : 13 Pat 620 : 155 Ind Cas 47 (DB), *Abdul Latif* v. *Debi Mahton.* (In an agreement for sale of land, the vendor after reciting that he has received a portion of the consideration stated that : "I the declarant mortgaged, hypothecated, and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, rehan, etc., in respect of the land entered in the deed of contract, the same shall be treated as *null and void* and inoperative." — *Held*, that the intention of the vendor was only to enter into covenant, usually found in such deeds, against encumbering or selling the property to another, and that the clause did not create either a charge or a mortgage.)]
[See however ('29) 16 AIR 1929 Oudh 539 (540) : 121 Ind Cas 81 (DB), *Narain Dass* v. *Murli Dhar.* (Stipulation in a decree that defendant must not dispose of his share in the factory until the satisfaction of the decretal amount held created a charge.)
('14) 1 AIR 1914 All 187 (188) : 36 All 201 : 22 Ind Cas 973 (DB), *Jawahir Mal* v. *Rani Indomati.* (Deed reciting that executant had borrowed certain sum and then referring to certain property — Covenant to repay sum with interest in certain period—Clause under which executant undertaking that until repayment of sum, he would not transfer property—Deed not using the word "hypothecate" or anything equivalent to it—*Held* per Richards, C. J. and Bannerji, J. that deed amounted to charge, although according to Bannerji, J., it amounted to a mortgage.)
('39) 26 AIR 1939 Nag 118 (119) : 182 Ind Cas 102, *Ganga Prasad* v. *Ratan Chand.* (Decree providing payment by instalment and directing defendant not to alienate property till satisfaction of decree — Decree held created charge on property.)]
15. ('13) 19 Ind Cas 221 (221, 222) (DB) (Mad), *Kamayya* v. *Yerakola.*
16. ('30) 17 AIR 1930 P C 76 (78) : 123 Ind Cas 157 (PC), *Hukamchand Kasliwal* v. *Radha Kishen Moti Lal.*
('32) 19 AIR 1932 Oudh 54 (56) : 7 Luck 237 : 134 Ind Cas 1093 (DB), *Ram Het* v. *Pohkar.* (The agreement merely creates a right in *B* to obtain a regular deed of mortgage to be executed by *A.*)
(1789) 30 E R 73 (74) : 2 Cox Eq Ca 160, *Williams* v. *Lucas.*
[*See also* ('38) 25 AIR 1938 Mad 889 (892) : ILR (1939) Mad 7 : 178 Ind Cas 220 (FB), *Venkataramasami* v. *Imperial Bank of India.*
('12) 15 Ind Cas 206 (210) : 36 Mad 426 (DB), *Narayana Kutti Goundan* v. *Pechiammal.*]
17. See Note 23 on Section 54.

father's estate and should withdraw a suit instituted by him against A for maintenance ; that A should pay a certain monthly allowance to B in perpetuity, and, further, if A for his own necessity mortgaged or hypothecated the *muafi* villages, so that the property left might be insufficient to meet the monthly allowance fixed, A would pay the allowance out of his other property. It was held by the Judicial Committee that the deed created a charge for the allowance on the property.[18]

2. In a partition dispute, the arbitrator awarded to the defendant property of greater value than that awarded to the plaintiff. In order to equalize the division, the arbitrator awarded a certain sum to be paid to the plaintiff by the defendant and further added that the property awarded to the defendant should be treated as *makphul* for the sum. It was held that a valid charge for the sum was created on the defendant's property.[19]

3. A stipulation in a lease deed that the lessee should deduct a certain portion of the annual rent in repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and not merely a personal obligation.[20]

4. A sold certain property to B. The sale deed contained the following provision: "The said vendee . . . . is to pay Rs. 25 . . . . to me annually (as *malikana*) which he has agreed to pay." It was held that the words 'as *malikana*' could not be rejected as mere surplusage. They showed an intention that the payment of Rs. 25 should be an annual charge upon the property.[21]

5. By a deed, J admitted liability. In respect of that liability, he undertook to execute a charge bond over specified share and rights in a village together with *sir* land. J undertook to get the sanction of the Court for transfer of *sir*, and not to assign the property until he carried out the above undertaking. It was held that the property was made security for the liability and that a charge was created.[22]

See also the undermentioned cases.[23]

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18. ('83) 9 Cal 945 (951) : 10 Ind App 45 (P C), *Mahomed Hossein* v. *Mahomed Nehaluddin.*

19. ('26) 13 AIR 1926 All 527 (529) : 96 Ind Cas 39 (DB), *Kanhaiya Lal* v. *Gangi.*

20. ('31) 18 AIR 1931 All 62 (64) : 52 All 985 : 130 Ind Cas 489 (DB), *Nathan Lal* v. *Durga Das.*

21. ('87) 9 All 591 (600) : 1887 All W N 121 (FB), *Churaman* v. *Balli.*

22. ('41) 28 AIR 1941 Nag 102 (105) : ILR (1942) Nag 263 : 194 Ind Cas 761 (DB), *Dau Bhairoprasad* v. *Jugalprasad.*

23. *In the following cases a charge was held created :*

('40) 27 AIR 1940 Pat 283 (284, 285) : 186 Ind Cas 221 (DB), *Bank of Bihar Ltd.* v. *Omitave Chattarji.* (A person who was appointed as a manager of a Bank agreed that he would furnish security to the value of Rs. 4,000 for the due and

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Note 5

proper discharge of his duties — In pursuance of this agreement he executed a document in the body of which he conveyed and transferred to the Bank a certain house which the Bank was to have and to hold as security for the said post of manager — The concluding portion of the document provided that in the event of his removal from his post by resignation, dismissal, death or otherwise, the Bank should reconvey the house to him — *Held*, that the last provision must be read in the light of the earlier provisions and that the document read as a whole created a charge on the house in favour of the Bank for any amount upto Rs. 4000, which might become due from the manager to the Bank by reason of his misconduct or failure to discharge his duty.)

('38) 25 AIR 1938 Lah 509 (510) : 177 Ind Cas 332 (DB), *Tirath Ram* v. *Official Receiver Ferozepore.* (Compromise in execution proceedings—Attachment of property continued — Stipulation that judgment-debtor should not transfer attached property till payment of entire decretal amount—Charge on property held created.)

('37) 24 AIR 1937 All 705 (706) : 171 Ind Cas 587, *Mt. Lakhna* v. *Sahu Sita Ram.* (Obiter.)

('01) 4 Oudh Cas 61 (63), *Gurdin Das* v. *Raj Raghubar Singh.*

('88) 15 Cal 66 (68, 69) : 14 Ind App 137 (PC), *Girish Chunder* v. *Anundo Moyi Debi.* (A direction in a will devising immovables to repay a debt due by the testator to the devisee's father with interest was construed to be a charge on the immovables.)

(1878) 8 Ch D 411 (415) : 47 L J Ch 660 : 26 W R (Eng) 734, *Mason* v. *Robinson.* (A testator granted some annuities to various persons and subject to them made a trust in favour of his sons and daughters — It was held that the annuities were made a charge on the property.)

('26) 13 AIR 1926 Bom 495 (496) : 98 Ind Cas 696 (DB), *Amrallal Gordhandas* v. *Keshavlal Kuberdas.* (Where by a written agreement the borrower agreed to pay the lender a commission on the gross income of a factory and it was also agreed that in certain circumstances the lender might recover the amount out of the machinery and properties of the factory belonging to the lender, held that the document created a charge within the meaning of S. 100 of the Transfer of Property Act.)

('80) 5 Cal 438 (443) : 6 Ind App 182 (PC), *Ashutosh Dutt* v. *Doorga Churn.*

('26) 13 AIR 1926 Oudh 349 (350) : 94 Ind Cas 788 : 1 Luck 176, *Bishwanath* v. *Abdus Samad.*

('17) 4 AIR 1917 All 346 (347) : 39 All 311 : 38 Ind Cas 166 (DB), *Mt. Surja Kunwari* v. *Har Narain Ram.*

(1875) L R 20 Eq 269 (272) : 44 L J Ch 490 : 23 W R (Eng.) 789, *Michell* v. *Wilton.*

('12) 14 Ind Cas 353 (368) : 36 Bom 564, *Shivlal Motilal* v. *Tricumdas Mills Co. Ltd.*

(1867) 2 Ch App 644 (648, 649) : 36 L J Ch 925 : 17 L T 153 : 16 W R (Eng.) 30, *Birch* v. *Sherrat.*

('33) 20 AIR 1933 Bom 298 (299, 300) : 145 Ind Cas 582 (DB), *Manekchand Ramchand* v. *Ganeshlal Govardhan.*

(1880) 5 App Cas 588 (594, 595) : 49 L J Ch 829 : 43 L T 227 : 29 W R (Eng.) 293, *Carmichael* v. *Gee.*

In the following cases no charge was held to be created :

('11) 12 Ind Cas 146 (146) (DB) (Mad), *President, Taluq Board, Peddapur* v. *Chilakamarvi.* (Where all that the document says is that the plaintiff and his children are to receive certain allowances at the chatrum, and not that any of the endowed properties, which are not even mentioned in the document, were to be charged with such payments, *held, it does not create any charge.*)

('20) 7 AIR 1920 P C 16 (21) : 47 Cal 932 : 16 Nag L R 114 : 47 Ind App 149 : 76 Ind Cas 680 (PC), *Sundar Lal* v. *Ramji Lal.* (If *A* has two villages *X* and *Y* and he keeps *X* and hands over *Y* to *B* to enjoy on terms that *B* has the usufruct and *A* pays the Government revenue, *B* has no charge over *X* to secure the payment of Government revenue payable by *A* in respect of *Y*.)

('25) 12 AIR 1925 Rang 55 (57) : 84 Ind Cas 302 : 2 Rang 429 (DB), *Somasundaram* v. *Nachiappa*. (Before the suit was decreed, a temporary injunction was passed restraining the defendant from alienating his property—After passing of decree the Appellate Court issued an *ad interim* order of execution — Upon receipt of that order the lower Court issued notice to the parties and ordered the defendant to file list of securities—Then on a certain day, the parties appeared in Court and exactly what happened was not known, but the Judge's diary order stated that judgment-debtor's property was already attached and therefore no further security was necessary and that decree-holder agreed—The appellate Court then made plenary the *ad interim* stay order and when its order was received by the lower Court, the clerk wrote on the reverse thereof : "Execution already stayed." When the case was called again the plaintiff applied for order directing judgment-debtor to furnish adequate security whereupon the judgment-debtor was ordered to furnish sufficient security—This was never done as the appeal was dismissed with execution of the decree— *Held*, that in these circumstances it cannot be held that the property in question was ever actually made security for the due performance of the decree.)

('95) 18 Mad 368 (371, 372) (DB), *Unni* v. *Nagammal*.

('12) 14 Ind Cas 189 (189) (DB) (Mad), *Arunajalam* v. *Seshan*.

('28) 15 AIR 1928 Lah 440 (441) : 109 Ind Cas 479 (DB), *Manohar Lal* v. *Ratan Lal*. (Under an award partitioning property between *J* and *S*, *S* to pay to *J* certain amount in instalments — On failure to pay two instalments, *J* to realize the whole amount by suit — *S* not to alienate property till such amount paid — No charge on *S*'s share for the amount.)

('75) 8 Mad H C R 189 (191) (DB), *Kosala Rama Pillai* v. *Saluckai Tevar*. (Debts undertaken by the holder of an ancestral and impartible polliaput in respect of decrees obtained against his mother cannot by such undertaking become a charge upon villages forming part of the estate.)

('04) 1 All L Jour 327 (328) (DB), *Bhagwati Prasad* v. *Dauna Kuar*. (Provision in a will that the guardian of some legatees shall pay certain maintenance allowance to a certain woman does not create a charge.)

('10) 8 Ind Cas 864 (866) (DB) (All), *Kishen Lal* v. *Bhawan Kuar*. (Some property, which had previously been mortgaged devolved upon certain persons by inheritance — They agreed to divide the property amongst themselves and to pay the mortgage-debt proportionately to their shares — The agreement contained a stipulation that "if for any reason, any of the cosharers fails to pay the debt, then the cosharer, who was to pay any amount of the debt in excess of his share shall be entitled to get the same from the person and the property of the defaulting cosharer" — *Held* that the stipulation in the agreement did not create any charge upon the property of any of the cosharers in respect of any sum paid by any other cosharer in excess of his rateable share of the debt.)

('25) 12 AIR 1925 Oudh 550 (552): 85 Ind Cas 331, *Chhotey Lal* v. *Iqbal Narain*.

('05) 2 Cal L Jour 138 (141) (DB), *Ambika Charan* v. *Mukta Kishori*. (A direction in the will for the payment of the testator's debts is only a general direction to pay up all his debts out of the estate, and does not create any charge thereupon.)

('23) 10 AIR 1923 Lah 652 (654) : 75 Ind Cas 441, *Puran Chand* v. *Puran Chand*. (At the foot of a hundi a note was added in the following words, "Hamari Delhi wa Ludhiana ki jaidad is qarze ki zinmewor hogi"; *held* these words do not create a charge.)

('14) 1 AIR 1914 Cal 263 (268) : 21 Ind Cas 397 (DB), *Rameshwar Singh* v. *Janeshwari Babooshin*. (A condition in babuana grant of properties that the grantee should pay his share of the Government revenue to the grantor is not enough to create a charge in favour of grantor on the property.)

('90) 1890 Bom P J 164 (164) (DB), *Mudkapa* v. *Sukreva*. (Sale-deed contained the following words: "This is my Stridhan — I have sold it to you — You should protect me by giving me food and raiment as long as I live" — *Held*, that these words imported only a personal obligation on the brother; they did not impose a charge on the land.)

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Note 6

6. Property must be specified. — The section uses the expression "immoveable property" and not "specific" immovable property as has been used in S. 58. It is, therefore, not necessary that the properties charged should be described with that amount of definiteness as is necessary in the case of a mortgage.[1] But there should be some expression to signify what properties exactly are to be charged.[2] A general description of the property would be sufficient if, from the facts and circumstances the property can be ascertained,[3] the principle

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('06) 33 Cal 1133 (1153) : 4 Cal L Jour 121 (DB), *Jagat Dhar Narain* v. *A. M. Brown.* (By a bond, being on the face of it an ordinary bond, the obligor agreed to repay the debt, and admitted that if he failed to do so, the obligee would be entitled to recover the debt by sale of a certain factory belonging to him and from his person and other properties and that the property referred to in the bond will be held paibandhi for the debt — Deed registered in Book I — Property held not intended to serve as security.)

('36) 23 AIR 1936 Lah 508 (510) : 164 Ind Cas 463, *Basanti Devi* v. *Official Receiver.* (Attachment before judgment — Suit compromised and compromise decree passed — Compromise providing that property should remain under attachment till payment — *Held*, that it would be straining the language used by the parties to hold that by providing that the property should remain under attachment they intended that the decree-holder should have a lien or a charge on the property — Affirmed in AIR 1936 Lah 610.)

('36) 164 Ind Cas 477 (479) (DB) (Cal), *Bibhuti Bhusan* v. *Baikuntha Nath.*

('26) 13 AIR 1926 Mad 1167 (1167) : 98 Ind Cas 454, *Alamelu Ammal* v. *Raja.*

('35) 1935 Oudh W N 288 (290) (DB), *Deputy Commissioner, Sitapur* v. *Mohammad Bahadur Ali.*

('79) 3 Cal L R 417 (420) (DB), *Bir Chunder Manickya* v. *Ishan Chunder.*

Note 6

1. ('19) 6 AIR 1919 Mad 528 (530) : 51 I. C. 963 (DB), *Srinivasa* v. *Renganatha.*

('90) 13 All 28 (44) : 1890 All W N 216 (DB), *Kishan Lal* v. *Gangaram.*

('40) 27 AIR 1940 All 456 (457) : I L R (1940) All 669 : 191 Ind Cas 148 (DB), *Municipal Board, Cawnpore* v. *Rupchand Jain.*

('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

2. ('32) 19 AIR 1932 Cal 451 (453) : 138 Ind Cas 24 (DB), *Mohini Debi* v. *Purna Sashi.*

('24) 11 AIR 1924 Nag 360 (361) : 78 Ind Cas 380, *Tulsiram* v. *Anusuya.* (Covenant that obligee should recover from "person and property of debtor" is too wide to fasten a charge.)

('26) 13 AIR 1926 Oudh 230 (231) : 91 Ind Cas 1009, *Chob Singh* v. *A. J. Williams.* (Property concerned must be reasonably certain.)

(1904) 1904 App Cas 355 (358): 73 L J Ch 739: 91 L T 602: 55 W R (Eng) 113: 20 T L R 633 : 12 Mans 141, *Illingworth* v. *Houldsworth.*

('18) 5 AIR 1918 Cal 557 (565, 566) : 40 Ind Cas 865 (DB), *Syam Peary* v. *Eastern Mortgage & Agency Co., Ltd.*

('41) 28 AIR 1941 Mad 794 (794) : 197 Ind Cas 441 (DB), *Narasimhamurthi* v. *Satyanandam.*

[*See also* (1718) 24 E R 458 (458) : 1 P Wms 429, *Fremoult* v. *Dedire.*]

3. ('18) 5 AIR 1918 Cal 557 (565, 566) : 40 Ind Cas 865 (DB), *Syam Peary* v. *Eastern Mortgage & Agency, Co., Ltd.*

('41) 28 AIR 1941 Mad 794 (794) : 197 Ind Cas 441 (DB), *Narasimhamurthi* v. *Satyanandam.*

('87) 9 All 158 (164) : 1887 All W N 15 (DB), *Ramsidh Pande* v. *Balgobind.*

('82) 5 All 11 (14): 1882 All W N 159 (DB), *Kanhia Lal* v. *Muhammad Husain.*

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Note 6

being "*certum est quod certum reddi protest*" that is certain which can be made certain.[4] Where, however, the description given is too vague and indefinite the charge will be void for uncertainty.[5] In *Montagu* v. *Earl of Sandwich*,[6] Cotton, L. J., observed:

> "I think it is an established rule, that where the covenant is to charge real estate, which can be ascertained by existing facts and circumstances, for example if there is a covenant to charge all the real estate which a man has at a particular time, that covenant will itself make a charge. But where the covenant is to charge, not all or any definite portion of a man's estate, but only that which is worth £1000 a year, or which would be sufficient to secure £1000 a year, then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant; and it remains simply a covenant to be enforced as against the assets of the covenantor."

('16) 3 AIR 1916 Oudh 329 (330) : 32 Ind Cas 740, *Chauharaja Baksh* v. *Ram Harakh*.

('10) 5 Ind Cas 917 (919) : 34 Mad 47 (DB), *Manikam Pillai* v. *Audinarayana Pillai*.

('38) 25 AIR 1938 Mad 767 (769): 182 Ind Cas 316, *Rathnavelu* v. *Subramaniam*.

('01) 24 Mad 689 (692) (DB), *Minakshi Achi* v. *Chinappa Udayan*. (Where a decree indicates that a charge is created and the property can be identified, it is immaterial that the decree does not specify it.)

(1899) 2 Ch D 530 (533) : 81 L T 354 : 48 W R (Eng) 59, *Tyson* v. *Kelcey*. (If it is possible to discover the meaning of the contract by construction, and to ascertain when the time for enforcement comes and to what property the charge attaches, it cannot be said that it ought not to be enforced because it is too vague or even because there might have been a difficulty in ascertaining the property at the time of the creation of the charge.)

[*See also* ('41) 28 AIR 1941 Cal 117 (118): 194 Ind Cas 133, *Upendra Nath* v. *Durlav Chandra*. (Charge for allowances granted under will may attach to general estate although testator had not provided for allowances to be paid out of specified properties.)

('40) 27 AIR 1940 Cal 93 (95) : 186 Ind Cas 843 (DB), *Bhola Nath* v. *Sarbamangala Debi*. (A will provided that monthly allowances should be paid to his grand-daughter out of the estate left by the testator—The testator gave two successive life estates and gave the remainder to his grandson—It was held that the charge would attach to the corpus of the estate.)]

4. ('87) 9 All 158 (162) : 1887 All W N 15 (DB), *Ramsidh Pande* v. *Balgobind*.

('18) 5 AIR 1918 Cal 557 (565, 566): 40 Ind Cas 865 (DB), *Syam Peary* v. *Eastern Mortgage & Agency Co., Ltd.*

('82) 5 All 11 (14) : 1882 All W N 159 (DB), *Kanhia Lal* v. *Muhammad Husain*.

5. ('32) 19 AIR 1932 Cal 451 (453) : 138 Ind Cas 24 (DB), *Mohini Debi* v. *Purna Sashi*.

('81) 3 Mad 35 (36, 37) (DB), *Bheri Dorayya* v. *Maddipatu Ramayya*.

('29) 16 AIR 1929 Oudh 539 (540) : 121 Ind Cas 81 (DB), *Narain Dass* v. *Murlidhar*.

('24) 11 AIR 1924 Nag 360 (361) : 78 Ind Cas 380, *Tulsiram* v. *Anusuya*.

('05) 2 All L Jour 754 (757), *Rajeshwar Swami* v. *Bihari Lal*.

('33) 20 AIR 1933 All 934 (937) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Mt. Kalawati*.

6. (1886) 32 Ch D 525 (538, 539) : 54 L T 502 : 55 L J Ch 925.

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Thus, a valid charge can be created upon what could be defined to be '*the whole of a man's property*' at the date of the charge.[7] A charge on *villages granted to a person by Government in lieu of loyal services rendered by him* is on a specified property.[8] So also property is specified where '*my share in the Premier Aerated Company at Hazaratganj*' is charged.[9] Where, on the other hand, in a partition suit a decree was passed by which one A was allotted *something more* than an exact one-third of a house and was directed to pay a certain amount to B and C on account of this excess and there was no amin's map or report on the record to show the excess area, it was held that the excess area being uncertain and undefined there was nothing on what the charge for the amount would rest.[10]

7. "By act of parties."— In the undermentioned cases,[1] a charge created by will was held to be a charge by act of parties and within the meaning of this section.

As to whether a charge created by decree incorporating a compromise is a charge created by act of parties, see NOTE 28.

8. Security bond charging immovable property.—Where, by a security bond, a person besides making himself personally liable under S. 145 of the Civil Procedure Code, gives his immovable property as security, the question whether the transaction amounts to a mortgage or a charge will depend on the terms of the document and the intention of the parties. It is therefore a question of construction of the particular document.[1]

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7. ('41) 28 AIR 1941 P C 16 (19) : ILR (1941) 1 Cal 468 : 68 Ind App 34: 193 I. C. 220 (PC), *Sris Chandra Nandy* v. *Rakhalananda.* (While it would not be unusual to create a charge on particular lands it would seem improbable that a vast estate should be charged as a whole with the payment of a small amount.)
('87) 9 All 158 (162, 164) : 1887 All W N 15 (DB), *Ramsidh Pande* v. *Balgobind.* ("All my wealth and property.")
('41) 28 AIR 1941 Mad 794 (794) : 197 Ind Cas 441 (DB), *Narasimhamurthi* v. *Satyanandam.* ("All the property of the judgment-debtor both moveable and immovable.")
[But see ('13) 19 Ind Cas 221 (221) (DB) (Mad), *Kamayya* v. *Yerokola.* (Words "all my property moveable and immovable, as 'Thanakha' shall be liable" are not enough to create a charge.)]
8. ('82) 5 All 11 (14) : 1882 All W N 159 (DB), *Kanhia Lal* v. *Muhammad Hussain.*
9. ('29) 16 AIR 1929 Oudh 539 (540, 541) : 121 Ind Cas 81 (DB), *Narain Dass* v. v. *Murlidhar.*
10. ('26) 13 AIR 1926 Oudh 230 (231) : 91 Ind Cas 1009, *Chob Singh* v. *A. J. Williams.*

Note 7

1. ('14) 1 AIR 1914 Oudh 349 (350) : 23 I. C. 867, *Parbhu Dayal* v. *Babbanlal.*
('32) 19 AIR 1932 Oudh 336 (340): 8 Luck 168: 143 Ind Cas 692 (DB), *H. Hunter* v. *Abdul Ali.*

Note 8

1. ('34) 21 AIR 1934 Mad 1 (3) : 57 Mad 218 : 149 Ind Cas 379 (DB), *Rama Rayanimgar* v. *Venkatalingam Nayanim.* (Charge.)
('17) 4 AIR 1917 All 104 (105) : 39 All 225 : 38 Ind Cas 33 (DB), *Amir* v. *Mahadeo Prasad.* (Mortgage.)
('19) 6 AIR 1919 P C 55 (57, 59) : 42 All 158 : 22 Oudh Cas 212 : 46 Ind App 228 : 55 Ind Cas 550 (PC), *Raghubar Singh* v. *Jai Indra Bahadur Singh.*

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This section shows that, for the creation of a charge, there must be some *person* in whose favour the charge is created. Where a security bond purporting to charge immovable property is given to the *Court* and not to any named person there is no charge, as the Court is not a juridical person and can neither sue nor take property, nor assign it.[2] In the undermentioned case[3] no person was named in the security bond as mortgagee. It was held that the security bond did not create a mortgage but created a charge. It is submitted that the decision is wrong as it proceeds on the reasoning that a document invalid as a mortgage creates a valid charge.

As to the enforcement of security bonds, see Notes on S. 145 and Note 4 on O. 34, R. 14 of the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edition.

9. Contingent charge. — A contingent charge, that is to say, a present charge as security for discharging a contingent liability can be validly created.[1] Section 5 and S. 21 of the Transfer of Property Act

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2. ('29) 16 AIR 1929 All 834 (835) : 119 Ind Cas 81 (DB), *Mehdi Ali Khan* v. *Chunni Lal.* (The beneficiary though not a necessary party to the transaction must be specifically named as being the person in whose favour the charge exists.)
('36) 23 AIR 1936 Rang 303 (304) : 164 Ind Cas 52, *Mahammed Razak* v. *Ram Ratan.*

3. ('30) 17 AIR 1930 Sind 159 (161) : 121 Ind Cas 878, *Madhoram Hardeodas* v. *Kewalram Gopaldas.*

Note 9

1. ('18) 5 AIR 1918 Mad 674 (675) : 39 Ind Cas 867 (DB), *Imbichi* v. *Achampat Avukoya Haji.*
('28) 15 AIR 1928 Pat 587 (588) : 7 Pat 584 : 110 Ind Cas 526 (DB), *Murat Singh* v. *Pheku Singh.*
('31) 18 AIR 1931 Mad 120 (121) : 130 Ind Cas 666, *Abdul Muhammad Rowther* v. *Seetha Lakshmi.* (Where a decree with reference to future maintenance stated that the plaintiff was to recover the value thereof at a particular rate by executing the decree and selling the plaint-mentioned property, it was held that the words were sufficient to create a charge in respect of future maintenance.)
('34) 21 AIR 1934 Lah 765 (767, 768) : 16 Lah 137 : 153 Ind Cas 1064 (DB), *Kesari Mal Umrao Singh* v. *Tansukh Rai Kidar Nath.* (Running account between debtor and creditor—Debtor's shop made collateral security to maximum of Rs. 4000—Charge is not limited to first advance of Rs. 4000 but includes all advances.)
('25) 12 AIR 1925 Pat 288 (290) : 78 I.C. 457 (DB), *Nand Lal* v. *Dharamdeo Singh.*
('11) 11 Ind Cas 629 (632) (DB) (Mad), *Balasubramania* v. *Sivaguru.*
('37) 24 AIR 1937 Pesh 76 (78) : 170 Ind Cas 136 (DB), *Harnam Singh* v. *Mohammad Akbar.*
('06) 28 All 655 (658) : 3 All L Jour 551, *Mt. Maina* v. *Mt. Bachchi.*
('38) 25 AIR 1938 Rang 145 (148) : 177 Ind Cas 601, *U Lat* v. *U Pon Gaung.*
[*See also* ('33) 20 AIR 1933 Pat 257 (258) : 144 Ind Cas 760, *Central Bank of India, Ltd.* v. *Sachindra Mohan.* (By the terms of a lease deed the landlord's claim for rent was made the first charge on the property—*Held* a present charge was created to meet a future contingency.)
('21) 8 AIR 1921 Mad 459 (460, 461) : 70 Ind Cas 362 (DB), *Sesha Iyer* v. *Sreenivasa.*
('89) 12 Mad 69 (71) (DB), *Cooling* v. *Saravana.* (Followed in 11 Ind Cas 629.)
('41) 28 AIR 1941 Pat 95 (96, 97) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Mt. Basumati Kuer* v. *Mt. Harbansi Kuer.* (Compromise decree creating charge for future maintenance.)

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recognise the principle of such a transaction.[2] In such a case as soon as the contract is entered into, the promisee is entitled to look to the specified property as security for the due performance of the contract.[3] No doubt there is a difference between a present charge to discharge a contingent liability and the mere possibility of a charge or a promise to create a charge in future. But it cannot be said that whenever there is a charge to secure a liability which will arise only, if at all, in the future, there is no present charge within the meaning of the section.[4] Thus, where in a document there was a clause to the following effect: "In the case of the aforesaid creditor being dispossessed of the holding in any way, in that case he shall realize his dues from my one anna share in Mauza Dharwali and Gasainpur," it was held that a present charge on existing property was created though it could only be enforced on the happening of the contingency, i.e., dispossession of the creditor.[5] A contrary view taken in the undermentioned cases[6] that such a charge is not a charge within the meaning of this section is, it is submitted, not correct. In *Madho Misser* v. *Sidh Binaik Upadhya*[7] which is a leading case for the contrary view, A borrowed money from B and agreed to repay the amount within a certain period with interest; he also agreed that if he did not repay the money according to the stipulation, B should

('27) 14 AIR 1927 Mad 1069 (1069) : 106 Ind Cas 508 (DB), *Krishna Varma* v. *Official Receiver, S. Malabar.* (A registered bond furnishing security for the payment of future subscriptions of a *kuri* held created a present charge, though the executant undertook to execute a mortgage in future when required.)]

2. ('11) 11 Ind Cas 629 (632) (DB) (Mad), *Balasubramanya* v. *Sivaguru.* (A charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards.)

('37) 24 AIR 1937 Pesh 76 (78) : 170 Ind Cas 136 (DB), *Harnam Singh* v. *Md. Akbar Khan.*

3. ('34) 21 AIR 1934 Lah 765 (767) : 16 Lah 137 : 153 Ind Cas 1064 (DB), *Kesari Mal* v. *Tansukh Rai.*

4. ('25) 12 AIR 1925 Pat 288 (290) : 78 Ind Cas 457 (DB), *Nand Lal* v. *Dharmadeo.*

('28) 15 AIR 1928 Pat 587 (588) : 7 Pat 584 : 110 Ind Cas 526 (DB), *Murat Singh* v. *Pheku Singh.*

('18) 5 AIR 1918 Mad 674 (675) : 39 Ind Cas 867 (DB), *Imbichi* v. *Achampat Avukoya Haji.*

5. ('28) 15 AIR 1928 Pat 587 (588) : 7 Pat 584 : 110 Ind Cas 526 (DB), *Murat Singh* v. *Pheku Singh.*

6. ('87) 14 Cal 687 (690, 691) (DB), *Madho Misser* v. *Sidh Binaik Upadhya.*

('06) 3 All L Jour 221 (223) : 1906 All W N 82 (DB), *Harjas Rai* v. *Naurang.* (A sale-deed contained the following covenant — "If in future any person appears as a claimant of the property sold and makes a claim in consequence of which there is an injury to the property sold, or we do not give possession, then the purchaser may recover the money from our persons or the sold property."—*Held*, that the covenant did not create a charge in favour of the purchaser.)

('22) 67 Ind Cas 939 (940) (DB) (Lah), *Abdul Samad* v. *Municipal Committee, Delhi.* (Dissented from in A I R 1934 Lah 765 : 16 Lah 137.)

('26) 13 AIR 1926 Oudh 209 (211) : 91 Ind Cas 507, *Raja Ram* v. *Jagannath.*

('32) 19 AIR 1932 Cal 451 (453) : 138 Ind Cas 24 (DB), *Mohini Debi* v. *Purna Sashi Gupta.* (An *ekrarnama* which says that if the allowance of maintenance remains in arrear in future, the properties may be sold for realisation of the same, cannot be said to create a charge.)

7. ('87) 14 Cal 687 (691) (DB).

take possession of certain land and then A would not be liable to pay interest. It was contended that the document created a charge on the property. In negativing the contention their Lordships of the Calcutta High Court observed :

> "When the Legislature speaks of a charge under S. 100, it speaks of something which operates as a charge upon land immediately as it is executed. This document seems to us, not to create a charge at the time of its execution, but to operate only as a charge upon the land in question upon the non-payment of the principal money in 1289. All that it does is to create the *possibility* of a charge ultimately arising on the land. That is not a charge under S. 100 of the Transfer of Property Act."

Similar observations were made in *Harjas Rai* v. *Naurang*[8] a case decided by the Allahabad High Court. Speaking about these cases Coutts-Trotter, J., in *Imbichi* v. *Achampat Avukoya Haji*,[9] observed as follows :

> "Now the learned Judge has held that their deed of partition, EX. D, did not create a 'charge' under S. 100, Transfer of Property Act, and in coming to that decision, he bases himself upon a decision in *Madho Misser* v. *Sidh Binaik Upadhya*.[10] Now that decision as well as the decision in *Harjas Rai* v. *Naurang*[11] is capable of two constructions. It is capable of being construed as deciding that the instrument in that case was, in fact, not a present charge to secure against a future contingent liability, but a mere contingent charge arising on the happening of a possible future event. If the two cases mean that, there is no particular harm in that, though whether one would agree with the view they take of the construction of the particular instruments is another question. But if they are supposed to enunciate the proposition which is contended for here, and nothing short of that proposition will avail the respondent—namely, wherever you have a charge to secure a liability which is not a liability existent *in præsenti*, but will arise, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, then I think this Court is bound to say that those decisions, if they mean that, are bad law and should not be followed. The most forcible illustration, I think, is the one given by my learned brother of a Government servant who gives security by the deposit of a fidelity bond or other security for the faithful discharge of his duties. Is the charge bad, because he has not been dishonest at the time the deposit is made? Another equally good illustration is the case of a man who, while his account is in credit at the bank, deposits his title deeds to secure any future overdraft there may be. It is idle to contend that those are not perfectly good *charges* on the property over which they

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8. ('06) 3 All L Jour 221 (223) : 1906 All W N 82 (DB).
9. ('18) 5 AIR 1918 Mad 674 (674, 675) : 39 Ind Cas 867 (DB).
10. ('87) 14 Cal 687 (691) (DB).
11. ('06) 3 All L Jour 221 (223) : 1906 All W N 82 (DB).

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purport to operate, notwithstanding the fact that the indebtedness in both cases is future and is contingent. As I say, if those cases in Calcutta and Allahabad are to be supposed to decide the proposition contended for, we decline to follow them."

10. Floating charge. — The term "floating charge" and its synonym "floating security"[1] are commonly used in financial and mercantile circles[2] as a charge which affects all the assets of a going concern expressed to be included in it, but not *specifically* affecting any item until some event occurs which causes it to crystallize into a fixed security. The term has received judicial recognition and is found used in legislative enactment.[3] The whole basis of this kind of charge is that even after the creation of the charge, the business goes on and the person who creates the charge can dispose of the assets in the ordinary course of business till the charge becomes a fixed charge.[4] In *Evans* v. *Rival Granite Quarries, Ltd*,[5] Buckley, L. J., described a "floating security" as follows :

> "A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

Note 10

1. (1904) 1904 App Cas 355 (356) : 91 L T 602 : 73 L J Ch 739 : 53 W R (Eng) 113, *Illingworth* v. *Houldsworth.*

2. ('27) 14 AIR 1927 Cal 682 (684) : 54 Cal 513 : 103 Ind Cas 748 (DB), *Jones & Co.* v. *Ranjit Roy.*

3. (1903) 2 Ch D 284 (294), *Houldsworth* v. *Yorkshire Woolcombers Association, Ltd.*
See Section 109 of the Indian Companies Act, VII of 1913.
See Section 93 of the English Companies (Consolidation) Act, 1908 (8 Edw. VII, C. 69).

4. (1903) 2 Ch D 284 (292), *Houldsworth* v. *Yorkshire Woolcombers Association, Ltd.*
(1885) 29 Ch D 736 (743): 54 L J Ch 919: 53 L T 562, *In re Horne & Hellard.*
('33) 20 AIR 1933 Cal 154 (157) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *Low & Co.* v. *Pulinbiharilal.*
[*See also* (1878) 10 Ch D 530 (540, 541) : 27 W R (Eng) 236 : 48 L J Ch 137 : 39 L T 589, *In re Florence Land & Public Works Co.* (Per Jessel, M. R.)]

5. (1910) 2 K B 979 (999) : 79 L J K B 970.
[*See also* ('31) 18 AIR 1931 Cal 223 (232) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank Ltd.* ((1910) 2 K. B. 979, followed.)
('27) 14 AIR 1927 Cal 682 (685) : 54 Cal 513 : 103 Ind Cas 748 (DB), *Jones & Co.* v. *Ranjit Roy.* ((1910) 2 K. B. 979, followed.)]

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According to Lord Macnaghten, in *Illingworth* v. *Houldsworth*[6] :

> "There was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined ; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

Romer, L. J., in *In re Yorkshire Woolcombers Association, Ltd.*,[7] lays down three characteristics of a floating charge. He observes :

> "I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge : (1) If it is a charge on a class of assets of a company present and future ; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time ; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way."

Thus, it will be seen from the above observations that, in a floating charge the property is constantly changing from time to time ; the charge does not of itself fasten even on the property existing at the moment of the creation of the charge.[8] The charge becomes a fixed charge or specific charge on the intervention of the charge-holder or the undertaking charged ceasing to be a going concern[9] and till then the charge remains dormant.[10]

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6. (1904) 1904 App Cas 355 (358) : 91 L T 602 : 53 W R (Eng) 113 : 73 L J Ch 739.
[*See also* ('31) 18 AIR 1931 Cal 223 (228, 230) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank.* (1904 A C 355 followed.)
('26) 13 AIR 1926 Bom 427 (429) : 50 Bom 547 : 96 Ind Cas 417 (DB), *Bank of Baroda* v. *Shivadasani.* (1904 A C 355, followed.)]

7. (1903) 2 Ch D 284 (295).
[*See also* ('42) 29 AIR 1942 All 119 (120) : I L R (1942) All 242 : 199 Ind Cas 122 (FB), *Maheshwari Brothers* v. *Offl. Liquidators, I. S. Works, Ltd.* (Affirming A I R 1938 All 574 : I L R (1938) All 896.)
('39) 26 AIR 1939 Sind 100 (103) : 181 Ind Cas 681, *In re Indus Film Corporation Ltd.*]

8. (1910) 2 K B 979 (994): 79 L J K B 970, *Evans* v. *Rival Granite Quarries Ltd.*
('26) 13 AIR 1926 Bom 427 (430) : 50 Bom 547 : 96 Ind Cas 417 (DB), *Bank of Baroda* v. *Shivdasani.*

9. ('31) 18 AIR 1931 P C 245 (246) : 58 Ind App 323 : 134 Ind Cas 651 : 59 Cal 377 (PC), *Imperial Bank of India* v. *Bengal National Bank, Ltd.*
('33) 20 AIR 1933 Cal 154 (157) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *Low & Co.* v. *Pulinbiharilal.*

10. (1888) 13 App Cas 523 (541) : 58 L J Q B 75 : 60 L T 162 : 37 W R (Eng) 513, *Tailby* v. *Official Receiver.* (Per Lord Macnaghten.)
(1897) 1897 App Cas 81 (86) : 66 L J Ch 102 : 75 L T 553 : 45 W R (Eng) 353, *Governments Stock & other Securities Investment Co., Ltd.* v. *Manila Rly. Co., Ltd.*
(1914) 1 Ch 954 (963, 964): 83 L J Ch 666: 110 L T 759, *Re Cromption & Co. Ltd.*

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Illustrations.

(1) Where leasehold property and the machinery, engine, boilers, etc., were charged, it was held that there was no floating charge but a fixed charge because the element of *fluctuation* which was necessary for a floating charge was wanting, and the element of fluctuation due to wear and tear was widely different from what would be consequent on the power of disposal in the ordinary course of business.[11] Similarly, where assets were given in the possession of the lender company it was held for the same reason that there was no floating charge.[12]

(2) Where the borrower company handed over the keys of the godowns to the lender company and further agreed to keep in the godowns stock fetching a certain fixed price and it was also agreed that whenever the borrower company wanted to take out any stock from the godowns it must do so only with the consent of the lender company, it was held that the document did not create a floating charge but a specific charge.[13]

(3) The mere element of uncertainty as to what the amount of the charge, or what the object charged would be were, however, held not sufficient to satisfy the requirements of a floating charge.[14] Where it was agreed that the borrower company could dispose of the stock *with the permission* of the lender company and thus carry on its business it was held that the nature of the fixed charge could not be altered so as to become a floating charge merely because, in spite of the charge, the business of the borrower company continued to be carried on.[15]

Debentures of companies afford the most ordinary example of a floating charge but they are not the only instances of it; a floating charge may be created even by an individual and by means other than the issue of debentures.[16] So also floating charge need not be on the whole undertaking nor the whole property of the company.[17]

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11. ('33) 20 AIR 1933 Cal 154 (157) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *Low & Co.* v. *Pulinbiharilal.*

12. ('27) 14 AIR 1927 Cal 682 (685, 686) : 54 Cal 513 : 103 Ind Cas 748 (DB), *Jones & Co. Ltd.* v. *Ranjit Roy.*

13. ('26) 13 AIR 1926 Bom 427 (430) : 50 Bom 547 : 96 Ind Cas 417 (DB), *Bank of Baroda* v. *Shivdasani.*

14. ('33) 20 AIR 1933 Cal 154 (158) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *Low & Co.* v. *Pulinbiharilal.*

15. ('26) 13 AIR 1926 Bom 427 (430) : 50 Bom 547 : 96 Ind Cas 417 (DB), *Bank of Baroda* v. *H. B. Shivadasani.*

16. ('33) 20 AIR 1933 Cal 154 (156, 157) : 59 Cal 1372 : 143 Ind Cas 193 (D B), *Low & Co* v. *Pulinbiharilal.* (Mortgages by tradesmen of their stock in trade and effects belong to the class of a floating security in so far as the security is attached to the subject charged by them in the varying condition in which it happens to be from time to time.)

17. (1903) 2 Ch D 284 (298), *Houldsworth* v. *Yorkshire Woolcombers Assocn. Ltd.*

In the absence of a stipulation to the contrary a floating charge leaves the person or the company creating the charge at liberty to create specific charges in priority to itself.[18] See also the undermentioned cases.[19]

A floating charge on the undertaking or property of a company, requires registration under S. 109 of the Indian Companies Act, VII of 1913. Otherwise it is void under that section.[20] A document creating a floating charge will also require registration under S. 17 of the Registration Act if it concerns immovable property of the value of Rs. 100 and upwards and will not affect the immovable property if not so registered.[21] As to the effect of non-registration upon the secured debts due to the borrower from third persons which are charged, see Notes on section 8.

11. "By operation of law." — It has been held that the words 'by operation of law' in this section are more extensive than the words 'by law' and that a charge created 'by operation of law' includes a charge directly created by the provisions of an Act as well as other charges created indirectly as a legal consequence of certain conditions.[1]

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18. ('31) 18 AIR 1931 Cal 223 (232) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank Ltd.*
(1878) 10 Ch D 530 (540, 546) : 27 W R (Eng) 236 : 48 L J Ch 137 : 39 L T 589, *In re Horence Land & Public Works Co.*
(1880) 15 Ch D 465 (472), *In re Colonial Trust Corporation.*

19. ('41) 28 AIR 1941 All 345 (348) : 196 Ind Cas 425 : I L R (1941) All 691 (FB), *U. P. Government* v. *Mannohan Das.*
(1899) 2 Ch 130 (135, 136) : 68 L J Ch 410 : 80 L T 461, *Foster* v. *Borax Co.*
(1900) 2 Ch 654 (658, 659) : 69 L J Ch 659 : 82 L T 674 : 48 W R (Eng) 636, *Vivian (H. H.) & Co Ltd.*
(1893) 69 L T (N S) 169 (170, 171) : 1 Q B 744 : 63 L J Q B 12 : 41 W R (Eng) 483, *Driver* v. *Broad.*
(1916) 1 Ch 132 (138) : 114 L T 276 : 85 L J Ch 106, *National Provincial Bank of England* v. *United Electric Theatres.*

20. ('26) 13 AIR 1926 Bom 28 (30) : 91 Ind Cas 334 (D B), *Pudumjee and Co* v. *N. H. Moos.*
('39) 26 AIR 1939 Sind 100 (106) : 181 Ind Cas 681, *In re Indus Film Corporation, Ltd.*
('27) 14 AIR 1927 Cal 682 (684) : 54 Cal 513 : 103 Ind Cas 748 (DB), *Jones and Co* v. *Ranjit Roy.*
('42) 29 AIR 1942 All 119 (120) : I L R (1942) All 242 : 199 Ind Cas 122 (F B), *Maheshwari Brothers* v. *Offl. Liquidators, I. S. Works, Ltd.*, (Affirming AIR 1938 All 574=I L R (1938) All 896.)
('31) 18 AIR 1931 Cal 223 (231) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank.*
See also Sections 79 and 88 of Companies Act, 1929 (19 & 20 Geo. V, Ch. 23.)

21. ('31) 18 AIR 1931 P C 245 (247) : 58 I A 323 : 59 Cal 377 : 134 Ind Cas 651 (P C), *Imperial Bank of India* v. *Bengal National Bank, Ltd.*
('30) 17 AIR 1930 Cal 536 (537) : 57 Cal 328 : 127 Ind Cas 760, *Imperial Bank of India* v. *Bengal National Bank.*
('26) 13 AIR 1926 Bom 28 (30) : 91 Ind Cas 334 (DB), *Pudumjee & Co.* v, *Moos.*

Note 11

1. ('03) 26 Mad 686 (726) : 13 Mad L Jour 83 (FB), *Rajah of Vizianagaram* v. *Rajah Somasekhararaj.*

Section 100
Note 11

The following are instances of charges by operation of law created directly by the provisions of Acts :

1. Under the provisions of this Act :
   (a) Seller's charge for unpaid purchase money under S. 55 (4) (b).
   (b) Buyer's charge under S. 55 (6) (b).
   (c) Charge for contribution under S. 82 of the Act.[1a]
2. Under the provisions of other Acts :
   (a) Charge in favour of Government in respect of the amount due under a certificate issued by Collector by virtue of S. 8, Bihar and Orissa Public Demands Recovery Act (IV of 1914).[2]
   (b) Charge in favour of Municipal Boards in United Provinces for the amount of taxes due to them under S. 177 of the U. P. Municipalities Act of 1916[3] and in favour of Calcutta Corporation for consolidated rates under Calcutta Municipal Act of 1923.[4]
   (c) Charge in favour of Government for a loan advanced under the Land Improvement Loans Act, XIX of 1883, by S. 7 (c) of the Act.[5]
   (d) Charge for the arrears of property tax under S. 212 of the Bombay City Municipal Act (Bombay Act III of 1888).[6]
   (e) Charge in favour of the Government for court-fee in a pauper suit under O. 33, R. 10 of the Civil Procedure Code.[7]

An attachment before judgment, or in execution of a decree has merely the effect of preventing all private alienations of the property to the prejudice of the claims enforceable under the attachment. It does not create any title, charge, lien or priority in the property in favour of the attaching creditor.[8] So also the appointment of a receiver

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1a. See Notes on Section 82.

2. ('34) 21 AIR 1934 Pat 648 (649, 650) : 13 Pat 364 : 155 Ind Cas 635 (DB), *Bhekdhari* v. *Radhika Koer.*

3. ('40) 27 AIR 1940 All 456 (456) : I L R (1940) All 669 : 191 Ind Cas 148 (DB), *Cawnpore Municipality* v. *Rupchand.*
('37) 24 AIR 1937 Oudh 31 (31) : 164 Ind Cas 1034 : 12 Luck 353, *Ramjilal* v. *Municipal Board, Lucknow.*

4. ('34) 21 AIR 1934 Cal 862 (864) : 61 Cal 1047 : 153 Ind Cas 972 (DB), *Corporation of Calcutta* v. *Kumar Arun Chandra.* (Reversing A I R 1934 Cal 325 : 60 Cal 1470.)
('15) 2 AIR 1915 Cal 478 (480, 481) : 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.* (Section 228 of Act III of 1899.)
('25) 12 AIR 1925 Cal 1067 (1068) : 87 Ind Cas 229 (DB), *Nayan Manjuri Dasi* v. *Chairman, Howrah Municipality.* (Do.)

5. ('39) 26 AIR 1939 Bom 183 (187) : 182 Ind Cas 635, *Lakshman* v. *Secretary of State.*
('19) 6 AIR 1919 Mad 590 (593) : 41 Mad 691 : 47 Ind Cas 301 (DB), *Sankaran* v. *Ramasami.*

6. ('35) 22 AIR 1935 Bom 347 (350) : 158 Ind Cas 151 : 59 Bom 681 (DB), *Secretary of State* v. *Municipal Corporation, Bombay No. 1.*

7. See Notes on O. 33, R. 10 of the Authors' Commentaries on the *Code of Civil Procedure, 1908*, 3rd (1940) Edn.

8. See cases under Note 5 on S. 64 in the Authors' Commentaries on the *Code of Civil Procedure, 1908*, 3rd (1940) Edn. and the undermentioned cases :

does not amount to a charge on the property for which the receiver is appointed.[9]

12. Charge under Rent Acts. — A charge for the payment of rent under the Bengal Tenancy Act[1] or the Madras Estates Land Act,[2] is not such a charge as is defined by this section. The charge created by the tenancy law in the Central Provinces, however, has been held to be a charge arising by operation of law within the meaning of this section.[3]

13. "And the transaction does not amount to a mortgage." — In its ordinary sense the word "charge" means an obligation imposed on property or a claim on property. In this sense every

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('10) 6 Ind Cas 113 (114) (DB) (All), *Sahu Lalta Prasad* v. *Zahur-ud-Din*. (A creditor, who before judgment attaches the property of the judgment-debtor, does not acquire any lien or charge on the property.)

[See however ('80) 5 Cal 148 (174) : 6 Ind App 88 (P C), *Suraj Bunsi Koer* v. *Sheo Prasad*. (An order of sale in addition to an attachment under a mortgage decree held to create a valid charge.)

('01) 23 All 467 (470) : 1901 All W N 143 (DB), *Ghulam Husain* v. *Dina Nath*. (Every attaching creditor who has obtained an order for sale thereby acquires a charge on the property attached.)

(1900) 2 Bom L R 32 (35, 40) (DB), *Parikh Girdharlal* v. *Thakore Fatehsing*.]

9. ('35) 22 AIR 1935 Mad 146 (149) : 153 Ind Cas 259, *Arunachalam* v. *Arunachalam*.

Note 12

1. ('88) 15 Cal 492 (496) (D B), *Fotic Chunder Dey Sirkar* v. *Foley*.

('06) 33 Cal 985 (995) : 4 Cal L Jour 219 (DB), *Royzuddi Sheikh* v. *Kritarthanath*.

('18) 5 AIR 1918 Cal 265 (270) : 43 Ind Cas 996 (D B), *Satya Shankar Ghosal* v. *Mon Mohan Guha*. (Per Chatterjea, J.)

[*See also* ('34) 21 A I R 1934 Pat 70 (71, 72) : 155 Ind Cas 663, *Ramnandan Prasad* v. *Ramdas*. (Rights given under S. 65, Bengal Tenancy Act, are peculiar to the landlord. There is no right of subrogation in the subsequent mortgagee advancing money to the mortgagor to pay off the rents.)]

2. ('19) 6 AIR 1919 Mad 733 (734) : 42 Mad 114 : 48 Ind Cas 794 (DB), *Suranna* v. *Suryanarayana*.

('32) 19 A I R 1932 Mad 189 (192) : 135 Ind Cas 609 : 55 Mad 468 (DB), *Vyraperumal* v. *Alagappa*.

('32) 19 A I R 1932 Mad 716 (719) : 139 Ind Cas 452, *Suryanarayana* v. *Ramachendrudu*.

[But see ('20) 7 A I R 1920 Mad 183 (185, 186) : 43 Mad 786 : 57 Ind Cas 764 (DB), *Venkatalakshmana* v. *Nenda Seetayya*. (Per Sadasiva Aiyar, J. : — Charge for rent where it is payable in money is a charge within the meaning of S. 100 and therefore O. 34 R. 14, C. P. C., applies.)]

3. ('40) 27 AIR 1940 Nag 156 (158) : 190 Ind Cas 641 (DB), *Sitaram* v. *Krishnarao*.

('90) 14 C P L R 17 (19, 20), *Bhagwandas* v. *Tarachand*. (Section 99, T. P. Act, (now repealed) held applicable.)

('07) 3 Nag L R 164 (168), *Singai Murlidhar* v. *Lala Premnarain*. (Landlord cannot bring the holding of his tenant to sale in execution of a decree for arrears of rent, except in the manner provided by S. 99, T. P. Act.)

('03) 16 C P L R 52 (53), *Khemchand* v. *Dhanraj*.

[But see ('97) 10 C P L R 48 (49, 51), *Bhaoo Patel* v. *Raja Raghoji*. (Charge under old S. 40 of the C. P. Tenancy Act, was held to be not such a charge as was defined by S. 100, T. P. Act.)]

Section 100
Note 13

mortgage would create a charge, but every charge would not be a mortgage.[1]

This Act, however, draws a clear distinction between a mortgage and a charge[2] and restricts the latter to cases where the security *does not amount to a mortgage* as defined in S. 58. In the undermentioned case[3] it was observed by Sadasiva Aiyar, J., that "*every mortgage creates a charge* but conversely every charge does not amount to a mortgage." It is submitted that the said observations are not correct in so far as they imply that a mortgage will include a charge, within the meaning of this Act. In some cases[4] the word "charge" has been loosely used for the word "mortgage." Such use of the word is not correct.

As has been seen already the main distinction between a 'charge' under this section and a mortgage is that a mortgage involves a *transfer* of an interest in specific immovable property, while in a charge, there is no such transfer of interest.[5] The following further differences between a mortgage and a charge may be noted :

Note 13

1. ('34) 21 AIR 1934 Bom 189 (190) : 152 Ind Cas 267 (DB), *Chhaganlal* v. *Chunilal.*

2. ('19) 6 AIR 1919 Cal 634 (635) : 45 Ind Cas 783 : 46 Cal 111 (DB), *Purnachandra* v. *Barada Prasanna.*
('41) 28 AIR 1941 Lah 274 (275) : 198 Ind Cas 100 (DB), *Sampuran Singh* v. *Ahmad Din.*
[*See also* ('87) 14 Cal 730 (738) (FB), *Girwar Singh* v. *Thakur Narain Singh.*]

3. ('19) 6 AIR 1919 Mad 528 (530) : 51 I. C. 963 (DB), *Srinivasa* v. *Renganatha.*

4. ('05) 1 Cal L Jour 531 (536) (DB), *Ram Nath Mukhopadhya* v. *Brahmamoyi Debya.*
('93) 6 C P L R 60 (63), *Ramprasad* v. *Deokaran Bhagwandas.*
('16) 3 AIR 1916 Cal 801 (802, 803) : 31 Ind Cas 22 : 43 Cal 69 (DB), *Har Shyam* v. *Shyam Lal.*
[*See also* ('13) 18 Ind Cas 80 (80) : 40 Cal 514 (DB), *Makbul Ali* v. *Ali Ahmad.*]

5. ('32) 19 AIR 1932 Lah 465 (466) : 13 Lah 660 : 139 Ind Cas 49 (FB), *Sher Singh* v. *Daya Ram.*
('32) 19 AIR 1932 Oudh 336 (340) : 8 Luck 168 : 143 Ind Cas 692 (DB), *Hunter* v. *Abdul Ali.*
('34) 21 AIR 1934 Bom 189 (190): 152 Ind Cas 267 (DB), *Chhaganlal* v. *Chunilal.*
('02) 25 Mad 220 (237) (FB), *Narayana Ayyar* v. *Venkataramana.*
('26) 13 AIR 1926 Mad 903 (904) : 95 Ind Cas 447, *Sambasiva* v. *Venkatarama.*
('06) 33 Cal 985 (992) : 4 Cal L Jour 224 (DB), *Royzuddi Sheik* v. *Kali Nath Mookerjee.*
('29) 16 AIR 1929 All 281 (285) : 116 Ind Cas 855: 51 All 612 (DB), *Altaf Begam* v. *Brij Narain.*
('29) 16 AIR 1929 Oudh 539 (540, 541) : 121 Ind Cas 81 (DB), *Narain Dass* v. *Murli Dhar.*
('24) 11 AIR 1924 Oudh 209 (215) : 75 Ind Cas 579 (DB), *Mohan Singh* v. *Sewa Ram.*
('36) 23 AIR 1936 Lah 482 (484) : 163 Ind Cas 69 (DB), *Benares Bank Ltd.* v. *Har Prasad.*
('37) 24 AIR 1937 Oudh 35 (42) : 166 Ind Cas 477 (FB), *Sharif Ahmad* v. *H. Hunter.*
('36) 23 AIR 1936 Oudh 196 (200) : 165 Ind Cas 70 (DB), *Sikandar Ara Amina Begam* v. *Hasan Ara Begum.*

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Note 13

(1) A charge can be created by act of parties or by operation of law. A mortgage, however, can only be created by act of parties.[6]

(2) In a simple mortgage there is always a personal covenant to pay, while there may or may not be a personal covenant in a charge.[7]

('22) 9 AIR 1922 Pat 529 (532) : 70 Ind Cas 24 : 1 Pat 387 (DB), *Shiva Prasad* v. *Beni Madhab.* (A document ran as follows : "This settled coal land, mines, etc., as well as all other moveables shall ever be regarded as a security for the payment of the rent and cesses due together with interest thereon due to you. I shall not be competent to transfer the said property by sale, gift or remove the same, so long as the rent, etc,, due to you will remain unpaid"—*Held* it created a mortgage and not merely a charge.)

('14) 1 AIR 1914 Oudh 349 (351) : 23 Ind Cas 867, *Parbhu Dayal* v. *Babhan Lal.*

('31) 18 AIR 1931 All 62 (64) : 130 Ind Cas 489 : 52 All 985 (DB), *Nathan Lal* v. *Durga Das.*

('41) 28 AIR 1941 Lah 274 (275) : 198 Ind Cas 100 (DB), *Sampuran Singh* v. *Ahmad Din.*

('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

('90) 13 All 28 (44) : 1890 All W N 216 (DB), *Kishan Lal* v. *Ganga Ram.*

('15) 2 AIR 1915 Cal 478 (480): 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*

('31) 18 AIR 1931 Cal 223 (228) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank, Ltd.*

('32) 19 AIR 1932 Cal 451 (454): 138 I. C. 24 (DB), *Mohini Debi* v. *Purna Sashi.*

('39) 26 AIR 1939 Nag 118(119): 182 I.C. 102, *Ganga Prasad* v. *Ratan Chand.*

('36) 23 AIR 1936 Nag 125 (127) : I L R (1936) Nag 22 : 165 Ind Cas 550 (DB), *Liladhar Uttamchand* v. *Shivaji Ganesh.*

('16) 3 AIR 1916 Low Bur 67 (67) : 33 Ind Cas 610, *Maung Pe Gyi* v. *P. N. Vellian Chetty.*

('08) 35 Cal 837 (843, 844) : 7 Cal L Jour 492 (DB), *Gobinda Chandra* v. *Dwarka Nath.*

('41) 28 AIR 1941 Nag 102 (103, 104) : I L R (1942) Nag 263 : 194 Ind Cas 761 (DB), *Dau Bhairoprasad* v. *Jugal Prasad.*

(1884) 12 Q B D 347 (350) : 32 W R (Eng) 492 : 53 L J Q B 222 : 50 L T 723, *Burlinson* v. *Hall.*

(1889) 23 Q B D 239 (242) : 38 W R (Eng) 15 : 58 L J Q B 459 : 61 L T 229, *Tancred* v. *Delagoa Bay Rly. Co.*

('40) 27 AIR 1940 All 456 (457) : I L R (1940) All 669 : 191 Ind Cas 148 (DB), *Municipal Board, Cawnpore* v. *Roopchand.*

[See however ('41) 28 AIR 1941 All 345 (347) : I L R (1941) All 691 : 196 Ind Cas 425 (FB), *U. P. Government* v. *Manmohan Das.* (*Obiter.*)

('14) 1 AIR 1914 Nag 32 (34) : 26 Ind Cas 601 : 10 Nag L R 81, *Khem Chand* v. *Malloo.*]

6. ('11) 11 Ind Cas 629 (632) (DB) (Mad), *Balasubramania* v. *Sivaguru.*

('15) 2 AIR 1915 Cal 478 (480) : 27 Ind Cas 261 : 42 Cal 625 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*

('08) 35 Cal 837 (844) (DB), *Gobinda Chandra* v, *Dwarka Nath.*

7. ('31) 18 AIR 1931 All 99 (100) : 52 All 901 : 130 Ind Cas 198 (DB), *Raghukul Tilak* v. *Pitam Singh.*

('33) 20 AIR 1933 All 934 (937) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Mt. Kalawati.*

('35) 22 AIR 1935 Oudh 309 (313) : 155 Ind Cas 40, *Akbar Husain* v. *Mt. Husain Jahan Begum.*

('27) 14 AIR 1927 Oudh 55 (59) : 99 Ind Cas 483 : 2 Luck 299 (DB), *Hukmichand* v. *Pioneer Mills., Ltd.*

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Notes 13–14

(3) A mortgage secures the payment of a *loan* or a *debt*. A charge need not necessarily secure any *debt* or *loan*. Thus, a charge for maintenance is not a charge to secure a debt which is to be advanced by the charge-holder.

(4) A mortgage can be enforced against a transferee with or without notice of it. A charge cannot be enforced against a transferee for consideration without notice.[8]

(5) A mortgage can be redeemed but that is not necessarily the case with a mere charge.[9] In the undermentioned cases[10] the word 'redeem' has been used in connexion with paying off the amount that was charged on the property. In these cases, it must be understood as having been used in the sense merely, of 'paying off a debt' and not in the technical sense in which it is used in connexion with a mortgage. (See also Note 43 on section 91.)

(6) A charge may be created in perpetuity, while a mortgage must necessarily be for a limited period.[11]

14. Transfer invalid as a mortgage whether operates as a charge. — A transaction which is intended to be a mortgage but which fails as a mortgage by reason of not fulfilling the requirements of law, such as the provisions of S. 59, does not operate as a charge.[1] A

('34) 21 AIR 1934 Bom 189 (190) : 152 Ind Cas 267 (DB), *Chhaganlal* v. *Chunnilal.*

('14) 1 AIR 1914 Mad 114 (115) : 24 Ind Cas 372 (DB), *Rangappa* v. *Thammayappa.* (Per Sadasiva Iyer J.)

('18) 5 AIR 1918 Mad 997 (997) : 38 Ind Cas 813 (DB), *Venkatarama Chetty* v. *Panchanatha Iyer.*

('15) 2 AIR 1915 Mad 1172 (1172) : 26 Ind Cas 938 (DB), *Chockalingam Chetty* v. *Kannusawmy Pillai.*

('19) 6 AIR 1919 Mad 528 (530) : 51 Ind Cas 963 (DB), *Srinivasa* v. *Renganatha.*

8. See Notes 22 to 24.

9. (1866) 13 L T (N S) 783 (784): 14 W R (Eng) 298 : 35 L J Ch 253 : 147 R R 129, *Earl of Coulett* v. *Hood.*

[*See also* ('33) 20 AIR 1933 All 934 (937) : 147 Ind Cas 302 (DB). *Matlub Hasan* v. *Kalawati.* (Charge for maintenance — Charge in perpetuity may not be redeemed at all.)

('13) 19 Ind Cas 661 (662) (DB) (All), *Masuma Khatun* v. *Tahira Khatun.* (Charge for maintenance—Such a charge may not be redeemed at all.)]

10. ('35) 22 AIR 1935 Mad 867 (869) : 59 Mad 101 : 158 Ind Cas 778 (DB), *Ramaswami Pillai* v. *Trichinopoly Co-operative Credit Bank, Ltd.*

('22) 9 AIR 1922 All 410 (411) : 77 Ind Cas 113 (DB), *Surat Singh* v. *Umrao Singh.*

11. ('20) 7 AIR 1920 Oudh 5 (6, 7) : 57 Ind Cas 618, *Raja Ram* v. *Sant Baksh.*

Note 14

1. ('99) 26 Cal 78 (81) (DB), *Tofaluddi Peada* v. *Mahar Ali.* (Mortgage bond attested by one witness only.)

('16) 3 A I R 1916 P C 169 (171) : 34 Ind Cas 900 (P C), *Ram Narayan Singh* v. *Adhindra Nath.* (Mortgage not attested by two witnesses.)

('06) 33 Cal 985 (993) : 4 Cal L Jour 219 (D B), *Royzuddi Sheik* v. *Kali Nath.* (Attested by one witness.)

('05) 32 Cal 729 (732) : 9 Cal W N 697 (DB), *Pran Nath* v. *Jadu Nath.* (Not properly attested.)

contrary view was expressed in the undermentioned case[2] that even where an intended security is not completed according to law, a charge may be created. The view was rested on the English rule that where parties intend to create a charge and have the power to do so, Court will give effect to that intention notwithstanding any mistake which may have occurred in the attempt to effect it, on the principle that equity treats that as done which ought to be done.[3] But the Courts in this country

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('97) 1 Cal W N 81 (82, 83) (D B), *Rani Kumari* v. *Srinath Roy.* (One attesting witness.)
('08) 35 Cal 837 (844):7 Cal L Jour 492 (DB), *Gobinda Chandra* v. *Dwarka Nath.* (The fact that the necessary formalities of due execution are wanting would not convert the mortgage into a charge.)
('12) 15 Ind Cas 666 (667) (DB) (Cal), *Debendra Chandra* v. *Behari Lal.* (One attesting witness.)
('25) 12 AIR 1925 Rang 55 (58) : 84 Ind Cas 302 : 2 Rang 429, *Somasundaram* v. *Nachiappa.* (Mortgage not reduced to writing or registered.)
('22) 9 A I R 1922 Low Bur 25 (26) : 11 Low Bur Rul 319 : 67 Ind Cas 652 (DB), *Maung Po Ngwe* v. *Yacoob Ally.*
('16) 3 AIR 1916 Low Bur 94 (95) : 8 Low Bur Rul 553 : 32 Ind Cas 595, *Ma Bon* v. *Maung Pa Lu.* (No registered deed.)
('14) 1 A I R 1914 Nag 32 (36) : 10 Nag L R 81 : 26 Ind Cas 601, *Khemchand* v. *Malloo.*
('08) 31 Mad 337 (338) (DB), *Samoo Patter* v. *Abdul Sammad.* (Deed not attested.)
('37) 24 AIR 1937 Mad 148 (149) : 170 Ind Cas 840, *Subbaraya Pillai* v. *Pichai Pillai.* (Want of registration and attestation.)
('17) 4 AIR 1917 Mad 849 (852) : 36 Ind Cas 903 (DB), *Anantarama Iyer* v. *Yusufji Oomer.* (Attested by one witness.)
('16) 3 AIR 1916 All 103 (104) : 38 All 461 : 35 Ind Cas 748 (DB), *Param Hans* v. *Randhir Singh.* (Deed not duly attested.)
('13) 18 Ind Cas 311 (312) : 35 All 164 (DB), *Collector of Mirzapur* v. *Bhagwan Prasad.* (Mortgage deed attested by only one witness.)
('05) 7 Bom L R 934 (935) (DB), *Narayan* v. *Lakshman Das.* (Deed unattested.)
('27) 14 A I R 1927 Sind 66 (75) : 97 Ind Cas 321, *Official Receiver* v. *Tirathdas Mewa Ram.* (Simple mortgage deed neither attested nor registered.)
('26) 13 AIR 1926 Sind 88 (89) : 18 Sind L R 282 : 93 Ind Cas 660 (DB), *Pribhdas* v. *Sahib Khan.* (Improper attestation.)
('34) 21 AIR 1934 Bom 24 (25, 26) : 149 Ind Cas 241 (DB), *Phattechand* v. *Uma Valoo.*
[*See also* ('04) 28 Mad 54 (55, 56) (DB), *Konchadi Shanbhogue* v. *Shiva Rao.*
('25) 12 A I R 1925 Rang 1 (2, 3) : 2 Rang 313 : 84 Ind Cas 1023 (D B), *Maung Tun Ya* v. *Maung Aung Dun.* (An oral usufructuary mortgagee has no charge on the mortgaged land within the meaning of S. 100 of the Transfer of Property Act, but he is equitably entitled to retain possession of the land until his debt has been repaid.)]

2. ('12) 17 Ind Cas 976 (979) : 39 Cal 810, *Charnock Collieris Co. Ltd.* v. *Bholanath Dhar.* (Where a deed of hypothecation did not comply with the terms of the articles of association of a company, held that the document created a valid charge.)

3. (1865) 13 L T (N S) 177 (178) : 46 E R 594 : 35 Beav 153 : 14 W R (Eng) 6 : 147 R R 82, *In re Strand Music Hall Co.*
(1894) 3 Ch 181 (183, 184) : 63 L J Ch 810 : 71 L T 115 : 42 W R (Eng) 600, *In re Queensland Land & Coal Co.*
(1904) 2 Ch 234 (247, 248) : 73 L J Ch 617 : 91 L T 124, *Johnston Foreign Patents Co., In re.*
(1886) 34 Ch D 43 (49, 50, 54) : 35 W R (Eng) 40 : 55 L T 472, *Ross* v. *Army and Navy Hotel Co.*
('06) 33 Cal 985 (994) : 4 Cal L Jour 219 (DB), *Royzuddi Sheikh* v. *Kali Nath.*

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Notes 14-15

are not free to apply the English equitable principles in the face of the statutory provision contained in this section.[4]

Where an instrument embodies the true contract between the parties and is, in terms, an instrument which only creates a charge, then, an erroneous belief of the parties that they had created a mortgage would not affect the true nature and validity of the transaction and the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge.[5]

15. Mortgage or charge. — A charge has a closer resemblance to a simple mortgage than to any other kind of mortgage. As the remedy in a simple mortgage and in a charge is the same and the provisions applicable to simple mortgages are made applicable to charges also, the line of demarcation between them is very thin and sometimes hardly distinguishable.[1] As has been seen already, the main distinction between a mortgage and a charge is that in a mortgage there is a *transfer of an interest* in property, while in a charge there is no such transfer. Therefore, in order to determine whether a particular transaction is a mortgage or a charge it must be ascertained whether the parties to the transaction *intended* to transfer an interest in the property.[1a] Such intention must be gathered by looking at the substance and essence of the transaction and not merely at the form of the deed.[2] If the intention of the parties is to transfer an interest in the property, in order to make it a security, the transaction will amount to a mortgage.[3] If, on the other hand, parties intend merely to make the property security without transferring any interest in it the transaction amounts to a charge.[4]

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4. ('06) 33 Cal 985 (994, 995) : 4 Cal L Jour 219 (DB), *Royzuddi Sheikh* v. *Kali Nath.*

5. ('14) 1 AIR 1914 Nag 32 (36) : 10 Nag L R 81 : 26 Ind Cas 601, *Khemchand* v. *Malloo.*

Note 15

1. ('33) 20 AIR 1933 All 934 (937) : 147 Ind Cas 302 (DB), *Matlab Hassan* v. *Mt. Kalawati.*

[*See also* ('16) 3 AIR 1916 Nag 78 (79) : 13 Nag L R 19 : 39 Ind Cas 50, *Mt. Kesar* v. *Mt. Munna.*]

1a. See Note 1.

2. ('36) 23 AIR 1936 Lah 482 (484) : 163 Ind Cas 69 (DB), *Benares Bank Ltd.* v. *Har Parshad.*

('33) 20 AIR 1933 All 934 (936) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Mt. Kalawati.*

3. ('34) 21 AIR 1934 Pat 217 (221) (DB), *Rameshwar Narain* v. *Pani Ram.*

('05) 9 Cal W N 1001 (1002) (DB), *Nabin Chand* v. *Raj Coomar.*

('20) 7 AIR 1920 Mad 650 (651) : 60 Ind Cas 611 (613) (DB), *Narayanasami Rao* v. *Ramasami Naicker.*

('37) 24 AIR 1937 Mad 148 (149) : 170 Ind Cas 840, *Subbaraya Pillai* v. *Pichai-pillai Udayan.*

('11) 11 Ind Cas 629 (632) (DB) (Mad), *Balasubramania* v. *Sivaguru.*

('91) 15 Bom 183 (186) (DB), *Venkatesh Shetti* v. *Narain.*

('15) 2 AIR 1915 All 15(15): 26 I. C. 752 (DB), *Kalyan Singh* v. *Dammar Singh.*

('41) 28 AIR 1941 Lah 274 (275) : 198 Ind Cas 100 (DB), *Sampuran Singh* v. *Ahmad Din.* (Person definitely stating that he mortgaged his property and would redeem it—Document is mortgage and not merely charge.)

4. (1900) 27 Cal 194 (196) (DB), *Kuloda Prosad* v. *Jageshar Koer.*

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In a simple mortgage the mortgagor agrees, expressly or impliedly that the mortgagee shall have the right to cause the mortgaged property to be sold for the recovery of his debt. The presence of a clause giving the other party a right to sell the property in order to recover his debt indicates a transfer of an interest in the property and is, therefore, a distinguishing factor between a simple mortgage and a charge. If an instrument is expressly stated to be a mortgage and gives a power of realisation of the mortgage-money by sale of the mortgaged property, it should be held to be a mortgage.[5] If, on the other hand, the instrument simply creates a lien or directs the realisation of money from a particular property without reference to sale, it creates a charge.[6] Thus, where a decree based on a compromise provided that 'the defendants do pay to the plaintiff the sum of Rs. 31,251', and further declared that the immoveable properties specified therein shall be hypothecated for the realisation of the said money and that the defendants shall not be able to create any encumbrance on the same,' it was held that the decree had no resemblance in form to a simple mortgage; that the hypothecation clause created a lien and prohibited further encumbrances and that the parties only intended that the immovable properties mentioned in the schedule to the decree should be reserved intact as security for the payment of money.[7] Similarly, where under a deed of adjustment filed in execution proceedings the firm *A* was to pay *K* Rs. 34,950 on 18-5-1921 and, on default, to pay Rs. 40,000 and the deed concluded: "the first party to be at liberty to recover the amount due to them under this adjustment by sale of the . . . . property in execution," it was held that the deed did not give the opponent the power of realisation by sale of the property in any of the recognised ways, i. e., by sale through Court in execution of a mortgage-decree or sale without the intervention of Court under a power given in a mortgage-deed, and was

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('16) 3 AIR 1916 Mad 1219 (1219) : 29 Ind Cas 605 (DB), *Ramachariar* v. *Dorai-sami Pillai.*
('39) 26 AIR 1939 Nag 132 (134) : 185 Ind Cas 33, *Renukabai* v. *Bheosan.*
('30) 17 AIR 1930 All 136 (147) : 52 All 281 : 124 Ind Cas 733 (FB), *Lallu Singh* v. *Ram Nandan.*
('07) 10 Oudh Cas 17 (20), *Karim Baksh* v. *Mehdi Hasan.*

5. ('08) 35 Cal 837 (843, 844) : 7 Cal L Jour 492 (DB), *Gobinda Chandra Paul* v. *Dwarka Nath.*
('85) 7 All 258 (265) : 1885 All W N 8 (FB), *Sheoratam Kuar* v. *Mahipal Kuar.*
('17) 4 AIR 1917 All 439 (441) : 38 All 361 : 35 Ind Cas 210 (DB), *Khurshed Ali* v. *Abdul Majid.*
('80) 2 All 481 (485) (DB), *Surju Prasad* v. *Bhawani Sahai.*
('11) 9 Ind Cas 828 (829) (DB) (All), *Muhammad Husain* v. *Vinayak Rao.*
('36) 23 AIR 1936 Lah 482 (485) : 163 Ind Cas 69 (DB), *Benares Bank Ltd.* v. *Har Parshad.*
('13) 20 Ind Cas 870 (871) (Oudh), *Gauhar Khan* v. *Ajudhia Khan.*

6. ('08) 35 Cal 837 (843) : 7 Cal L Jour 492 (DB), *Govinda Chandra* v. *Dwarka Nath.*
('36) 23 AIR 1936 Oudh 196 (200) : 165 Ind Cas 70 (DB), *Sikandar Ara Amina Begam* v. *Hasan Ara.*

7. ('08) 35 Cal 837 (844) : 7 Cal L Jour 492 (DB), *Govinda Chandra* v. *Dwarka Nath.*

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therefore not a mortgage but was merely a charge.[8] The power of sale given by the deed in that case was peculiar, limited and outside the provision of the Indian law relating to realisation of moneys secured by mortgage by sale of the mortgaged property. On the other hand where it was stated that the property was *nazar gahan* and the transferee was granted a right to cause the property to be sold through Court, it was held that the document created a mortgage and not a charge.[8a] In the case of documents written in the language of the Province, the mere name given to the document[9] or the words which imply a power of sale[10] are not, by themselves sufficient guides for determining the character of the transaction. The intention of the parties must be ascertained from all the circumstances. Thus, where an *ikrarnama* executed by A in favour of his wife M securing his immovable property for the payment of her dower-debt used the words 'arth' and 'mustaghraq' which imply a power of sale and it was argued that the above words showed that the transaction was a mortgage, it was held that there was nothing in the deed except the above words to show that the power of sale was granted; that the parties wishing to create a charge as distinguished from a mortgage could not do so without using the above or some such words; and that what was intended was to provide a property which M could always take possession of, in lieu of her dower and therefore the transaction did not amount to a simple mortgage but created a charge only.[11]

Where an instalment bond provided that the executant would be personally responsible for the payment of the money and in case of default it would be competent to the other party "to institute a suit, obtain a decree and to recover the dues by attachment and sale of the under-tenure," it was held that the clause which entitled the creditor to recover his dues by attachment and sale of the property lent support to the view that a mere charge was to be created, inasmuch as an attachment is wholly unnecessary in proceeding for the sale of property under a mortgage decree. The document therefore was held to create only a charge and not a mortgage.[12]

According to the High Court of Lahore the presence of a personal liability makes the transaction a mortgage. In *Benares Bank Ltd.* v. *Harprasad*[12a] their Lordships observed :

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8. ('27) 14 AIR 1927 Sind 66 (75) : 97 Ind Cas 321, *Official Receiver* v. *Tirathdas Mewaram.*

8a. ('90) 14 Bom 577 (580) (DB), *Onkar Ramshet* v. *Govardhan Purushotamdas.*

9. ('14) 1 AIR 1914 Nag 32 (35) : 10 Nag L R 81 : 26 Ind Cas 601, *Khemchand* v. *Malloo.*

10. ('13) 19 Ind Cas 658 (660) (DB) (All), *Moti Begum* v. *Har Prasad.*
('90) 13 All 28 (39, 41) : 1890 All W N 216 (DB), *Kishan Lall* v. *Ganga Ram.*

11. ('13) 19 Ind Cas 658 (660) (DB) (All), *Moti Begum* v. *Har Prasad.*
[*See also* ('13) 19 Ind Cas 661 (662) (DB) (All), *Masuma Khatun* v. *Tahira Khatun.*]

12. ('06) 33 Cal 985 (992) : 4 Cal L Jour 219 (DB), *Royzuddi Sheikh* v. *Kritarthanath.*

12a. ('36) 23 AIR 1936 Lah 482 (484) : 163 Ind Cas 69 (DB).
[*See also* ('41) 28 AIR 1941 Lah 274 (275) : 198 Ind Cas 100 (DB), *Sampuran Singh* v. *Ahmad Din.*]

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"When a charge is created by act of party the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant, the security will become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant and as the right of sale is a right *in rem* the transaction would be a mortgage. For this reason it has been held that the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage."

In the Punjab certain classes of agriculturists cannot create a mortgage of their land by virtue of the Punjab Alienation of Land Act (XIII of 1900) though it was permissible before. Where A executed a mortgage before the Act and subsequent to the Act took a further advance on the old security on the same conditions as the original mortgage, it was held that the subsequent transaction was not a fresh alienation so as to be hit by the Act,[13] but that it created only a charge.[14]

16. Creation of charge — Writing and registration, whether necessary.—Prior to 1929, there was no provision specifying any formalities for the creation of a charge as there was in S. 59 in regard to mortgages, in S. 107 in regard to leases, in S. 118 in regard to exchanges, and in S. 123 in regard to gifts. In some cases it was held, therefore, that it could be created even orally,[1] in accordance with the general principle of law that everything is to be taken as permissible unless there is a prohibition against it. If, however, a document was executed, it had to be registered under S. 17 (1) (b), Registration Act, unless the amount secured was less than one hundred rupees.[2] No

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13. ('21) 8 AIR 1921 Lah 136 (137) : 2 Lah 202 : 62 Ind Cas 789 (DB), *Remal Das* v. *Mt. Jannat.*

14. ('32) 19 AIR 1932 Lah 465 (466) : 13 Lah 660 : 139 Ind Cas 49 (FB), *Sher Singh* v. *Daya Ram.*

Note 16

1. ('36) 164 Ind Cas 477 (479) (DB) (Cal), *Bibhuti Bhusan* v. *Baikuntha Nath.*

('34) 21 AIR 1934 Bom 189 (191): 152 Ind Cas 267 (DB), *Chhaganlal* v. *Chunilal.* (Case not governed by the amended section. NOTE:—In so far as the decision says that oral charge could be created by virtue of S. 9, it is not correct as S. 9 refers only to transfers of property, which a charge is not.)

('36) 23 AIR 1936 Mad 865 (867) : 170 Ind Cas 7 (DB), *Kuppuswamy* v. *Rasappa Chettiar.* (NOTE: — In so far as the decision says that the charge can be created orally by virtue of S. 9, it is incorrect, as S. 9 does not apply to charges, as it is not a transfer of property, though the principle on which S. 9 is based will apply to a charge also.)

('26) 13 AIR 1926 Nag 262 (263) : 92 Ind Cas 25, *Ahmad Beg* v. *Model Mills, Nagpur Ltd.*

('14) 1 AIR 1914 Oudh 349 (351) : 23 Ind Cas 867, *Parbhu Dayal* v. *Babban Lal.*

2. ('29) 16 AIR 1929 P C 141 (143) : 117 Ind Cas 489 : 7 Rang 234 (P C), *Khoo Sain Ban* v. *Tan Guat Tean.*

('26) 13 AIR 1926 P C 94 (96) : 53 Ind App 214 : 98 Ind Cas 508 (P C), *Dayal Singh* v. *Indar Singh.*

('34) 21 AIR 1934 Mad 615 (616) : 152 Ind Cas 375 (DB), *Rajagopala Ayyangar* v. *Ranganatha Ayyangar.*

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attestation was however necessary.[3] Nor was it necessary that the deed should also be signed by the person creating the charge. It was sufficient if it was accepted by him.[4]

Under the section in its present form, all the provisions of the Act preceding this section which apply to a simple mortgage apply, so far as may be, also to a charge. One of these provisions is S. 59, under which, whatever the amount of the principal money secured, a simple mortgage can only be created by a registered instrument. It follows that all the requirements as to registration, attestation and signature, necessary for the creation of a simple mortgage contained in S. 59, will apply also to the creation of a charge.[5]

Where the charge is created by a decree, it is exempted from registration under S. 17 (2) (vi), Registration Act, 1908. The same rule has been held to apply where the decree incorporates a compromise creating a charge.[6]

See also Note 8 on section 4.

('33) 20 AIR 1933 Cal 154 (160) : 59 Cal 1372 : 143 Ind Cas 193 (DB), *Low & Co.* v. *Pulinbiharilal.*

('34) 21 AIR 1934 Mad 713 (714) : 152 Ind Cas 772 (DB), *Rangampudi* v. *Venkateswarlu.* (A charge though it may not amount to a transfer creates some interest in immovable property and such a document must be registered.)

('31) 18 AIR 1931 Cal 223 (228) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank, Ltd.*

('12) 14 Ind Cas 29 (30) (DB) (Oudh), *Shah Alam Mirza* v. *Wahiduddahir Mirza.*

('26) 13 AIR 1926 Bom 495 (496) : 98 Ind Cas 696 (DB), *Amritlal* v. *Keshavlal.*

('24) 11 AIR 1924 Nag 360 (361) : 78 Ind Cas 380, *Tulsiram* v. *Anusuya.*

('26) 13 AIR 1926 Nag 262 (263) : 92 Ind Cas 25, *Ahmad Beg* v. *Model Mills Nagpur, Ltd.*

('85) 1885 All W N 19 (21) (DB), *Bunyadi Begam* v. *Muhammad Ashgar Ali.*

('36) 23 AIR 1936 Mad 865 (867) : 170 Ind Cas 7 (DB), *Kuppuswamy* v. *Rasappa.*

('36) 164 Ind Cas 477 (479) (DB) (Cal), *Bibhuti Bhusan Ghose* v. *Baikuntha Nath.*

('33) 20 AIR 1933 Oudh 76 (78) : 141 Ind Cas 474 (DB), *Kesho Prasad* v. *Upper India Bank Ltd., Lucknow.*

('33) 20 AIR 1933 Rang 259 (261) : 147 Ind Cas 562, *Po Kyi Maung* v. *Noor Mahomed.* (Surety bond, which purports to create a charge in favour of Court over a house and site for a sum of Rs. 176-8-0 if not registered is invalid.)

[*See also* ('23) 10 AIR 1923 Bom 287 (287): 73 Ind Cas 296, *Tirthdas Ghanshamdas* v. *Sadhusingh Udhasingh.*]

3. ('21) 8 AIR 1921 Mad 514 (515) : 66 Ind Cas 554 (DB), *Ramasami Iyengar* v. *Kuppusami Iyer.*

4. ('36) 23 AIR 1936 Mad 865 (867, 868) : 170 Ind Cas 7 (DB), *Kuppuswami* v. *Rasappa Chettiar.*

5. ('40) 27 AIR 1940 Mad 140 (141) : I L R (1940) Mad 306 : 187 Ind Cas 243 (DB), *Shiva Rao* v. *Official, Liquidator.* (Oral charge is invalid.)

('39) 26 AIR 1939 Mad 202 (203) : I L R (1939) Mad 199 : 183 Ind Cas 639 (DB), *Viswanadhan* v. *M. S. Menon.* (Debenture creating a charge for less than Rs. 100 is invalid if not registered.)

[But see ('36) 23 AIR 1936 Oudh 196 (200) : 165 Ind Cas 70 (DB), *Sikandar Ara Amina Begam* v. *Hasan Ara Begum.* (A charge is valid without attestation.)]

6. ('36) 23 AIR 1936 All 621 (623) : 162 Ind Cas 45, *Mt. Tijjo* v. *Chiranjilal.* (Different considerations would prevail where a third party, who was not party to the suit, comes to enforce the claim under the composition deed—Such person desires to enforce the claim under the composition deed and not the decree—Agreement must therefore be registered.)

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17. Rights and liabilities of a charge-holder. — The old section did not clearly show what exactly the rights and liabilities of a charge-holder were. The object of the words "and all the provisions . . . . . apply to such charge" now introduced in the present section will clarify the position.[1] But even this fails to give a clear idea as to the particular rights and liabilities of a charge-holder. The words 'so far as may be,' show that certain provisions which apply to a simple mortgage may *not* be applicable to the case of a charge. The section provides that all the provisions preceding this section which apply to a simple mortgage shall apply to a charge, unless any particular provision is incompatible with a charge.[1a] Thus, the provisions contained in S. 56,[1b] S. 67,[2] S. 68,[3] S. 79,[4] S. 83[5] and S. 92[6] have been held to be applicable to charges. On the other hand the provisions of S. 67A have been held applicable to charges created by act of parties but not to charges created by operation of law, on the ground that the clause 'in the absence of a contract to the contrary' occurring in that section is an essential part of it and cannot be given effect to in a statutory charge.[7] On the same principle, it follows that all the provisions which apply to a simple mortgage only 'in the absence of a contract to the contrary' will not apply to a charge created by operation of law.

('33) 20 AIR 1933 Bom 298 (299) : 145 Ind Cas 582 (DB), *Manekchand* v. *Ganeshlal.*

('08) 35 Cal 837 (841) : 7 Cal L Jour 492 (DB), *Gobinda Chandra Pal* v. *Dwarka Nath Pal.*

('30) 17 AIR 1930 Nag 17 (19) : 120 Ind Cas 218, *Bapuji* v. *Tansa.*

('39) 26 AIR 1939 Nag 118 (119) : 182 Ind Cas 102, *Ganga Prasad* v. *Ratanchand.*

[*See also* ('08) 35 Cal 845 (849) : 7 Cal L Jour 149 (FB), *Indra Bibi* v. *Jain Sirdar Ahiri.* (Deed not registered according to provisions of the law in force and therefore inoperative.)]

Note 17

1. See Report of the Special Committee, clause 49, printed on page 22 (64).

1a. ('39) 26 AIR 1939 Mad 202 (203) : ILR (1939) Mad 199 : 183 Ind Cas 639 (DB), *Viswanadhan* v. *M. S. Menon.*

1b. See Note 6 on Section 56.

2. ('34) 21 AIR 1934 Cal 862 (864) : 61 Cal 1047 : 153 Ind Cas 972 (DB), *Corporation of Calcutta* v. *Kumar Arun Chandra.* (Appeal from A I R 1934 Cal 325 : 60 Cal 1470.)

('37) 24 AIR 1937 Oudh 420 (423) : 13 Luck 35 : 167 Ind Cas 52 (DB), *Sharif Ahmad* v. *H. Hunter.* (If owner of property charged is made to pay the whole amount, his remedy will lie in a suit for contribution against the persons in possession of the portion not purchased by him.)

('36) 23 AIR 1936 Oudh 52 (54) : 11 Luck 575 : 159 Ind Cas 117 (DB), *Parshadi Lal* v. *Brij Mohan Lal.*

('32) 19 AIR 1932 Oudh 336 (339) : 8 Luck 168 : 143 Ind Cas 692 (DB), *H. Hunter* v. *Abdul Ali.*

See also Note 3 on Section 67.

3. See Note 20 on Section 68.

4. See Note 9 on Section 79.

5. See Note 4 on Section 83.

6. See Note 7 on Section 92.

7. ('34) 21 AIR 1934 Cal 862 (863, 864) : 61 Cal 1047 : 153 Ind Cas 972 (DB), *Corporation of Calcutta* v. *Kumar Arun Chandra.* (Appeal from AIR 1934 Cal 325 : 60 Cal 1470.)

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A charge-holder, like a simple mortgagee, has a right to bring the property charged to sale.[8] In *Renukabai* v. *Bheosan*[9] where a charge for maintenance was created by act of parties and the charge-holder was given a right to take possession of the property instead of a right to ask for sale, it was held that the first part of the section dealt with substantive rights and the second with the manner in which they were to be enforced and if a transaction created a charge within the meaning of the first part of the section it did not become invalid only because a remedy provided for the enforcement of the charge was other than the sale of the property. According to his Lordship "S. 100 contemplates other methods of enforcement, for the words relating to sale are 'so far as may be' and unless some authority is cited to show that the transaction is invalid, effect should be given to the manifest intention of the parties."

Where a charge-holder is given *possession* of the property as a charge-holder, he can remain in possession of it until the amount due to him is satisfied; but if the possession is not attributable to the charge, he cannot insist on retaining possession until his dues are paid.[10] In the undermentioned case,[11] decided before the amendment in 1929, where the charge-holder was given possession as such and one of the owners of the charged property sued to recover possession on payment of the charged amount, it was held that, by virtue of S. 100, the last paragraph of S. 60 applied to his case and if he had claimed possession of his share only on payment of the proportionate amount, he would not have been allowed to do so but as he claimed the whole property by paying the whole amount he was entitled to do so.

18. Priority as amongst several charges. — Ordinarily as between several charges created on the same immovable property a charge later in point of time will be postponed to one earlier in point of time.[1] See also section 48.

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8. ('36) 23 AIR 1936 P C 204 (206) : 59 Mad 910 : 63 Ind App 304 : 163 Ind Cas 4 (P C), *Venkata Jagannatha Rao* v. *Surya Rao.*
('39) 26 AIR 1939 Nag 132 (134) : 185 Ind Cas 33, *Renukabai* v. *Bheosan.*
('40) 27 AIR 1940 Nag 8 (11) : 188 Ind Cas 23 (DB), *Badridas Lalchand* v. *Raja Pratapgir.*
[*See also* ('99) 12 C P L R 26 (27), *Mohammad Amin* v. *Jan Patel.*
(1861) 31 L J Ch 282 (283) : 5 L T (N S) 572 : 10 W R (Eng) 148 : 136 R R 379, *Matthews* v. *Goodday.*
(1894) 3 Ch 220 (227) : 43 W R (Eng) 55 : 63 L J Ch 749 : 71 L T 181, *In re Owen.*]

9. ('39) 26 AIR 1939 Nag 132 (134) : 185 Ind Cas 33.

10. ('37) 24 A I R 1937 Cal 129 (138, 139) : I L R (1937) 1 Cal 203 : 170 Ind Cas 214 (DB), *L. A. Creet* v. *Firm Gangraj-Gulraj.*
[*See also* ('06) 33 Cal 1119 (1130) : 3 Cal L Jour 616 (DB), *Dharamadas Kundu* v. *Amulyadhan Kundoo.*]

11. ('07) 10 Oudh Cas 17 (20), *Karim Bakhsh* v. *Mehdi Hasan Khan.*

Note 18

1. ('41) 28 AIR 1941 Cal 436 (441) : 195 Ind Cas 856, *Bhupati Banerjee* v. *Bon Behary Roy.*
('23) 10 A I R 1923 Rang 222 (223) : 1 Rang 261 : 76 Ind Cas 508, *Aung Dun* v. *Maung Tun Ya.*

19. Assignment of a charge. — A charge is an interest in property and, as such, is transferable.[1]

As to whether such an assignment requires registration, see NOTE 17 on section 8, under the sub-heading 'debt secured by a charge' and the undermentioned cases.[2]

A partition deed between A and N created a charge in favour of A on properties allotted to N's share for expenses of certain religious ceremonies. A transferred his share to X who performed such ceremonies and claimed to enforce the charge against N's properties. It was held that if X was competent to perform such ceremonies, he could enforce the charge against N.[3]

20. Section does not apply to a charge of a trustee. — A trustee has a right of indemnity for out-of-pocket expenses properly incurred by him in the execution of the trust. He has a first charge, in respect of this right of indemnity, on the trust estate,[1] both income and corpus.[2] The first half of the second paragraph of this section provides that the provisions of this section will not apply to such a charge. Section 32 of the Trusts Act, 1882, provides a special mode for the enforcement of the trustee's charge. That section provides :

> "Every trustee may reimburse himself, or pay or discharge out of the trust property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust property, or the protection or support of the beneficiary.

Note 19

1. ('38) 25 A I R 1938 Mad 457 (458) : 177 Ind Cas 648 (DB), *Lakshmayya* v. *Purushothama.* (Vendor's lien under S. 55 (4) (b).)
('15) 2 AIR 1915 Cal 543 (544) : 42 Cal 849 : 29 Ind Cas 869 (DB), *Sheo Nandan Lal* v. *Jainul Abdin.*

2. ('36) 23 AIR 1936 Mad 573 (574) : 163 Ind Cas 190, *Narayana Tirumampu* v. *Valia Govinda.*
('41) 28 A I R 1941 Bom 71 (75) : I L R (1941) Bom 136 : 193 Ind Cas 740 (DB), *Raychand Jivaji* v. *Basappa Virappa.*

3. ('42) 29 AIR 1942 Mad 711 (712), *Seshamma* v. *Vasudeva.*

Note 20

1. ('10) 5 Ind Cas 404 (406) : 37 Ind App 27 : 37 Cal 229 (P C), *Raja Peary Mohun Mokerji* v. *Narendra Nath Mukerjee.*
('16) 3 AIR 1916 Mad 57 (59) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Kaliba Mavulvija* v. *Saran Bivi Saila Ammal.*
(1882) 22 Ch D 255 (260, 262) : 52 L J Ch 228 : 48 L T 516 : 31 W R (Eng) 195, *In re Pumfrey.*
(1866) 14 L T 280 (280) : 35 Beav 449 : 55 E R 970 : 147 R R 255 : 12 Jur (N S) 757 : 14 W R (Eng) 599, *Exhall Coal Co., Ltd., Re, Bleckley.*
(1887) 20 Q B D 43 (46) : 57 L J Q B 47 : 58 L T 118 : 36 W R (Eng) 189, *In re Holden; Ex parte Official Receiver.* (Trust originally valid subsequently becoming void.)
(1885) 29 Ch D 212 (217) : 54 L J Ch 838 : 52 L T 344 : 33 W R (Eng) 452, *James* v. *Couchman.*
(1910) 1 K B 271 (276) : 79 L J K B 488 : 101 L T 771, *St. Thomas's Hospital* v. *Richardson.*
(1884) 25 Ch D 617 (619) : 32 W R (Eng) 424 : 53 L J Ch 598 : 50 L T 320, *Dodds* v. *Tuke.*

2. ('16) 3 A I R 1916 Mad 57 (62) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Kaliba Mavulvija* v. *Saran Bibi Saila Ammal.*

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If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, express or implied, he made the payment, the amount of such expenses.

Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment."

The reason why the trustee is given the right to enforce his charge only by prohibiting any disposition of the trust property without previous payment of such expenses is that he cannot be allowed to put an end to the trust itself by bringing the *corpus* of the property to sale.[3] In *Drake* v. *Williamson*[4] the re-building of a chapel was entrusted to three of the trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, £500, which they personally engaged to pay. The representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees. It was held that the representatives of the persons who had paid the £500 were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would have been altogether destroyed, and that the proper course for realising the money was to deliver the title deeds into their custody and to prohibit disposition of the property without previous discharge of their lien.

The trustee is, however, entitled to have his costs and expenses of executing the trust which is existing and valid. Where the trust is void there is no trust which he can execute and therefore he cannot claim costs and expenses incurred in the execution of what is merely an invalid and inoperative nominal trust.[5]

21. "Save as otherwise expressly provided by any law for the time being in force." — This expression in the second paragraph has the effect of excluding the charges which are expressly provided for in any other law in force from the operation of the

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(1884) 25 Ch D 710 (715) : 50 L T 742, *Stott* v. *Milne.*

(1892) 66 L T 718 (719), *Re Owen*; *Frisby, Dyke & Co.* v. *Owen.* (Executor of a will is in the position of a trustee.)

3. ('16) 3 A I R 1916 Mad 57 (62) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Kaliba Mavulvija* v. *Saran Bivi Saila Ammal.*

4. (1858) 25 Beav 622 : 4 Jur (NS) 1009 : 6 WR (Eng) 824 : 53 ER 774 : 119 RR 571.

5. (1866) L R 1 Eq 651 (655) : 14 W R (Eng) 469 : 14 L T 120 : 35 LJ Ch 385 : 147 R R 227, *Smith* v. *Dresser.*

(1887) 20 Q B D 43 (46, 47) : 57 L J Q B 47 : 58 L T 118 : 36 W R (Eng) 189, *In re Holden*; *Ex parte Official Receiver.* (Trust originally valid, subsequently becoming void—Trustee entitled to charge on trust property for expenses incurred in the performance of his duty as trustee.)

provision as regards notice in this section. Thus, in case of a charge for a loan under the Land Improvement Loan Act (XIX of 1883), S. 7 (1) of that Act read with its proviso operates as a saving clause and excludes it from the provision as to notice.[1] Similarly, a charge for rent under the Central Provinces Tenancy Act (I of 1920) is saved from the operation of the provision as regards notice in this section by reason of the express provision in S. 9 of that Act.[2] But the provision as to notice under this section was applied to charges created under the United Provinces Municipalities Act of 1916 and the Calcutta Municipal Act of 1899, for sums due on account of a tax imposed upon buildings or lands and consolidated rates.[3]

In *Maina* v. *Ahsan Hussain*[4] A obtained a decree for her maintenance against B, her husband, creating a charge on B's property. Subsequently, B mortgaged the property to C who sued on the mortgage and obtained possession by foreclosure. On A's execution of the decree against C for enforcing the charge, C sued for declaration that the property in his hands was free from the charge as he was a *bona fide* transferee for value without notice. It was held that assuming that C had no notice and the charge created by the decree was a charge by operation of law within the meaning of this section, C, as a person claiming through B was B's privy and the decree passed against B bound C also under the general rule of law. C, therefore, was held to fall under the saving clause of the proviso as stated above and could not claim the benefit of the proviso.

22. Transferee for consideration without notice.— Under the section as it stood before 1929 there was a difference of opinion on the question whether a charge was enforceable against a transferee for value without notice. The general trend of decisions was that it could not be so enforced.[1] A contrary view that it could be enforced even

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Note 21

1. ('39) 26 AIR 1939 Bom 183 (187) : 182 Ind Cas 635, *Lakshman Venkatesh* v. *Secy. of State.* (Transferee for consideration without notice—Charge held binding.)
2. ('40) 27 AIR 1940 Nag 156 (158) : 190 Ind Cas 641 (DB), *Sitaram* v. *Krishnarao.* (The departure from the ordinary law, however, cannot be carried further by implication.)
3. ('37) 24 AIR 1937 Oudh 31 (32) : 12 Luck 353 : 164 Ind Cas 1034, *Ramji Lal* v. *Municipal Board, Lucknow.* (Section 177, U. P. Municipalities Act, 1916.)
('40) 27 AIR 1940 All 456 (457) : I L R (1940) All 669 : 191 Ind Cas 148 (DB), *Municipal Board, Cawnpore* v. *Roop Chand Jain.* (Do.)
('15) 2 AIR 1915 Cal 478 (480, 481) : 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*
4. ('37) 169 Ind Cas 169 (171) (Nag).

Note 22

1. ('16) 3 AIR 1916 All 264 (265) : 38 All 254 : 35 Ind Cas 289 (DB), *Gur Dayal* v. *Karam Singh.*
('16) 3 AIR 1916 Oudh 290 (291) : 32 Ind Cas 729, *Abul Hasan Khan* v. *Mt. Jagwanta.*
('14) 1 AIR 1914 Oudh 349 (351) : 23 Ind Cas 867, *Parbhu Dayal* v. *Babban Lal.* (Charge created by a will—Assumed to be a charge within S. 100.)

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against a transferee for value without notice was held in some cases on the ground that a charge was a transfer of some interest in the property charged and that the transferee could not take a larger interest than the transferor himself had.[2]

As has been seen already in Note 1, the creation of a charge does *not* transfer any interest in the property charged, as in the case of a mortgage. While, therefore, in the case of a mortgage a transferee of the mortgaged property can acquire only the remaining interest of the mortgagor, a transferee of the charged property takes the *whole property* unless there is any equity against him. If he is a *bona fide* transferee for value there is no equity against him and therefore the charge cannot be enforceable against him.

The present section as amended in 1929 makes this position quite clear. A charge is not enforceable against a *bona fide* transferee for value.[3] According to one view the amended section was introduced

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('32) 19 AIR 1932 Oudh 336 (340) : 8 Luck 168 : 143 Ind Cas 692 (DB), *H. Hunter* v. *Abdul Ali.* (Charge created by a will.)
('81) 8 Cal L R 210*n* (211*n*) (DB), *Deo Nundun Agha* v. *Deshputty Singh.* (Purchaser with notice—Charge could be enforced against him.)
('76) 25 Suth W R 243 (245) (DB), *L. P. D. Broughten* v. *W. Spink.* (Mortgage with notice of a charge—*Held* charge had priority over the mortgage.)
('32) 19 AIR 1932 Cal 451 (454) : 138 Ind Cas 24 (DB), *Mohini Debi* v. *Purna Sashi.* (The case of decree of Court is different as it binds the property.)
('26) 13 AIR 1926 Nag 262 (263) : 92 Ind Cas 25, *Ahmad Baig* v. *Model Mills, Nagpur Ltd.*
('34) 21 AIR 1934 Nag 149 (150) : 30 Nag L R 303 : 150 Ind Cas 20, *Ramkrishna Nandram* v. *Ganesh Narain.*
('33) 142 Ind Cas 376 (377) (Nag), *Panna Lal* v. *Narayan Rao.*
('91) 1891 All W N 9 (10) (DB), *Khushhal Chand* v. *Nizam Un-Nissa.*
('90) 13 All 28 (44) : 1890 All W N 216 (DB), *Kishan Lal* v. *Ganga Ram.*
('06) 33 Cal 985 (993) : 4 Cal L Jour 219 (DB), *Royzuddi Sheikh* v. *Kritarthanath.*
[*See* ('23) 10 AIR 1923 Rang 222 (223) : 1 Rang 261 : 76 Ind Cas 508, *Aung Dun* v. *Maung Tun Ya.*]

2. ('89) 12 Mad 69 (71) (DB), *Cooling* v. *Saravana.*
('25) 12 AIR 1925 Mad 95 (105) : 85 Ind Cas 855 (DB), *Mollayya* v. *Krishnaswami.*
('70) 5 Mad H C R 457 (461) (DB), *Sadagopa Chariyar* v. *Ruthna Mudali.*
('69) 4 Mad H C R 434 (440, 442) (DB), *Golla Chinna* v. *Kali Appiah.*
('37) 24 AIR 1937 Mad 92 (94) : 170 Ind Cas 649, *Chittamma* v. *Mureyya.*
('79) 2 All 162 (164) (DB), *Abadi Begam* v. *Asa Ram.*
('06) 28 All 655 (659) : 3 All L Jour 551, *Maina* v. *Bachchi.*

3. ('37) 24 AIR 1937 Oudh 301 (309) : 167 Ind Cas 962 (DB), *Md. Yunus Khan* v. *Court of Wards, Balrampur Estate.*
('37) 24 AIR 1937 Oudh 420 (422) : 13 Luck 35 : 167 Ind Cas 52 (DB), *Sharif Ahmad* v. *H. Hunter.*
('36) 23 AIR 1936 Sind 16(19): 161 I.C. 547(DB), *Rambhabai* v. *Doongersi Nagji.*
('39) 26 AIR 1939 Nag 132 (136) : 185 Ind Cas 33, *Mt. Renukabai* v. *Bheosan.*
('32) 19 AIR 1932 Mad 189 (192) : 55 Mad 468: 135 Ind Cas 609 (DB), *Vyraperumal* v. *Alagappa.*
('40) 27 AIR 1940 Nag 163 (171) : I L R (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.* (The legal estate prevails over a mere equity except when the legal owner takes with notice.)
('37) 24 AIR 1937 Oudh 35 (42) : 166 Ind Cas 477 (FB), *Sharif Ahmad* v. *H. Hunter.*

merely to clarify the position and does not effect any change in the law as it stood before the amendment.[4] According to another view the amendment has effected a change in the law, though there is a difference of opinion as to whether it is retrospective.[5]

The onus is on the transferee to prove that he is a transferee for consideration without notice.[6] The defence is a *single* defence that he is a *purchaser for value without notice* and does not consist of first, a defence that the defendant is a purchaser for value and then a reply from the plaintiff that he had notice,[7] and hence, ought to be specifically alleged and proved by the transferee.[8]

It was held in the undermentioned case that where a subsequent transferee is a simple mortgagee, he cannot be considered 'to have the property in his hands' within the meaning of this section, so as to be able to plead the defence under the proviso.[9]

As to the enforcement of a seller's charge and a buyer's charge against a transferee for consideration without notice, see Notes 12 and 20 respectively on S. 55.

23. Subsequent transferee from a transferee, if protected. —Where A is a transferee of the charged property for consideration *with* notice of the charge and he transfers it to B who takes it for consideration *without* notice of the charge, on the plain meaning of the section B being a transferee *without* notice, the property in his

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('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

('36) 23 AIR 1936 Lah 482 (484) : 163 I. C. 69 (DB), *Benares Bank* v. *Har Parshad.*

4. ('40) 27 AIR 1940 All 456 (456) : I L R (1940) All 669 : 191 Ind Cas 148 (DB), *Cawnpore Municipality* v. *Roop Chand.* (Overruled on another point in ('43) 30 A I R 1943 All 115 (F B).)

('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

[*See also* ('34) 21 AIR 1934 Mad 353 (354): 150 Ind Cas 930 (DB), *Aravamudhu* v. *Abiramavalli.* (Obiter.)]

5. ('34) 21 AIR 1934 Bom 189 (191) : 152 Ind Cas 267 (DB), *Chhaganlal* v. *Chunilal.* (Is not retrospective.)

('37) 24 AIR 1937 Mad 92 (94) : 170 Ind Cas 649, *Chittamma* v. *Mureyya.* (Do.)

('39) 26 AIR 1939 All 687 (688) : I L R (1939) All 885 : 185 Ind Cas 597 (DB), *Indra Narain* v. *Mohammad Ismail.* (Is retrospective — Overruled on another point in ('43) 30 A I R 1943 All 115 (F B).)

6. ('39) 26 AIR 1939 Nag 132 (135) : 185 Ind Cas 33, *Renukabai* v. *Bheosan.*

('40) 27 AIR 1940 Nag 163 (171) : I L R (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

('15) 2 AIR 1915 Cal 478 (481): 42 Cal 625: 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*

7. ('15) 2 AIR 1915 Cal 478 (481) : 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*

8. ('28) 15 AIR 1928 Pat 587 (589) : 7 Pat 584 : 110 Ind Cas 526 (DB), *Murat Singh* v. *Pheku Singh.*

(1911) 2 K B 473 (486) : 80 L J K B 1107 : 104 L T 911, *Wilkes* v. *Spooner.*

(1879) 11 Ch D 327 (337) : 27 W R (Eng) 621 : 40 L T 201 : 49 L J Ch 68, *Attorney General* v. *Biphosphated Guano Co.*

9. ('40) 27 AIR 1940 Mad 701 (703) : 192 I. C. 47, *Surayya* v. *Venkataramanamma.*

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hands will not be subject to the charge.[1] Where A, a transferee for consideration *without* notice of a charge, transfers it to B who *has* notice of it, can B take it free from charge? Yes. The reason is that a purchaser for valuable consideration without notice can give a good title to a purchaser from him with or without notice.[2] A being a purchaser without notice takes the property free of the charge and he is perfectly entitled to transfer his rights to any person whether the latter had notice of the charge or not. B can thus shelter himself under the title of A, his transferor.[3]

In *Harnam Singh* v. *Akbar Khan*[4] where the facts were that a property subject to charge was purchased by H without notice who transferred it to K who had notice of the charge, it was held that K could not avail himself of a defence under this proviso, that the mere fact that H intervened could not change the situation and that K took subject to the charge. It is submitted that the decision is not correct.

Compare Note 21 on S. 53.

24. Charge, whether binds auction-purchaser.—Section 2, cl. (d) provides that the Act does not apply to transfers in execution of decrees or orders save as provided by S. 57 and Chap. IV. The saving provision in S. 2, cl. (d) is perfectly general in its terms and this section being contained in Chap. IV, the provision as to notice applies to transfers by auction sales, and an auction purchaser takes the property which he buys for a price, free of the charge if he has no notice thereof.[1] (See also Notes on section 2.)

According to the undermentioned cases,[2] however, this provision does not apply to auction-purchasers. Relying upon the Preamble and the definition of 'transfer of property' in S. 5, they hold that the words

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Note 23

1. *See* ('15) 2 AIR 1915 Cal 478 (481) : 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.*
2. (1911) 2 K B 473 (483) : 80 L J K B 1107 : 104 L T 911, *Wilkes* v. *Spooner.* (The only exception is that a trustee who has sold property in breach of trust or a person who has acquired property by fraud cannot protect himself by purchasing it from a *bona fide* purchaser for value without notice.)
(1880) 14 Ch D 432 (445) : 28 W R (Eng) 270 : 41 L T 755 : 49 L J Ch 498, *In re Stapleford Colliery Co. (Barrow's case).*
(1879) 11 Ch D 327 (334) : 27 W R (Eng) 621 : 40 L T 201 : 49 L J Ch 68, *Attorney General* v. *Biphosphated Guano Co.* (*Per* Fry, J.)
3. ('15) 2 AIR 1915 Cal 478 (481) : 42 Cal 625 : 27 Ind Cas 261 (DB), *Akshoy Kumar* v. *Corporation of Calcutta.* (*Held* both *A* and *B* had constructive notice of the charge and hence *B* was bound.)
4. ('37) 24 AIR 1937 Pesh 76 (78) : 170 Ind Cas 136 (DB).

Note 24

1. ('40) 27 AIR 1940 All 456 (457) : ILR (1940) All 669 : 191 Ind Cas 148 (DB), *Municipal Board, Cawnpore* v. *Roop Chand Jain.* (Overruled on another point in ('43) 30 A I R 1943 All 115 (F B).)
('43) 30 AIR 1943 All 115 (122) (FB), *Lala Nawal Kishore* v. *Municipal Board, Agra.* (*Overruling* ('39) 26 AIR 1939 All 687 (689) : ILR (1939) All 885 : 185 Ind Cas 597 (DB), *Indra Narain* v. *Mahammad Ismail.*)
[But see ('40) 27 AIR 1940 Mad 701 (702): 192 Ind Cas 47, *Surayya* v. *Venkataramanamma.* (Relying upon ('39) 26 AIR 1939 All 687.)]
2. ('40) 27 AIR 1940 Mad 701 (702): 192 I.C. 47, *Surayya* v. *Venkataramanamma.*

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'transferred for consideration' in this proviso must be taken to mean only a transfer by act of parties and not a transfer by court sale. Further, following the English law on the subject, these cases hold that the auction-purchaser is in no better position than the judgment-debtor himself and he is, therefore, subject to the same equities as the judgment-debtor was, with or without notice of the charge. No doubt, the language of section 100 itself seems to be more appropriate for a transaction based on a contract. But in view of the fact that by virtue of S. 2 (d), the provisions of S. 100 directly apply to the transfers by operation of law or by or in execution of a decree or order of a Court, the words 'transferred for consideration,' which are wide enough to include these transfers also, must be taken to include auction sales and this proviso must, therefore, be taken to apply to auction-purchasers.[3]

See also the undermentioned cases[4] in which this provision as to notice was applied to auction-purchasers.

25. Enforcement of charge. — By virtue of the last clause of the first paragraph of this section, S. 67 is applicable to a charge-holder and he is entitled, like a simple mortgagee, to sue for sale of the charged property. Order 34, R. 15 of the Code of Civil Procedure provides that the provisions contained in that order and which apply to a simple mortgage should, so far as may be, be applied to charges also. The procedure for the enforcement of a charge by a suit for sale of the property will, therefore, be governed by rules contained in that order. There must, therefore, be a preliminary decree under O. 34, R. 4 of the Code of Civil Procedure in all such cases.[1] Further by virtue of O. 34,

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('38) 25 AIR 1938 Oudh 84 (86):13 Luck 746 : 172 Ind Cas 855 (DB), *Har Narain* v. *Bank of Upper India.*

('37) 24 AIR 1937 Cal 129 (138) : ILR (1937) 1 Cal 203 : 170 Ind Cas 214 (DB), *L. A. Creet* v. *Firm Gangaraj Gulraj.*

('29) 16 AIR 1929 Oudh 316 (318) : 5 Luck 172 : 117 Ind Cas 405 (DB), *Razia Begam* v. *Ishrat Ali.* (Overruled on another ground in AIR 1937 Oudh 217 : 13 Luck 101 (FB).)

('25) 12 AIR 1925 All 60 (61): 47 All 60: 92 Ind Cas 348 (DB), *Mahadeo* v. *Anandi.*

3. ('43) 30 AIR 1943 All 115 (121, 122) (FB), *Lala Nawal Kishore* v. *Municipal Board, Agra.*

4. ('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

('37) 24 AIR 1937 Oudh 31 (32) : 12 Luck 353 : 164 Ind Cas 1034, *Ramji Lal* v. *Municipal Board, Lucknow.*

('32) 19 AIR 1932 Oudh 336 (340, 341) : 8 Luck 168 : 143 Ind Cas 692 (DB), *Hunter* v. *Abdul Ali.*

('37) 24 AIR 1937 Nag 36 (36, 37) : ILR (1938) Nag 183 : 166 Ind Cas 796, *Ghasiram* v. *Mt. Acharaj Kuar.*

('41) 28 AIR 1941 Pat 95 (97, 98) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Mt. Basumati Kuar* v. *Mt. Harbansi Kuer.*

Note 25

1. ('42) 29 AIR 1942 Sind 83 (84) : I L R (1942) Kar 168 : 202 Ind Cas 296, *Isso* v. *Rattanchand.*

('40) 27 AIR 1940 Cal 60 (62) : 186 Ind Cas 833, *Jnanendra Nath* v. *Sashi Mukhi Debya.*

[*See also* ('33) 20 AIR 1933 P C 143 (144) : 11 Rang 186 : 60 Ind App 183 : 142 Ind Cas 788 (PC), *Ram Raghubir* v. *United Refineries (Burma) Ltd.*]

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R. 14 of the Code of Civil Procedure, he cannot obtain a money decree in respect of the amount charged and sell the property. He must file a *suit for sale* of the property charged.[2]

The effect of a decree on a charge is the same as that of a decree on a mortgage.[3]

Where in pursuance of a decree for sale, the property is sold but the sale proceeds are found insufficient, the charge-holder will be entitled to apply for a personal decree against the judgment-debtor under O. 34, R. 6 if the judgment-debtor is also under a personal obligation to pay the money.[4] It has been observed, however, in the undermentioned case,[5] that even if the judgment-debtor is not under a personal obligation to pay, the charge-holder will be entitled to a personal decree under O. 34, R. 6 by virtue of the provisions of O. 34, R. 15. The relevant remarks are based on the authority of an Allahabad case[6] and on the assumption that in that case the decree was granted under O. 34, R. 6 only on the authority of O. 34, R. 15. It is submitted that the view ignores the words, 'so far as may be' in R. 15. A personal decree under O. 34, R. 6 cannot be passed unless the judgment-debtor is also under a personal obligation. In the Allahabad case above referred to there was such a personal obligation and it was not decided merely on the strength of the provision in O. 34, R. 15 as it stood before the amendment.

A decree creating a charge for future maintenance to be paid at a particular time stands exactly on the same footing as a decree ordering the payment of a sum of money by instalments and the charge-holder may apply for execution of the decree as the amount of maintenance becomes due.[7] In such a case though the charged property may be sold

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2. ('20) 7 AIR 1920 Pat 521 (522) : 5 Pat L Jour 248 : 57 Ind Cas 653, *Raj Kumar Lal* v. *Jaikaran Das.*
('40) 27 AIR 1940 Pat 283 (285) : 186 Ind Cas 221 (DB), *Bank of Bihar Ltd.* v. *Omitave Chattarji.*
('05) 1 Nag L R 117 (119, 120), *Mangal Prasad* v. *Chandra Mall.* (The charge created by S. 65 of the C. P. Land Revenue Act is one within the purview of S. 100, T. P. Act, and cannot be enforced without bringing a suit for sale of the charged property.)
('18) 5 AIR 1918 Cal 705 (707) : 45 Cal 530 : 41 Ind Cas 73 (DB), *Gobinda Chandra* v. *Kailash Chandra.*
(1867) 8 Suth W R (PC) 17 (21) : 11 Moo Ind App 241 (PC), *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee.* (Suit seeking personal remedy only — Property cannot be sold.)

3. ('37) 24 AIR 1937 Cal 129 (138) : ILR (1937) 1 Cal 203 : 170 Ind Cas 214 (DB), *L. A. Creet* v. *Firm Gangaraj Gulraj.*

4. ('05) 2 All L Jour 379 (383) (DB), *Uttam Ishlok* v. *Phulman Rai.* (*Per* Bannerji, J.—View approved in Letters Patent Appeal reported in 28 All 365.)
('35) 22 AIR 1935 All 411 (415, 416) : 57 All 797 : 157 Ind Cas 533 (DB), *Babu Ram* v. *Inam Ullah.*

5. ('32) 19 AIR 1932 Cal 775 (781) : 59 Cal 1314 : 140 Ind Cas 788 (DB), *Fala Krista Pal* v. *Jagannath Marwari.*

6. ('05) 2 All L Jour 379 (383) (DB), *Uttam Ishlok* v. *Phulman Rai.*

7. ('70) 15 Suth W R 128 (129) (DB), *Peareenath Broehmo* v. *Juggessuree.*
('86) 9 All 33 (34) : 1886 All W N 248 (DB), *Mansa Debi* v. *Jiwan Lal.*
('39) 26 AIR 1939 All 579 (580) : 184 Ind Cas 626 (DB), *Durga Prasad* v. *Mt. Tulsa Kuar.* (Charge-holder need not file a separate suit—O. 34, R. 14 is no bar to execution.)

for arrears already accrued, the liability for future payments will remain after the sale and the property in the hands of the auction purchaser will be subject to the charge in respect of such payments.[8]

The amount of court-fee that is recoverable in a pauper suit and for which the Government has a charge on the subject-matter of the suit can be recovered by the Government in execution of the decree and a separate suit for the purpose is not necessary.[9]

A person having a charge on the property of a company can claim priority over the unsecured creditors of the company, without bringing a suit for that purpose, if the company has gone into liquidation.[10]

Where a charge-holder is entitled to claim possession of the property instead of a sale thereof, the decree in a suit for possession will have to approximate as near as may be to a decree for foreclosure.[11] A charge-holder not entitled to possession of the property cannot enforce the charge by suing for possession.[12]

As to the enforcement of the charge under section 7 of the Land Improvement Loans Act, XIX of 1883, see the undermentioned case.[13]

26. Personal liability. — Where a charge is created by act of parties and there is a personal covenant to pay, the charge-holder is, of course, entitled to a personal decree against the person bound to pay.

Where there is no personal *covenant to pay* the charge-holder will not on principle be entitled to a personal decree.[1] It has, however, been held in the undermentioned cases,[3] that he will be given a personal decree where the charge is on the income of the property and the defendant has been in receipt and enjoyment of the income. Where the plaintiff had a seller's charge under S. 55 (4) (b) and sued to enforce his charge and also claimed a personal decree against the defendant, he

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('98) 2 Cal W N 33 (33, 34), *Chundra Moni Dassee* v. *Mutty Lal Mullick*. (As the charge-holder had come to an arrangement with the judgment-debtor after the decree, she was referred to a separate suit for claiming the arrears.)

8. See the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn., O. 34, R. 15, Note 12.

9. ('96) 18 All 419 (421) : 1896 All W N 121 (DB), *Ram Das* v. *Secretary of State*.

10. ('14) 1 AIR 1914 Bom 267 (268) : 27 I. C. 34 (DB), *Keshavlal* v. *Girdharilal*.

11. ('39) 26 AIR 1939 Nag 132 (134) : 185 Ind Cas 33, *Mt. Renukabai* v. *Bheosan Hapsaji*.

12. ('40) 27 AIR 1940 Nag 8 (11) : 188 Ind Cas 23 (DB), *Badridas Lalchand* v. *Raja Pratapgir*.

13. ('15) 2 AIR 1915 Cal 813 (815) : 27 Ind Cas 391 (DB), *Secretary of State* v. *Lalit Mohan Bose*.

Note 26

1. *See* ('32) 19 AIR 1932 Oudh 168 (170) : 138 Ind Cas 128 (DB), *Har Narain Das* v. *Mt. Bibi Rup Kuar*.

2. ('32) 19 AIR 1932 Oudh 168 (170) : 138 Ind Cas 128 (DB), *Har Narain Das* v. *Mt. Bibi Rup Kuar*.

('36) 23 AIR 1936 Oudh 52 (55) : 11 Luck 575 : 159 Ind Cas 117 (DB), *Parshadi Lal* v. *Brij Mohan Lal*.

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was granted such a decree inasmuch as the buyer was also under a personal obligation to pay the purchase-money under S. 55 (5) (b).[3]

27. **Sale in execution of a charge decree — Whether extinguishes the charge.** — Where in a suit to enforce a charge a decree for sale is obtained and the property is sold in execution of the decree, a question arises whether such a sale extinguishes the charge on the property and the auction purchaser gets it free from it. The general principle applicable to the mortgage is that at a mortgage sale the auction purchaser takes the security free from the mortgage. Order 34, R. 15 of the Civil Procedure Code also provides that all provisions which apply to a simple mortgage shall, so far as may be, apply to charges. In applying those provisions, it must, however, be borne in mind that a charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on a mortgage[1] and hence different results may follow. Thus, the general principle stated above regarding mortgage sale, might apply in the case of a single charge, because by reason of sale, all dues on the charge may be liquidated either by the sale proceeds or by a personal remedy where available and thus the charge may be extinguished. But where a charge is of a recurring nature, as in the case of maintenance allowance, if the property is sold in execution of a decree for arrears, the liability in respect of future payments remains after the sale and is not extinguished by it. The effect of the sale is to satisfy the claim for the arrears only. The charge for future maintenance still remains attached to the property and the auction purchaser gets the property subject to the charge.[2]

28. **Charge created by a decree.**

(A) Whether such a charge is within this section :

As seen in Note 1 a charge may be created by a decree of Court. The judicial decisions are not unanimous on the question whether such a charge is 'a charge' within the meaning of this section. One view is that where a decree incorporates a compromise creating a charge upon specific immovable property of the judgment-debtor, it is a charge within the meaning of this section.[1] According to some cases it is

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3. ('31) 18 AIR 1931 All 99 (101) : 52 All 901 : 130 Ind Cas 198 (DB), *Raghukul Tilak* v. *Pitam Singh.*

('33) 20 AIR 1933 P C 143 (145) : 60 Ind App 183 : 11 Rang 186 : 142 Ind Cas 788 (P C), *Ram Raghubir Lal* v. *United Refineries (Burma) Ltd.*

Note 27

1. ('40) 27 AIR 1940 Cal 60 (62, 63) : 186 Ind Cas 833, *Jnanendra Nath* v. *Sashi Mukhi Debya.*

('33) 20 AIR 1933 All 934 (938) : 147 Ind Cas 302 (DB), *Matlub Hasan* v. *Mt. Kalawati.*

2. ('40) 27 AIR 1940 Cal 60 (62) : 186 Ind Cas 833, *Jnanendra Nath* v. *Sashi Mukhi Debya.*

Note 28

1. ('06) 28 All 655 (659) : 3 All L Jour 551, *Maina* v. *Bachchi.*

('41) 28 AIR 1941 Pat 95 (98) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Basumati Kuer* v. *Harbansi Kuer.*

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nothing but a charge by act of parties,[2] the reason being the well settled principle that a contract is nonetheless a contract because it is embodied in a decree.[3] Another view is that a charge created by a decree is not a charge within the meaning of this section. According to this view the section is limited to charges created by act of parties or by operation of law and is not exhaustive of all charges. A charge created by a decree is neither a charge created by act of parties nor a charge by operation of law. It is, therefore, not included in this section.[4] According to this latter view, 'decrees stand on somewhat different footing and are governed by rules of their own, so it may well be that the intention of the Legislature was to leave decrees out of this section'.[5] This view does not distinguish between decrees incorporating a compromise and ordinary decrees.

No doubt, this section specifically deals with charges created only by act of parties and by operation of law. It is also true that in view of the distinction made by S. 2, cl. (d) between a transfer 'by operation of law' and that 'by or in execution of a decree of a competent Court,' a charge created by operation of law must be distinguished from that created by a decree so as not to include the latter within the former class. The Special Committee in 1927, however, have referred to the charges created by a decree in their report and have purported to amend the section in order to protect the transferees for consideration without notice 'as charges created by operation of law or by a decree will not necessarily be registered'.[6] This seems to suggest that they intended to include the charge created by decree within the purview of this section.

('37) 24 AIR 1937 Oudh 217 (219) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*

('41) 28 A I R 1941 Cal 436 (438) : 195 Ind Cas 856, *Bhupati Banerjee* v. *Bon Behary.*

('25) 12 AIR 1925 All 60 (61) : 47 All 90 : 92 Ind Cas 348 (DB), *Mahadeo Prasad* v. *Anandi Lal.*

2. ('41) 28 AIR 1941 Pat 95 (98) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Basumati Kuer* v. *Harbansi Kuer.*

[*See also* ('18) 5 AIR 1918 Cal 705 (707):45 Cal 530:41 Ind Cas 73 (DB), *Gobinda Chandra Pal* v. *Kailash Chandra Pal.* (Money decree on a security bond declaring charge—*Held* charge was already there—Decree merely declared it—It is, therefore, a charge by act of parties.)]

3. ('41) 28 A I R 1941 Pat 95 (98) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Basumati Kuer* v. *Harbansi Kuer.*

('16) 3 AIR 1916 Cal 816 (817) : 43 Cal 217:31 Ind Cas 13 (DB), *Kusadhaj Bhakta* v. *Broj Mohan.*

('24) 11 AIR 1924 Pat 231 (232) : 2 Pat 749 : 81 Ind Cas 298 (DB), *C. J. Smith* v. *A. Kenny.*

4. ('40) 27 AIR 1940 Nag 163 (166) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

('37) 169 Ind Cas 169 (171) (Nag), *Maina* v. *Ahsan Hussain.*

[*See also* ('39) 26 AIR 1939 All 579 (580) : 184 Ind Cas 626 (DB), *Durga Prasad* v. *Mt. Tulsa Kuar.*]

5. ('40) 27 AIR 1940 Nag 163 (166) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

6. See the Report of the Special Committee, printed on page 22 (64).

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(B) Enforceability against transferee for consideration without notice.

Even in the cases which held that a charge created by a decree was a charge within the meaning of this section there was a conflict of opinion as to whether such a charge could be enforced against a transferee for consideration without notice of a charge. Some cases held that a charge created by decree could be enforced against transferee for consideration whether he had notice of it or not[7] resting their view on the ground that a charge was a transfer of an interest in property and an owner of the property charged could, like a mortgagor, pass it only subject to it.[8] A contrary view, namely that a charge could not be enforced against a transferee for consideration without notice was taken by other cases.[9] By the amendment in 1929, the conflict has been set at rest by the addition of the proviso in the section and, therefore, no charge, if it comes within the meaning of the section, whether by decree or otherwise, will be enforceable against a transferee for consideration without notice of it.[10]

According to the view which holds that the charge created by a decree is not a charge within the meaning of this section, its enforceability against a transferee for value without notice will be governed by different considerations and different rules. The difference which the intervention of a decree makes, according to this view, is that, not only the immediate parties to a decree are bound by it but also all persons who claim through or under them and date their title from after the decree or the institution of the suit. In other words, not only are the parties bound by the decree but also their privies. One effect of this is that the question of notice does not arise.[11] Thus, where a decree creating a charge is executable, that is to say, if the Court orders the defendant

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7. ('06) 28 All 655 (660) : 3 All L Jour 551, *Maina* v. *Bachchi.*
('25) 12 AIR 1925 All 60 (61) : 47 All 90: 92 Ind Cas 348 (DB), *Mahadeo Prasad* v. *Anandi Lal.*
('25) 12 AIR 1925 Bom 343 (343) : 87 Ind Cas 951 (DB), *Kallappa* v. *Balwant.*
(1900) 27 Cal 194 (196) (DB), *Kuloda Prosad* v. *Jageshar Koer.*
('13) 21 Ind Cas 54 (56) : 37 Bom 621 (DB), *Bhoje Mahadev* v. *Gangabai.*
('36) 164 Ind Cas 921 (925) (DB) (Cal), *Hemlata Debi* v. *Bhowani Charan Roy.*
('36) 23 AIR 1936 Cal 112 (113) : 167 Ind Cas 455, *Sashi Bhusan Ghose* v. *Bhupendra Nath Pal.*
[*See also* ('73) 20 Suth W R 196 (197) (DB), *Tarunginee Dassee* v. *Chowdhry Dwarkanath Mussant.* (Case before the Act.)]

8. ('06) 28 All 655 (659) : 3 All L Jour 551, *Maina* v. *Bachchi.*
('25) 12 AIR 1925 Bom 343 (343) : 87 Ind Cas 951 (DB), *Kallapa* v. *Balwant.*

9. ('37) 24 AIR 1937 Oudh 217 (218) : 13 Luck 101 : 166 Ind Cas 662 (FB), *Mt. Indrani* v. *Maharaj Narain.*
[*See also* ('34) 21 AIR 1934 Mad 353 (354): 150 Ind Cas 930 (DB), *Aravamudhu* v. *Abiramavalli.* (Obiter.)]

10. ('41) 28 AIR 1941 Pat 95 (98) : 20 Pat 86 : 192 Ind Cas 866 (DB), *Basumati Kuer* v. *Harbansi Kuer.*
('41) 28 AIR 1941 Cal 436 (438, 439): 195 Ind Cas 856, *Bhupati Banerjee* v. *Bon Behary.* (Decree incorporating a compromise between the parties.)

11. ('40) 27 AIR 1940 Nag 163 (166): I L R (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*
('38) 25 AIR 1938 Nag 129 (130, 131) : I L R (1938) Nag 431 : 172 Ind Cas 949 (DB), *Ahsan Hussain* v. *Maina.*

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to pay the plaintiff a certain sum of money on a specified date and directs that if it is not paid, property which it specifies is to be sold for its recovery, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another, however innocent the other party may be. The doctrine of estoppel by record applies in such a case. The doctrine of *lis pendens* may also apply.[12] The effect of the former doctrine is to create an estoppel in such a case so as to bind the transferee from the judgment-debtor after the decree to carry out its orders in the same way and to the same extent as the judgment-debtor himself and it is not necessary for the decree-holder to sue the transferee all over again.[13] But when the decree creating a charge is merely declaratory and does not direct the doing of a particular thing, that is to say, it is not executable, an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor. Pleas are available to him which are not available to the judgment-debtor. The effect of the application of the doctrine of estoppel by record to such a decree is only this : The estoppel being restricted to the precise point put in issue and decided, or at the outside, to a point which might and ought to have been raised, the decree is effective to create a charge on property in the hands of the judgment-debtor in that suit and nothing more. Then the ordinary rule governing the charges namely that a *bona fide* purchaser for value without notice takes the property free of charge, obtains in this case and a transferee for consideration without notice of a charge created by a decree will not be bound by the charge.[14] The same result follows by the application of the doctrine of *lis pendens*. When a decree creates a charge and provides expressly or impliedly for its execution, it does not put an end to the suit and hence the transferee from the judgment-debtor is bound by the charge, whether he takes it with or without notice.[15] But where the decree is merely

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12. ('40) 27 AIR 1940 Nag 163 (167) : I L R (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

('38) 25 AIR 1938 Nag 129 (130, 131) : I L R (1938) Nag 431 : 172 Ind Cas 949 (DB), *Ahsan Hussain* v. *Maina.* (Affirming 169 Ind Cas 169 on L. P. Appeal.)

13. ('40) 27 AIR 1940 Nag 163 (167) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

14. ('40) 27 AIR 1940 Nag 163 (167, 171) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

('38) 25 AIR 1938 Nag 129 (130, 131) : ILR (1938) Nag 431 : 172 Ind Cas 949 (DB), *Ahsan Hussain* v. *Maina.*

15. ('40) 27 AIR 1940 Nag 163 (172) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai.*

('37) 169 Ind Cas 169 (171) (Nag), *Maina* v. *Ahsan Hussain.*

('34) 21 AIR 1934 Mad 353(354):150 I.C. 930(DB), *Aravamudhu* v. *Abiramavalli.*

[*See also* ('30) 17 AIR 1930 Mad 824 (830) : 54 Mad 132 : 127 Ind Cas 809 (DB), *Seetharamanujacharyulu* v. *Venkatasubramma.* (Transfer before passing of the decree in a suit for maintenance claiming charge on specific property — *Held*, transfer hit by the doctrine of *lis pendens* and purchaser is bound by the charge.)]

[But see ('13) 21 Ind Cas 54 (56) : 37 Bom 621 (D B), *Bhoje Mahadeo* v. *Gangabai.* (Case before amendment of S. 52 in 1929.)]

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declaratory and inexecutable, the suit *qua* suit is at an end and the transfer is not hit by the doctrine of *lis pendens*.[16] In short, where a decree creating a charge is executable, the property in the hands of a transferee for consideration without notice will be bound by the charge, while, in case of a declaratory and inexecutable decree, he will not be so bound.

(c) Enforcement of the charge.

By virtue of O. 34, R. 15, Civil Procedure Code, all provisions in O. 34 applicable to a simple mortgage apply, so far as may be, to charges within the meaning of S. 100. If a charge created by a decree is regarded as one under S. 100, the rules in O. 34 will apply to it so far as they are appropriate to the nature of the charge. Thus, where a decree creating a charge is final in its terms, no fresh final decree is necessary.[17] Rule 14 of O. 34, however, does not apply to charges which are created for the first time by a decree. Such a charge can, therefore, be enforced in execution without any fresh suit being filed in respect of it.[18]

If a charge created by a decree is treated as one not within S. 100, it will be enforced by sale of the property in execution of the decree itself when it is executable and by a suit to enforce the charge by sale, where the decree is declaratory.

As regards the personal remedy for such a charge, which is a matter of construction of each particular decree, see the undermentioned cases.[19]

29. **Payments in the nature of salvage.** — Where a person having some interest in a property or some right or duty towards the owner of the property pays money in order to save the property from loss or destruction, he has a first charge on the property for such payments.[1]

Government revenue is the first and paramount charge upon the land and if default is made in payment, the land is sold in a summary way. The purchaser gets a clear title and the land is lost for ever to the defaulting proprietor.[2] The question arises as to whether a person

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16. ('40) 27 AIR 1940 Nag 163 (172) : ILR (1941) Nag 513 : 194 Ind Cas 861 (DB), *Ghasiram* v. *Kundanbai*.

17. See Note 2 on O. 34, R. 15, of Author's Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn.

18. See Note 3 on O. 34, R. 14, of the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn.

19. ('42) 29 AIR 1942 Sind 83 (84) : I L R (1942) Kar 168 : 202 Ind Cas 296, *Isso* v. *Rattan Chand*.
('41) 28 A I R 1941 Bom 90 (92) : I L R (1941) Bom 299 : 193 Ind Cas 217 (F B), *Gurappa* v *Amarangji*. (AIR 1941 Bom 71 : ILR (1941) Bom 136 overruled.)

Note 29

1. See also Note 11 on S. 48.
('67) 8 Suth W R P C 17 (18) : 11 Moo Ind App 241 (PC), *Nugender Chunder* v. *Mt. Kaminee Dossee*.
('94) 21 Cal. 142 (148) : 20 Ind App 160 (PC), *Dakhina Mohan* v. *Saroda Mohan*.

2. ('94) 21 Cal 142 (148) : 20 Ind App 160 (PC), *Dakhina Mohan* v. *Saroda Mohan*.

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who pays the Government revenue on behalf of another who is liable to pay it and thus saves the land from sale is entitled to a charge, for such payment, on the land saved. In *Nugender Chunder Ghose* v. *Shreemutty Kaminee Dossee*[3] A mortgaged his property to B. A died and his widow C while in possession of the property allowed the Government revenue to fall into arrears. In order to save the property from being sold, B paid up the arrears. Their Lordships of the Privy Council observed :

> " Considering that the payment of the revenue by the mortgagee will prevent the *talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *talook* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *talook* as against all persons interested therein for the amount of the money so paid."

Following this decision it was held in the undermentioned cases[4] that a cosharer who paid the quota of the Government revenue due from another cosharer in order to save the estate from being sold was entitled to a charge on the other cosharer's share for the payment made on his behalf. This view was, however, adversely commented upon in *Kristomohinee Dossee* v. *Kali Prosono Ghose*.[5] The question came for decision before a Full Bench in *Kinu Ram* v. *Mozaffar Hosain*[6] and the majority of the Judges held that the observations of their Lordships of the

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('81) 6 Cal. 389 (391): 7 Cal L R 456 (DB), *Chatraput Singh* v. *Grindra Chunder*.

('17) 4 AIR 1917 Mad 984 (985) : 40 Mad 93 : 32 Ind Cas 971 (DB), *Subbaraya Goundan* v. *Ranganadha Mudaliar*. (According to the principle enunciated in S. 141 of the Contract Act, an assignee of Government revenue is entitled to the security which the Government had, although he may not be entitled to all the statutory remedies of his assignor and consequently an assignee of jodi as such will have a first charge therefor.)

[*See also* ('90) 13 Mad 319 (320) (DB), *Krishnasami* v. *Venkatarama*.

('85) 8 Mad 130 (132, 133) (DB), *Secretary of State* v. *Narayanan*. (By accepting a sanad or patta, a landholder pledges each and every field included in it as security for the whole assessment, and he cannot split the security any more than an ordinary mortgagor. The Government can therefore sell a field for the arrears due on the entire patta, and a person claiming an interest in that particular field cannot obtain its release upon payment of the proportionate arrears due on that field, or at all events its full assessment.)]

3. ('67) 11 Moo Ind App 241 (258) : 8 Suth W R P C 17 (PC).

4. ('74) 22 Suth W R 411 (412) (DB), *Enayat Hossein* v. *Muddun Mooree*.
('81) 6 Cal 549 (551) : 8 Cal L R 209 (DB), *Ram Dutt Singh* v. *Horakh Narain Singh*.
('83) 9 Cal 377 (379) (DB), *Nobin Chunder* v. *Rup Lall*.
('86) 11 Bom 313 (319) (DB), *Achut Ramchandra* v. *Hari Kamti*.
('86) 1886 All W N 269 (269) (DB), *Bhup Singh* v. *Gulab Rai*.
('86) 8 All 384 (386) : 1886 All W N 134 (DB), *Lachman Singh* v. *Salig Ram*.
('80) 8 Cal L R 210 (211) (DB), *Deo Nandun* v. *Deshputty Singh*.
[*See also* ('81) 6 Cal 549 (551) : 8 Cal L R 209 (212) (DB), *Ram Dutt Singh* v. *Harakh Narain Singh*.]

5. ('82) 8 Cal 402 (419) (DB).

6. ('87) 14 Cal 809 (825, 832) (FB).

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Privy Council in *Nugender's case* were merely *obiter*, that those observations ought to be understood as applicable to the case of a mortgagee alone; that the doctrine of salvage lien acted upon in Irish cases was rejected in England in the undermentioned cases[7] and that there was no general principle of law that a payment of Government revenue, or any other payment necessary to save the estate, made by one having an interest which would be sacrificed by the loss of the estate, gives a charge on the estate for the money so paid and that, therefore, a cosharer paying the Government revenue and thus saving the estate did not by reason of such payment acquire any charge on the share of the defaulting cosharer. The minority, however, followed *Nugender's case* and took the contrary view taken by earlier cases. Following the majority view in *Kinu Ram's case* the High Courts of Allahabad,[8] Bombay,[9] Calcutta[10] and Patna[11] have held that the cosharer has no charge for the payment. The Madras High Court,[12] on the other hand,

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7. (1886) 34 Ch D 234 (246) : 56 L J Ch 707 : 56 L T 220 : 35 W R (Eng) 143, *Falcke* v. *Scottish Imperial Insurance Co.*
(1883) 23 Ch D 552 (563) : 52 L J Ch 762 : 48 L T 564 : 31 W R (Eng) 561, *Leslie* v. *French.*

8. ('92) 14 All 273 (295, 298) : 1892 All W N 117 (FB), *Chitor Mal* v. *Shiblal.*
('37) 24 AIR 1937 All 618 (619) : I L R (1937) All 706 : 171 Ind Cas 394 (DB). *Brij Chandra* v. *Ram Narain.* (There is no charge created in favour of a lambardar under S. 221, Agra Tenancy Act (III of 1926).)
[*See also* ('32) 19 AIR 1932 All 332 (334) : 54 All 140 : 136 Ind Cas 66 (DB), *Munni Bibi* v. *Triloki Nath.* (A person who makes a payment on account of another, in respect of immovable property, does not thereby acquire any charge on the property so saved, but has only a personal remedy.)]

9. ('02) 26 Bom 437 (442) : 4 Bom L R 90 (DB), *Shivrao* v. *Pundlik.*

10. ('88) 15 Cal 542 (545) (DB), *Khub Lal* v. *Pudmanund Singh.*
('98) 25 Cal 565 (569) : 2 Cal W N 425 (DB), *Upendra Lal* v. *Girindra Nath.* (The claim for contribution for the payment of Government revenue creates only a personal liability against the co-sharers on account of whose share the payment has been made and does not create a charge on the estate.)
('14) 1 AIR 1914 Cal 263 (268) : 21 Ind Cas 397 (DB), *Rameshwar Singh* v. *Janeshwari Babooshin.*
[*See also* ('20) 7 AIR 1920 Cal 956 (957) : 62 Ind Cas 94 (DB), *Gosta Behari* v. *Atar Sundari.*]

11. ('28) 15 AIR 1928 Pat 641 (643, 644) : 7 Pat 613 : 111 Ind Cas 84 (DB), *Bhubneshwari Kuer* v. *Manir Khan.*

12. ('88) 11 Mad 452 (454) (DB), *Seshagiri* v. *Pichu.*
('03) 26 Mad 686 (722, 725) : 13 Mad L Jour 83 (FB), *Rajah of Vizianagaram* v. *Rajah Setrucherla.*
('04) 28 Mad 493 (494) : 15 Mad L Jour 219 (DB), *Alayakammah* v. *Subbaraya Goundar.*
('12) 15 Ind Cas 262 (263) : 36 Mad 493 (DB), *Amman Paruykyi* v. *Pakram Haji.*
('93) 17 Mad 247 (250) : 4 Mad L Jour 73 (DB), *Srinivasa Thathachar* v. *Rama Ayyan.*
('16) 3 AIR 1916 Mad 980 (981) : 39 Mad 795 : 31 Ind Cas 255 (DB), *Jagapati Raju* v. *Sadrusannama Arad.*
('26) 13 AIR 1929 Mad 141 (142) : 90 Ind Cas 551, *Kotayya* v. *Kotappa.*
('32) 19 AIR 1932 Mad 189 (191) : 55 Mad 468 : 135 Ind Cas 609 (DB), *Vyraperumal Mudaliar* v. *Alagappa.* (But not to first charge.)
('36) 23 AIR 1936 Mad 752 (760, 763) : 167 Ind Cas 980 (DB), *Chengalroya Reddi* v. *Udai Kavour.* (Zamindari sold for arrears of peishcush — Owner of village in zamindari setting aside the revenue sale — Such person is entitled to first charge over property so recovered.)

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has followed *Nugender's case* and the view taken by the minority of the Judges in *Kinu Ram's case* and held that the cosharer has got a charge in such cases. The Nagpur Court adopted the majority view in *Kinu Ram's case* in one case[13] but in later cases[14] held that the cosharer has got a charge.

The majority view in *Kinu Ram's case* left the case of a mortgagee paying Government revenue untouched and it was held in the undermentioned cases[15] following *Nugender's case* that the mortgagee paying the Government revenue in order to save the property from sale has a charge on the property.

The principle referred to above as to payments in the nature of salvage, is not confined to payments of Government revenue, but is of general application.[16] A purchased an oil well which was subject to a mortgage. B had a right of pre-emption. A made payment to the mortgagee in part satisfaction of the mortgage decree on the oil well, the payments being necessary to save the oil well from sale. It was held that A had a charge for the amount paid as against B exercising his right of pre-emption.[17]

It will thus be seen that even if it is assumed as held in *Kinu Ram's case* that the doctrine of salvage has been rejected in England, it has been applied, and applied by the highest tribunal, in India. Thus, in *Monohar Das* v. *Hazari Mull*[18] decided in the year 1931 their Lordships of the Privy Council observed :

"As regards the present question, the only effect of the preliminary decree was to make the mortgaged property security for

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[*See also* ('20) 7 AIR 1920 Mad 739 (740) : 59 Ind Cas 262 (DB), *Muhammed Khali* v. *Kunhi Rama Nair*.]

13. ('92) 7 C P L R 42 (43, 44), *Hirasa* v. *Lakhansing*.

14. ('41) 28 AIR 1941 Nag 245 (249) : I L R (1941) Nag 474 : 197 Ind Cas 327 (DB), *Gulab* v. *Bindraban*.
('32) 19 AIR 1932 Nag 171 (172) : 28 Nag L R 214 : 140 Ind Cas 532, *Manoharlal* v. *Kanhaiyalal*.

15. ('03) 30 Cal 794 (798) : 7 Cal W N 609 (DB), *Upendra Chandra* v. *Tara Prosanna*.
('30) 17 AIR 1930 Cal 151 (153) : 57 Cal 298 : 126 Ind Cas 125 (DB), *Hazarimull* v. *Manohar Das*. (His remedy to realize it is the same as under S. 72, T. P. Act.)
('20) 7 AIR 1920 Pat 521 (522) : 5 Pat L Jour 248 : 57 Ind Cas 653, *Rajkumar Lal* v. *Jaikaran Das*.
('19) 6 AIR 1919 Low Bur 136 (138) : 43 Ind Cas 190, *Ma Pwa Kin* v. *K. P. S. A. R. P. Firm*.
[See however ('36) 23 AIR 1936 Rang 47 (48) : 161 Ind Cas 626, *A. Murray* v. *M. S. M. Firm*.]

16. ('24) 11 AIR 1924 Rang 204 (205, 206) : 1 Rang 714 : 79 Ind Cas 766 (DB), *Ma Lon* v. *Ma Nyo*.
('79) 4 Cal 539 (541) : 6 Cal L R 28 (DB), *Mohesh Chunder* v. *Ram Prosonno*. (Payment of zamindari rent.)
('28) 15 AIR 1928 Rang 278 (280) : 6 Rang 500 : 113 Ind Cas 801, *U Shwe Bwa* v. *Maung Thauk Kya*.

17. ('24) 11 AIR 1924 Rang 204 (205, 206) : 1 Rang 714 : 79 Ind Cas 766 (DB), *Ma Lon* v. *Ma Nyo*.

18. ('31) 18 AIR 1931 P C 226 (228) : 59 Cal 463 : 58 Ind App 341 : 134 Ind Cas 645 (PC).

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the judgment debt pending realization by sale as provided in the decree, and, pending such realization, the plaintiff, as a secured decree-holder, was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted, and their Lordships see no reason why he should not be entitled, in accordance with the opinion of the Board in the case already cited *(Nugender's case)*, to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested."

It has been held by the Rangoon High Court that the charge given on the principle of salvage lien is not a charge within the meaning of the section.[19]

30. Hindu widow's right of maintenance. — A Hindu widow's right of maintenance is not a charge on the family property within the meaning of this section though it may be made a charge by a decree of Court or by agreement.[1] In some decisions, no doubt, the word "charge" or "security" has been used in connection with the widow's right of maintenance[1a] but it is in a loose sense that the word can be so used.[2] Thus, it may be said that the widow has a charge on

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19. ('24) 11 AIR 1924 Rang 204 (205, 206) : 1 Rang 714 : 79 Ind Cas 766 (DB), *Ma Lon* v. *Ma Nyo*.

Note 30

1. ('06) 4 Cal L Jour 476 (481, 483) (DB), *Digambari Debi* v. *Dhan Kumari Bibi*.
('10) 10 Ind Cas 347 (349) : 35 Mad 147 (DB), *Subarayulu Chetti* v. *Kamalavalli Thayaramma*.
('72) 17 Suth W R 432 (436) (DB), *Nistarini Dasi* v. *Makkanlall Dutt*.
('87) 10 Mad 283 (288) (FB), *Muttia* v. *Virammal*.
('26) 13 AIR 1926 All 527 (529) : 96 Ind Cas 39 (DB), *Kanhaiyalal* v. *Jangi*.
('25) 12 AIR 1925 Lah 32 (33) : 5 Lah 375 : 84 Ind Cas 168 (DB), *Bholi Bai* v. *Dwarka Das*.
('29) 16 AIR 1929 Mad 47 (48) : 117 Ind Cas 785 (DB), *Gopala Pattar* v. *Parvati Ammal*.
('37) 24 AIR 1937 Mad 915 (918) : 177 Ind Cas 33 (DB), *Ramarayudu* v. *Sitalakshmamma*.
(1900) 22 All 326 (327) : 1900 All W N 97 (DB), *Ram Kunwar* v. *Ram Dai*.
('39) 26 AIR 1939 All 579 (580) : 184 Ind Cas 626 (DB), *Durga Prasad* v. *Mt. Tulsa Kuar*.
[*See also* ('37) 24 AIR 1937 All 56 (57) : I L R (1937) All 269 : 167 Ind Cas 123 (DB), *Jwala Prasad* v. *Mt. Padmawati*. (Claim of wife for maintenance is not charge upon estate of her husband unless fixed and charged upon it.)
('75) 23 Suth W R 33 (33) (DB), *Koomaree Debia* v. *Roy Luchmeeputsingh Bahadoor*.]
See also cases cited under Note 5 on S. 39.
1a. ('86) 13 Cal 336 (343, 344, 345) (DB), *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi*.
('89) 16 Cal 758 (766) : 16 Ind App 115 (PC), *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry*. (On appeal from 13 Cal 336 affirmed.)
('75) 1 Cal 133 (138) : 2 Ind App 275 (PC), *Baijun Doobay* v. *Brij Bhookun Lall Awusti*.
('71) 1871 Pun Re No. 7, *Hurdyal* v. *Mt. Radhan*.
2. ('16) 3 AIR 1916 Pat 252 (254): 2 Pat L Jour 55: 38 Ind Cas 791 (DB), *Brajasunder* v. *Sarat Kumari*.

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the property only in the sense that the liability of her husband's relations to maintain her is not a personal one but arises from there being family property in their hands.[3] Debts due by a deceased Hindu are also not a charge upon any specific property unless expressly made so by agreement or by a decree.[4] Debts binding upon a Hindu, however, take precedence over his widow's right of maintenance.[5] Therefore, though under S. 39, a right of maintenance can be enforced against a transferee with notice or a gratuitous transferee, the rule does not apply where the debts having precedence over the right of maintenance, a transfer of the family property is in liquidation of such debts.[6] But if the maintenance has been made a charge upon the property it will take precedence over the right of a subsequent purchaser of the same property in execution of a money decree even though such decree is in respect of a debt binding on the husband.[7]

See also Notes 2 and 5 on S. 39.

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3. *See* ('27) 14 AIR 1927 Mad 502 (503) : 101 Ind Cas 806, *Rattamma* v. *Seshachalam Sarma.*
('27) 14 AIR 1927 Lah 883 (883): 104 Ind Cas 118, *Mt. Parbati* v. *Firm Wiru Mal Haveli Ram.*
[*See also* ('83) 9 Cal 535 (555) : 12 Cal L R 465 (DB), *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep.*]

4. ('83) 9 Cal 535 (555) : 12 Cal L R 465 (DB), *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep.*
('02) 26 Mad 792 (796) : 13 Mad L Jour 258 (DB), *Veerasokkaraju* v. *Papiah.*
('66) 1866 Agra (FB) 71 (74) (FB), *Zuburdust Khan* v. *Indurmun.*
[*See also* ('69) 11 Suth W R O C 21 (23) (DB), *Nilkant Chatterjee* v. *Peary Mohan Das.*]
[See however ('74) 14 Beng L R 21 (44) (DB), *Gopal Narain Mozoomdar* v. *Muddomutty Guptee.*]

5. ('20) 7 AIR 1920 Mad 722 (722) : 43 Mad 800 : 59 Ind Cas 398 (DB), *Somasundram Chetty* v. *Unnamalai Ammal.*
('30) 17 AIR 1930 Mad 824 (829) : 54 Mad 132 : 127 Ind Cas 809 (DB), *Seetharamanujacharyulu* v. *Venkatasubbamma.*
('27) 14 AIR 1927 Mad 1092 (1093) : 102 Ind Cas 101, *Jamna Bhai Ammal* v. *Balakrishna.*
('81) 5 Bom 99 (108), *Narbadabai* v. *Mahadeo Narayan.*
('03) 27 Mad 45 (49, 50) : 12 Mad L Jour 270 (DB), *Jayanti Subbiah* v. *Alamelu Mangamma.*
('27) 14 AIR 1927 Lah 883 (883): 104 Ind Cas 118, *Mt. Parbati* v. *Firm Wirumal Haveli Ram.*
('78) 2 Bom 494 (505) (FB), *Lakshman Ramchandra* v. *Satyabhama Bai.*
('33) 20 AIR 1933 Lah 901 (904) : 15 Lah 9 : 149 Ind Cas 693 (DB), *Mt. Champa* v. *Official Receiver, Karachi.*

6. ('78) 2 Bom 494 (498, 499) (DB), *Lakshman Ramchandra* v. *Satyabhamabai.*
('15) 2 AIR 1915 Mad 464 (466, 470, 471) : 25 Ind Cas 759 (DB), *Krishna Patter* v. *Sinaponnu.*

7. ('28) 15 AIR 1928 Mad 713 (718) : 109 Ind Cas 872 (FB), *Thimmanayanim* v. *Venkatappa Nayanim.*
('30) 17 AIR 1930 Mad 824 (830) : 54 Mad 132 : 127 Ind Cas 809 (DB), *Seetharamanujacharyulu* v. *Venkatasubbamma.*
('20) 7 AIR 1920 Mad 722 (722) : 43 Mad 800 : 59 Ind Cas 398 (DB), *Somasundaram* v. *Unnamalai.*

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31. Debts of a deceased Muhammadan. — The unsecured debts of a deceased Muhammadan are not a charge upon the estate left by him and do not give the creditor any priority over a *bona fide* purchaser for value to whom it has been transferred by his heir-at-law.[1] A Muhammadan wife's claim for dower is exactly on the same footing as any other unsecured debt and does not create a charge upon the estate of the husband.[2] Thus, in *Hamira Bibi* v. *Zubaida Bibi*[3] their Lordships of the Privy Council observed :

> "The dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs,

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Note 31

1. ('81) 7 Cal L R 460 (463) (DB), *Land Mortgage Bank Ltd.* v. *Bidyadhari Dasi.*
('78) 4 Cal 402 (408) : 5 Ind App 211 (PC), *Bazayet Hossein* v. *Dooli Chand.*
('29) 16 AIR 1929 Mad 609 (610) : 120 Ind Cas 889 (DB), *Nainar Rowthen* v. *Pichai Rowthen.*
[*See also* ('21) 8 AIR 1921 Oudh 150 (153) : 57 Ind Cas 526, *Jadunath Singh* v. *Mt. Afzal Khanan.* (The word 'charge' is used in this case in a loose sense.)]

2. ('26) 13 AIR 1926 Pat 404 (406) : 95 Ind Cas 367 (DB), *Md. Habibur Rahman* v. *Qasim Husain.*
('42) 29 AIR 1942 Pat 210 (212) : 20 Pat 798 : 197 Ind Cas 241 (DB), *Mahomed Zobair* v. *Mt. Bibi Sahidan.*
('69) 11 Suth W R 212 (213) (DB), *Mt. Khyratun* v. *Mt. Amanee.*
('73) 20 Suth W R 92 (93) (DB), *Mt. Begum* v. *Doolee Chund.*
('34) 21 AIR 1934 Oudh 307 (312) : 9 Luck 701 : 148 Ind Cas 1052 (DB), *Md. Sadiq Ali* v. *Fakhr Jahan Begum.*
('84) 1884 All W N 33 (33) (DB), *Narain Das* v. *Alladehi.*
('23) 10 AIR 1923 All 331 (331) : 45 All 384 : 73 Ind Cas 977 (DB), *Kaneez Fatima Begum* v. *Ram Nanda Dhar.*
('25) 12 AIR 1925 Oudh 171 (172) : 80 Ind Cas 692, *Zamin Hussain* v. *Tasaduq Ali.*
('34) 21 AIR 1934 Oudh 437 (438) : 151 Ind Cas 1013, *Mt. Ahmadi Begum* v. *Abdullah.*
('31) 18 AIR 1931 Oudh 63 (65) : 130 Ind Cas 113 (DB), *Abdul Rahman* v. *Mt. Inayati Bibi.*
('80) 1880 Pun Re No. 96, *Mt. Makht Bibi* v. *Gulam Muhammad.* (Except in the sense that dower is a debt payable out of the estate of the deceased it is not a charge on the estate.)
('94) 1894 Bom P J 173 (DB), *Bachabibi* v. *Kamrudin.*
('02) 25 Mad 658 (659) (DB), *Ameer Ammal* v. *Sankaranarayanan Chetty.*
[*See also* ('03) 26 All 28 (36) : 1903 All W N 184 (DB), *Bholanath* v. *Maqbul-un-nissa.*
('70) 13 Suth W R 49 (49, 50) (DB), *Mt. Mehrun* v. *Mt. Kubeerul.*
('23) 10 AIR 1923 Pat 72 (76) : 68 Ind Cas 601 : 2 Pat 75 (DB), *Abdur Rahman* v. *Wali Mahamad.* (The right of Muhammadan widow to retain possession of her husband's estate in lieu of dower is strictly speaking neither a lien nor a charge. She has a right to transfer the debt coupled with the security so as to bind her co-heirs until they discharge the debt. She can also during her life time transfer the right of possession apart from the debt but that is a matter between herself and her transferee and the transfer will not bind her co-heirs after her death.)]

3. ('16) 3 AIR 1916 P C 46 (48) : 38 All 581 : 43 Ind App 294 : 36 Ind Cas 87 (P C).

obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board."[4]

32. Nankar and dahyak rights. — *Nankar* is the assignment of a portion of land or the revenue of an estate to the occupant of a zamindari as an allowance for his subsistence.[1] A right to receive a cash *nankar* out of the profits of a zamindari is a charge on such zamindari.[2] A cash *nankar* granted in lieu of the surrender of zamindari rights has been held to be an under-proprietary right and a charge on the zamindari rights so surrendered.[3] *Dahyak* or *daswant* is closely analogous to *nankar* and is also a charge on the property.[4]

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4. *See also* ('73) 20 Suth W R 92 (93) (DB), *Mt. Begum* v. *Doolee Chund.*
('70) 13 Suth W R 49 (49, 50) (DB), *Mt. Mehrun* v. *Mt. Kubeerul.*
('04) 1 All L Jour 394 (395) (DB), *Mariam* v. *Mazhar Ali.* (A Mahomedan widow cannot by seizing upon her husband's estate create a lien on it for her dower debt.)
('23) 10 AIR 1923 All 331 (331) : 45 All 384 : 73 Ind Cas 977 (DB), *Kaneez Fatima Begum* v. *Ram Nanda.*
('25) 12 AIR 1925 Oudh 171 (172) : 80 Ind Cas 692, *Zamin Husain* v. *Tasadduq Ali.*
('37) 24 AIR 1937 Lah 589 (590) : ILR (1937) Lah 149 : 171 Ind Cas 831 (DB), *Mt. Nawab Begum* v. *Hussain Ali.*
(1855) 6 Moo Ind App 211 (228, 229) (PC), *Ameeroonnissa* v. *Mooradoonnissa.*

Note 32

1. *The Law Lexicon of British India*, by P. Ramanatha Aiyer.
A Manual of Law Terms and Phrases, by K. Jagadisa Aiyar. (Nankar is the name given to the commission and allowances granted to a zemindar when originally these zemindars were only farmers of revenue and had to make payments of the entire collection from ryots to the state.)
2. ('16) 3 AIR 1916 Oudh 129 (130) : 19 Oudh Cas 49 : 33 Ind Cas 461, *Deputy Commissioner, Fyzabad* v. *Jagjiwan Bakhsh Singh.*
3. ('38) 25 AIR 1938 Oudh 84 (85) : 13 Luck 746 : 172 Ind Cas 855 (DB), *Har Narain* v. *Bank of Upper India.* (Taluqdari estate, subject to charge of nankar and entered as such in khewats and wajib-ul-arz, sold in execution—Decree-holder himself auction purchaser — Auction purchaser must be presumed to have constructive notice of charge—Charge is binding on him.)
('16) 3 AIR 1916 Oudh 176 (176, 177) : 18 Oudh Cas 380 : 33 Ind Cas 555, *Ram Jiwan* v. *Jadunath.* (Granted by the decree of settlement officer—The payment of nankar or dahyak is not a mere personal right but an interest in immovable property—After the transfer of the property, it cannot be enforced against the original owner but can only be enforced against the transferee.)
('98) 1 Oudh Cas 163, *Rudr Pratab Sahi* v. *Sheo Charan.*
('19) 6 AIR 1919 Oudh 403 (404) : 21 Oudh Cas 327 : 49 Ind Cas 509, *Pran Kunwar* v. *Shankar Baksh Singh.*
('16) 3 AIR 1916 Oudh 129 (130) : 19 Oudh Cas 49 : 33 Ind Cas 461, *Deputy Commissioner, Fyzabad* v. *Jagjiwan Bakhsh Singh.* (Granted by a decree of settlement Court.)
4. ('19) 6 AIR 1919 Oudh 403 (404) : 21 Oudh Cas 327 : 49 Ind Cas 509, *Pran Kunwar* v. *Shankar Baksh Singh.* (Cash allowance in perpetuity awarded by an order of the Settlement Officer amounting to a tenth of the assumed rental.)

Section 101

[a]**101.** Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

No merger in case of subsequent encumbrance.

a. Section 101 was substituted for the original section by Section 51 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The old section ran as follows :—

"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

Extinguishment of charges.

Synopsis

1. Scope of the section.
2. Benefit under the rule of intention must be a benefit at the time the charge is paid off.
3. Renewal of one mortgage by another.
4. Mortgagee taking subsequent sale or mortgage in discharge of the prior mortgage — Latter transaction invalid—Effect.
5. Mortgagee purchasing portion of mortgaged property—Effect.
6. Purchase at sale in execution of decree for rent under the Bengal Tenancy Act.
7. Extinguishment of mortgage by decree of Court. See Note 26 on S. 60.
8. Who can claim benefit of section.
9. "As between himself and any subsequent mortgagee," etc.
10. Charge kept alive—Enforcement.
11. Section if retrospective.

Other Topics (miscellaneous)

Extinction of mortgage security

By a decree for foreclosure. See S. 60 Note 26.

By payment of mortgage-debt by mortgagor. See S. 92 Note 10; S. 101 Note 1.

By release by the mortgagee of the debt. See S. 60 Note 43.

By merger. See S. 101 Note 1.

Merger of lesser estate in greater estate. See Note 1.

Principle of "keeping alive." See Note 1.

Rule of intention. See Notes 1 and 2.

1. Scope of the section.—It is an important principle of equity jurisprudence, that the mere fact of a charge having been paid off does not decide the question whether it was *extinguished*. It is a matter of *intention* of the parties. If the charge is intended to be kept alive it will not be extinguished. The intention to keep the charge alive is presumed where it is for the *benefit* of the person paying to do so, for

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a man is presumed to act according to his interest.[1] This principle of equity, which may be called the rule of intention is, however, not applicable where the person paying off a charge is *himself personally liable* to pay it. In *Adams* v. *Angell*,[2] the leading English case on the point, Jessel, M. R., observed as follows :

> "In a Court of Equity, it has always been considered that the mere form in which a charge has been paid off does not decide the question whether it was intended to be kept alive or not. . . . . The person who pays off the charge may keep it alive or extinguish it, and he may keep it alive either by means of an assignment to a trustee or by a declaration of intention. . , ... The intention, however, is always to prevail if it is sufficiently expressed or evidenced by the surrounding circumstances."

In *Thorne* v. *Cann*,[3] Lord Macnaghten observed :

> "Nothing, I think, is better settled than this — that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

The equitable rule of intention was applied in England, not only to cases where a charge was paid off by a person, but also to cases to which the doctrine of *merger* was applicable. Under the latter doctrine where a smaller estate and a larger estate in property became united in the same person in the same capacity, as where a charge holder acquired the ownership in the property, or the owner acquired the charge on the property, the lesser estate became merged and extinguished in the greater.[4] Equity, however, prevented the merger by applying the rule of intention to such cases also.[5]

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1. ('84) 10 Cal 1035 (1046) : 11 Ind App 126 (PC), *Gokuldoss Gopaldas* v. *Puranmal Premsukhdas.*
('28) 15 AIR 1928 All 77 (79) : 50 All 218 : 108 Ind Cas 728 (DB), *Maksud Ali* v. *Abdullah.*
('20) 7 AIR 1920 Pat 251 (254): 58 Ind Cas 489 (DB), *Baij Nath* v. *Daleep Narain.*
('20) 7 AIR 1920 Mad 389 (390) : 58 Ind Cas 493 (DB), *Malireddi* v. *Gopala.*
('28) 108 Ind Cas 291 (293) (Mad), *Alwar Chetty* v. *Jagannatha Ayyar.*
('19) 6 AIR 1919 Mad 542 (544) : 52 Ind Cas 842, *Chidambaram* v. *Meenakshi.*

2. (1877) 46 L J Ch 352 (352) : 5 Ch D 634 : 36 L T 334.

3. (1894) 64 L J Ch 1 (6) : 1895 App Cas 11 : 71 L T 852.

4. Halsbury, *Laws of England*, Vol. 13, p. 146; Topham, New Law of Property, 4th Edn., 1932, pp. 194, 195.

5. Halsbury, *Laws of England*, Vol. 13, p. 146; Topham, New Law of Property, 4th Edn., 1932, pp. 194, 195.
('31) 18 AIR 1931 Pat 426 (431, 432) : 10 Pat 630 : 135 Ind Cas 85 (DB), *Someshwari* v. *Maheshwari.* (Merger does not *ipso jure* take place on acquisition of superior with inferior right—Inferior right may be kept alive when manifestly for benefit of person having superior right.)

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In India the rule of intention was applied by Courts to cases arising before the Act was passed, as being in consonance with justice, equity and good conscience.[6] In *Mohesh Lal* v. *Mohunt Bawan Das*[7] A took a loan from B in 1872 on a mortgage for Rs. 20,000 of which a sum of Rs. 8,000 and odd was for the payment of an earlier mortgage of 1869 carrying a higher rate of interest. B himself paid off the earlier mortgage out of the consideration amount and got back the discharged mortgage-bond. There were no mesne incumbrances between A's mortgage and the earlier mortgage. It was held by their Lordships of the Privy Council that the question whether a charge paid off was kept alive or extinguished was one of intention of the parties, that in the circumstances of the case the intention of the parties was to extinguish the charge, that it was not for the benefit of the parties on the date of the advance that the prior charge should be kept alive, and that therefore the charge was extinguished. In *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*,[8] A purchased, in execution of a money-decree, certain property which was already subject to two mortgages x and y. A paid off x and, in a suit by the mortgagee of y in right of his mortgage, claimed to hold x as a shield. Their Lordships of the Privy Council held that he was entitled to do so. They refused to extend to India the rule laid down in *Toulmin* v. *Steere*[9] that when a person paid off a prior charge with notice of an incumbrance, he could not keep the charge alive against the incumbrancer. Their Lordships observed :

('18) 5 AIR 1918 Pat 651 (652) : 43 Ind Cas 449 (DB), *Lachanbati Koeri* v. *Bodhnath Tewari*. (Question of merger of mokarrari right in patni tenure is one of intention.)

('14) 1 AIR 1914 Cal 233 (234) : 23 Ind Cas 393 (DB), *Gopal Lal* v. *Sahilendrabasini*.

[*See also* ('15) 2 AIR 1915 Cal 452 (454) : 28 Ind Cas 314 (DB), *Amaloo* v. *Muksud Ali*.]

6. ('71) 7 Mad H C R 229 (231) (DB), *Ramu Naikan* v. *Subbaraya Mudali*.
('82) 1882 All W N 59 (59) (DB), *Muhammad Ibrahim* v. *Tekchand*.
('85) 1885 All W N 155 (155) (DB), *Parsi* v. *Girand Singh*.
('83) 1883 All W N 40 (40) (DB), *Baldeo Prasad* v. *Baldeo Singh*.
('85) 1885 All W N 21 (25) (DB), *Ajudhia Prasad* v. *Dulari Lal*.
('81) 3 All 682 (686, 687) : 1881 All W N 53 (DB), *Gaya Prasad* v. *Salik Prasad*.
('82) 4 All 196 (198) : 1882 All W N 13 (DB), *Har Prasad* v. *Bhagwan Das*. (Mortgagee purchasing in execution of money decree.)
('82) 4 All 518 (525) : 1882 All W N 118 (DB), *Ali Hassan* v. *Dhirja*.
('85) 7 All 568 (569): 1885 All W N 112 (DB), *Sirbadh Rai* v. *Raghunath Prasad*.
('85) 7 All 577 (579) : 1885 All W N 115 (DB), *Janki Prasad* v. *Sri Matra Mautangui Debia*.
('82) 6 Bom 404 (407) (FB), *Mulchand Kuber* v. *Lallu Trikam*.
('82) 6 Bom 561 (563) (DB), *Shantapa* v. *Balapa*. (6 Bom 404 (FB) followed.)
('78) 3 Cal 307 (311) (DB), *Goluknath Misser* v. *Lalla Prem Lal*. (*Tennison* v. *Sweeny*, (1844) 1 Jones & Lot 710 applied.)
('75) 23 Suth W R 338 (339) (DB), *Gopee Bhundhoo Shantra* v. *Kalee Pudo*.
('72) 17 Suth W R 480 (483) (DB), *Wajed Hassein* v. *Hafez Ahmed*.

7. ('83) 9 Cal 961 (977) : 10 Ind App 62 (PC).

8. ('84) 10 Cal 1035 (1046) : 11 Ind App 126 (PC). (11 Bom H C R 41 and 14 Suth W R 491 held not good law.)

9. (1817) 36 E R 81 (85, 86) : 3 Mer 210 : 17 R R 67.

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"The obvious question to ask in the interests of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest."

In the year 1882, the Act introduced two provisions in Ss. 74 and 101. The former provided that any subsequent *mortgagee* paying off a prior mortgage was entitled to all the rights and powers of the mortgagee paid off, independent of any rule of intention. In other words, the mortgage paid off was kept alive without reference to any rule of intention of the parties. Section 101 enacted the rule of intention in relation to *merger*. It ran as follows :

> "Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

The section did not, in terms, apply to cases where the charge-holder did not become *absolutely entitled* to the property charged and there was therefore no question of merger.[10] In such cases and in all other cases not regarded as covered by Ss. 74 and 101 where a charge or mortgage was paid off the general rule of intention was applied by Courts.[11]

(a) Where a *charge-holder* acquired the ownership of the property charged and there were no intermediate incumbrances and no other circumstances showing that it would be for his benefit to keep the charge alive the charge was extinguished by merger.[12] The case

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10. ('31) 18 AIR 1931 All 76 (81) : 133 Ind Cas 142 (DB), *Fazal Rab* v. *Manzoor Ahmad.* (Part owner of equity of redemption paying off prior mortgage.)

11. ('31) 18 AIR 1931 All 76 (81) : 133 Ind Cas 142 (DB), *Fazal Rab* v. *Manzoor Ahmad.* (Person himself liable to pay a charge cannot, as against the charge-holder keep alive a prior charge paid off.)

('26) 13 AIR 1926 All 653 (655) : 95 Ind Cas 998 (DB), *Chhote Lal* v. *Bansidhar.*

('30) 17 AIR 1930 Cal 530 (531) : 57 Cal 473 : 126 Ind Cas 413 (DB), *Sonaulla Karikar* v. *Abu Sayad Mahomed Ismail.* (*A* mortgaged to *B* and then sold to *C* —He again sold the same property to *D* who paid off *B* — *Held D* can keep alive the mortgage against *C*.)

('22) 9 AIR 1922 All 394 (395) : 44 All 659 : 75 Ind Cas 472 (DB), *Ram Sarup* v. *Ramlal.*

('28) 15 AIR 1928 Lah 301 (303) : 9 Lah 88 : 112 Ind Cas 17 (DB), *Fateh Ali* v. *Gehna.* (Mortgagee purchasing or acquiring subsequent mortgage.)

('36) 23 AIR 1936 Mad 171 (175) : 59 Mad 359 : 160 Ind Cas 137 (FB), *Lakshmi Amma* v. *Shankara Narayana.*

12. ('13) 16 Ind Cas 210 (212) : 40 Cal 89 : 39 Ind App 228 (PC), *Bhawani Kumar* v. *Mathura Prasad Singh.*

('26) 13 AIR 1926 Cal 165 (166, 167) : 90 Ind Cas 746 (DB), *Indra Narayan* v. *Tarini Prosad.* (Mortgagee purchasing in execution of decree on mortgage — No rent charge then in existence—Merger takes place — He cannot set up the mortgage against subsequent purchaser at rent sale : 40 Cal 89 : 39 Ind App 228 (PC), followed.)

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fell within section 101 of the Act as it stood before the amendment of 1929.

(b) Where a *charge-holder* acquired the ownership of the property charged and there were intermediate incumbrances or other circumstances rendering it beneficial for him to keep the charge alive, the charge was not extinguished.[13] If even in such a case the

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('11) 9 Ind Cas 139 (140) (DB) (Mad), *Sundaramayya* v. *Mummareddiyanadamma.*
('16) 3 AIR 1916 Mad 875 (877) : 29 Ind Cas 916 (DB), *Arumugasundara Maharaja Pillai* v. *Narasimha Aiyar.*
('17) 4 AIR 1917 Mad 536 (539) : 35 Ind Cas 224 (DB), *Rajah of Kalahasti* v. *Prayag Dossjee Varu.*
('33) 20 AIR 1933 Mad 879 (883): 57 Mad 195: 148 Ind Cas 1121 (DB), *Dasopolai* v. *Narayana Patro.*
('25) 12 AIR 1925 Mad 786 (787) : 87 Ind Cas 57 (DB), *Balamani Ammal* v. *Rama Aiyar.*
('30) 17 AIR 1930 All 311(312): 127 I.C. 588(DB), *Ali Raja* v. *Muhammed Zafar.*
('14) 1 AIR 1914 Bom 25 (26) : 38 Bom 369 : 23 Ind Cas 121 (DB), *Laxman Ganesh* v. *Mathurabai Narayan.*
('24) 11 AIR 1924 Lah 377 (378) : 73 Ind Cas 764 (DB), *Gobind Sarup* v. *Kuldip Singh.* (Mortgagee acquiring equity of redemption—No intermediate incumbrance —Merger takes place.)
('35) 22 AIR 1935 Lah 714 (716) : 159 Ind Cas 1091 (DB), *Gokal Chand* v. *Qandhara Singh.* (Mortgagee purchasing equity of redemption—Effect—Purchase made in benamidar's name—Merger takes place.)
('15) 2 AIR 1915 All 359 (359): 31 Ind Cas 891 (DB), *Jawahir Mal* v. *Udai Ram.*
('13) 18 Ind Cas 99 (100) (All), *Baldeo Prasad* v. *Mahabir Prasad.*
('35) 22 AIR 1935 All 770 (771) : 157 Ind Cas 1099, *Sundarlal* v. *Rahat Ali.*
('83) 1883 All W N 61 (61) (DB), *Ahmad Wali* v. *Bakar Husain.* (Though the purchase is made 'subject to the mortgage.')
('85) 1885 All W N 210 (211) (DB), *Khwaja Bakhsh* v. *Imaman.* (Do.)
('06) 1906 All W N 190 (190), *Ram Nidh* v. *Ishar Dayal.*
('22) 9 AIR 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 912 (DB), *Bai Reva* v. *Valimahomed Myamahomed.*
('94) 18 Bom 348 (354) (DB), *Bapu* v. *Mahadaji.*
('30) 17 A I R 1930 Lah 620 (623) : 128 Ind Cas 296 (D B), *Lakhmi Chand* v. *Partap Singh.* (Purchase of equity of redemption by mortgagee—No intermediate mortgage—Presumption of merger.)
[*See also* ('09) 2 Ind Cas 949 (950) : 1909 Pun Re No. 59 (DB), *Sri Ram* v. *Ramji Das.*
('10) 6 Ind Cas 764 (766) (DB) (Mad), *Ponnamal* v. *Kalithitta Mudali.*]

13. ('80) 5 Cal L R 29 (32) (DB), *Bissen Doss Singh* v. *Sheo Prosad Singh.*
('04) 1 All L Jour 288 (291) (DB), *Kadir Buksh* v. *Jwala Prasad.* (Purchase of equity of redemption by puisne mortgagee — No extinguishment against prior mortgagee.)
('30) 17 AIR 1930 Cal 335 (337) : 57 Cal 82 : 125 Ind Cas 661 (DB), *Mangtulal* v. *Upendra Mohan Pal.* (Mortgagee purchasing property can keep alive the mortgage against subsequent lessee.)
('08) 7 Cal L Jour 1 (31) (DB), *Bhawani Koer* v. *Mathura Prasad.*
('24) 11 AIR 1924 Mad 103 (103) : 75 Ind Cas 1016 (DB), *Thiruvadi Ayyangar* v. *P. Janaki.*
('04) 7 Oudh Cas 330 (332), *Najju Khan* v. *Ram Bali.*
('19) 6 AIR 1919 Pat 53 (54) : 51 Ind Cas 758 (DB), *Siva Narayan Ram* v. *Hari Narayan.*
('26) 13 AIR 1926 Pat 478 (480) : 97 Ind Cas 205 (DB), *Maharaj Bahadur Singh* v. *A. H. Forbes.*
('16) 3 AIR 1916 Mad 859 (861) : 38 Mad 18 : 16 Ind Cas 877 (DB), *Syed Ibrahim Sahib* v. *Arumugathayee.*

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intention was clear to extinguish the charge, it was extinguished.[14] This case also fell within the old S. 101.

(c) Where the *owner* of property acquired a charge upon it and there were no incumbrances and no other benefit by keeping the charge alive, the charge was extinguished by merger.[15] But where

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('34) 21 AIR 1934 Pat 70 (73) : 155 Ind Cas 663, *Ramnandan Prasad* v. *Ram Das.*
('32) 19 AIR 1932 Pat 332 (334) : 140 Ind Cas 104 (DB), *Sripat Singh* v. *Naresh Chandra.* (Heir of assignee of prior mortgagee and mortgagor same — Heirs can claim priority.)
('34) 21 AIR 1934 Pat 134 (138) : 13 Pat 200 : 153 Ind Cas 412 (DB), *Chanda Bibi* v. *Mohan Ram.*
('22) 9 AIR 1922 P C 11 (13) : 48 Ind App 465 : 43 All 469 : 65 Ind Cas 151 (PC), *Mt. Sukhi* v. *Ghulam Safdar Khan.* (Auction purchaser in execution of mortgage decree.)
('17) 4 A I R 1917 All 237 (238) : 38 Ind Cas 573 (D B), *Ghulam Safdar Khan* v. *Sukhi.*
('23) 10 AIR 1923 All 457 (457) : 74 Ind Cas 684 (DB), *Phul Chand* v. *Mt. Surji.*
('09) 4 Ind Cas 810 (811) : 32 All 1 (DB), *Baldeo Prasad* v. *Uman Shankar.*
('23) 10 AIR 1923 Pat 581 (584) : 75 Ind Cas 305 (DB), *Kesho Prasad* v. *Lakhu Rai.*
('32) 19 AIR 1932 Lah 237 (238) : 138 Ind Cas 699 (DB), *Makhan Mal* v. *Gokal Chand.*
('22) 9 AIR 1922 All 394 (395) : 44 All 659 : 75 Ind Cas 472 (DB), *Ram Sarup* v. *Ram Lal.*
('14) 1 AIR 1914 Bom 268 (270) : 38 Bom 24 : 21 Ind Cas 39 (DB), *Shankar Venkatesh* v. *Sadashiv Mahadji.*
('32) 19 AIR 1932 Cal 772 (773): 140 Ind Cas 589 (DB), *Upendra Nath* v. *Saroda Prosad.* (Mortgagee purchasing.)
('04) 31 Cal 370 (372) (DB), *Gunindra Prasad* v. *Baijnath Singh.* (Purchase by mortgagee of mortgaged property along with others, does not extinguish mortgage.)
('33) 20 AIR 1933 All 412 (413): 145 Ind Cas 304 (DB), *Sarda Prasad* v. *Kanhai Lal.*
('32) 19 AIR 1932 Rang 197 (200): 10 Rang 465 : 140 Ind Cas 156, *Ko Po Kun* v. *C. A. M. A. L. Firm.*
('32) 19 AIR 1932 Mad 84 (85) : 136 Ind Cas 305, *Abdul Majid Sahib* v. *Arunachala Mudaliar.*
('14) 1 AIR 1914 Sind 131 (133) : 8 Sind L R 264 : 28 Ind Cas 67 (DB), *Mt. Chandulbai* v. *Basaramal Topanmal.*
('24) 11 AIR 1924 Nag 266 (268): 20 Nag L R 115: 87 Ind Cas 87, *Laxman Singh* v. *Janardan.*
('30) 17 AIR 1930 Nag 166 (171) : 127 Ind Cas 881, *Sheoji* v. *Bhasker.*
[*See* ('32) 19 AIR 1932 Lah 56 (57) : 135 Ind Cas 201, *Gurdit Singh* v. *Hukumat Rai.*]
[*See also* ('27) 14 AIR 1927 Oudh 341 (343) : 103 Ind Cas 802 (DB), *Hanwant Ram* v. *Ram Harakh.*
('17) 4 AIR 1917 All 309 (311) : 39 All 74 : 37 Ind Cas 4 (DB), *Jamanadei* v. *Lalaram.*
('23) 10 AIR 1923 Pat 581 (584) : 75 Ind Cas 305 (DB), *Kesho Prasad* v. *Lakhu Rai.*]

14. ('28) 15 AIR 1928 Mad 1109 (1111) : 113 Ind Cas 666 (DB), *Ramaswami* v. *Gopalasubba.*
('23) 10 AIR 1923 Oudh 121 (122) : 26 Oudh Cas 289 : 74 Ind Cas 360, *Kalloo Singh* v. *Bakhtawar Singh.*
[*See also* ('24) 11 AIR 1924 Oudh 1 (9) : 74 Ind Cas 503 (DB), *Baldeo Singh* v. *Dy. Commissioner, Kheri.*]

15. ('15) 2 AIR 1915 All 242 (242) : 37 All 309 : 28 Ind Cas 973 (DB), *Badan* v. *Murari Lal.*

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the owner (not being the mortgagor himself) acquired a charge thereon and there were intermediate incumbrances, or it was otherwise for his benefit to keep the charge alive, it was not extinguished.[16] These cases also were held to come within the old S. 101,[17] though a contrary view was expressed in the undermentioned case[18] that the matter was governed not by S. 101 but by the general doctrine of merger. The same principles applied where the owner of property subject to several mortgages (not being the mortgagor himself or a person personally liable to pay them) *paid off* an earlier mortgage. On such payment, he was held entitled to treat himself as *buying the charge* and was thus reduced to the position of an owner of property acquiring a charge thereon, and the question whether the charge was extinguished by the rule of merger was one of intention under S. 101 of the Act. In *Mali Reddi Ayyareddi* v. *Gopala Krishnayya*[19] their Lordships of the Privy Council observed as follows :

> "It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to mortgages, may if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage-debt. . . . . It is further to be presumed, and indeed the Statute so enacts (Transfer of Property Act, S. 101) that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

Where therefore an owner of property (not being himself under a personal liability to pay the debt) paid off an earlier mortgage, he was held entitled to keep the charge alive, if there were intermediate incumbrances or it was otherwise for his benefit to do so.[20]

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16. ('15) 2 AIR 1915 All 242 (242) : 37 All 309 : 28 Ind Cas 973 (DB), *Badan* v. *Murari Lal.*

('34) 21 AIR 1934 Lah 143 (144) : 154 Ind Cas 695, *Radha Kishan* v. *Fakharuddin.* (Representative of a mortgagor purchasing the mortgagee rights.)

17. ('42) 29 AIR 1942 Mad 558 (562) : 202 Ind Cas 697 (DB), *Venkatalingama* v. *Parathasarathy.* (Question in the case was the applicability of the old S. 101. AIR 1915 All 242 : 37 All 309 dissented from.)

18. ('15) 2 AIR 1915 All 242 (242) : 37 All 309 : 28 Ind Cas 973 (DB), *Badan* v. *Murarilal.*

19. ('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 79 Ind Cas 592 (PC).

20. ('26) 13 AIR 1926 Lah 430 (430) : 7 Lah 212 : 94 Ind Cas 152 (DB), *Mehl Singh* v. *Amar Nath.* (Owner paying off earlier mortgage.)

('17) 4 AIR 1917 Pat 417 (418) : 39 Ind Cas 500 (DB), *Mahabir Prasad* v. *Bibi Nagin.*

('30) 17 AIR 1930 Cal 572 (573, 574) : 128 Ind Cas 192 (DB), *Kalimuddin Shaik* v. *Baidyanath Saha.*

('13) 18 Ind Cas 704 (705) (DB) (All), *Jamiunnissa* v. *Pitambar Das.*

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(d) Where a person *advanced* money to a mortgagor for the purpose of paying off a prior mortgage, and took a sale or mortgage of the properties in consideration of such advance, the question whether the mortgage paid off was kept alive for his benefit was regarded as one depending on the intention of the parties.[21]

('22) 9 AIR 1922 Lah 275 (276) : 3 Lah 99 : 63 Ind Cas 760 (DB), *Bar Singh* v. *Hazra Singh.*

21. ('12) 14 Ind Cas 496 (503) : 39 Ind App 68 : 39 Cal 527 (PC), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh.*
('25) 12 AIR 1925 Mad 1217 (1217) : 90 Ind Cas 767, *Tiruvengadam Pillai* v. *Sabapathi Pillai.*
('24) 11 AIR 1924 Mad 103 (103) : 75 Ind Cas 1016 (DB), *Thiruwadi Ayyangar* v. *P. Janki.*
('06) 33 Cal 1133 (1155) : 4 Cal L J 121 (DB), *Jagatdhar Narain* v. *Brown.*
('02) 29 Cal 154 (165) : 29 Ind App 9 (PC), *Dinobundhu Shaw Chowdhry* v. *Jogmoya Dasi.* (On the facts it was held that the intention was to keep the mortgages paid off alive—3 C W N 153 affirmed on appeal.)
('22) 9 AIR 1922 Pat 181 (182) : 1 Pat 332 : 67 Ind Cas 221 (DB), *Ram Narain Lal* v. *Sahadeo Singh.* (Intention held to be to keep it alive.)
('28) 15 AIR 1928 Rang 287 (288) : 113 Ind Cas 809 : 6 Rang 488 (DB), *Natchiappa Chettiar* v. *Ko Tha Zan.* (Do.)
('20) 7 AIR 1920 Mad 941 (943) : 58 Ind Cas 813 (DB), *Chidambara Nadan* v. *Muni Nagendrayyan.* (Do.)
('14) 1 AIR 1914 Mad 693 (694) : 21 Ind Cas 978 (DB), *Subramania Pillai* v. *Palaniappa Mudali.* (Do.)
('06) 29 Mad 37 (41) (DB), *Vanmikalinga Mudali* v. *Chidambara Chetty.* (Presumption is of intention to keep it alive.)
('19) 6 AIR 1919 Mad 818 (819) : 47 Ind Cas 882 (DB), *Rama Rao* v. *Mandachalugai.* (Do.)
('18) 5 AIR 1918 Mad 333 (334) : 43 Ind Cas 714 (DB), *Suppu Sekkayya Bhattar* v. *Suppu Bhattar.* (Do.)
('97) 20 Mad 486 (486, 487) : 7 Mad L Jour 198 (DB), *Purnamal Chand* v. *Venkata Sabbarayulu.* (Intention is to keep it alive.)
('10) 7 Ind Cas 473 (473) (DB) (Cal), *Tara Prosad Mandal* v. *Kristo Prosad Panda.* (Do.)
('11) 12 Ind Cas 607 (608) : 34 All 102 (DB), *Gur Narain* v. *Shadi Lal.* (Do.)
('26) 13 AIR 1926 Mad 1082 (1083) : 97 Ind Cas 932 (DB), *Prakasa Rao* v. *Ramanna.* (Do.)
('28) 15 AIR 1928 Pat 195 (196): 108 Ind Cas 95 (DB), *Ram Dass* v. *Ramnandan.* (Do.)
('29) 16 AIR 1929 Pat 325 (327): 8 Pat 360: 118 Ind Cas 730 (DB), *Durga Missir* v. *Baijnath Saran.* (Do.)
('13) 18 Ind Cas 487 (488) (DB) (Low Bur), *Nachippa Chetty* v. *Periacuppan Chetty.* (Do.)
('33) 20 AIR 1933 Lah 1000 (1001): 145 Ind Cas 719, *Pal Singh* v. *Sunder Singh.* (Do.)
('02) 29 Cal 25 (30) (DB), *Bhiku* v. *Shujat Ali.* (Do.)
('13) 18 Ind Cas 945 (945) (DB) (All), *Lajja Ram* v. *Guru Baksh.* (Do.)
('16) 3 AIR 1916 All 81 (82) : 38 All 502 : 35 Ind Cas 732 (DB), *Udit Narayan* v. *Ashrafi.* (Do.)
('31) 18 AIR 1931 Bom 545 (546) : 135 Ind Cas 489 (DB), *Allisaheb* v. *Shesho Govind.* (Do.)
('27) 14 AIR 1927 All 211 (212): 101 Ind Cas 409 : 49 All 233 (DB), *Madho Singh* v. *Pancham Singh.* (Do.)
('91) 13 All 581 (584, 585) : 1891 All W N 193 (SB), *Tulsa* v. *Khub Chand.* (Do.)

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(e) A person who had *covenanted* to pay the debt or was otherwise personally liable to pay the debt could not, by paying off a prior charge, keep it alive as against the former.[22] Thus, the *mortgagor* who had effected two mortgages on the same property could not, by paying off one of them, keep it alive against the other.[23] So also a person who had undertaken to pay mortgages x and y could not pay off x and keep it alive against y.[24]

Where a person *paid off* a prior charge on the property and was entitled under the rule of intention to keep the charge alive for his benefit, he stepped into the shoes of the charge holder who was paid

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('34) 21 AIR 1934 Lah 806 (806, 807) : 154 Ind Cas 706, *Abdul Majid* v. *Bhagwant Kishore.* (29 Cal 154 : 29 Ind App 9 (PC) referred to.)

('14) 1 AIR 1914 All 443 (444): 23 Ind Cas 827 (DB), *Har Narain* v. *Har Prasad.* (The intention is to extinguish the mortgage.)

('09) 4 Ind Cas 1032 (1034) : 5 Low Bur Rul 138 (DB), *Soobramanian Chetty* v. *Aga Rajat Ali.*

('36) 23 AIR 1936 Cal 313 (314, 315) : 166 Ind Cas 788, *Rajani Nath* v. *Ennatali Howladar.*

('30) 17 AIR 1930 Lah 1063 (1065): 130 I.C. 49(DB), *Gopal Singh* v. *Ladha Mal.*
[*See also* ('21) 8 AIR 1921 Cal 781 (782) : 64 Ind Cas 266 (DB), *Ali Mahomed Khan* v. *Maharaj Bepari.* (Intention is to keep it alive.)
('11) 12 Ind Cas 805 (806) (Low Bur), *Maung Paw* v. *Maung San U.* (Do.)]

22. ('84) 7 Mad 127 (127) (DB), *Krishna* v. *Narayana.*

('24) 11 AIR 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 : 5 L R P C 49 : 79 Ind Cas 592 (PC), *Malireddi Ayyareddi* v. *Gopalakrishnayya.*

23. ('15) 2 AIR 1915 All 242 (243) : 37 All 309 : 28 Ind Cas 973 (DB), *Badan* v. *Murarilal.* (The rule of intention is founded on equity and is not applied where *A* having created a charge himself acquires or pays off an earlier charge.)

('06) 29 Mad 113 (114) (DB), *Manjhappa* v. *Krishnayya.*

('85) 7 All 864 (866): 1885 All W N 275 (DB), *Radhey Lal* v. *Mahesh Prasad.* (The ground on which the decision was rested in this case was, however, that it would be fraud for the owner or his heirs to set up the charge as against the subsequent encumbrancer.)
[*See also* ('07) 5 Cal L Jour 95 (99) (DB), *Bhaja Chowdhury* v. *Chuni Lal Marwari.*]

24. ('85) 1885 All W N 130 (131) (DB), *Nathu* v. *Bindraban.*

('26) 13 AIR 1926 Nag 321 (322) : 93 Ind Cas 95 (DB), *Kasturchand* v. *Singhai Ratanchand.*

('24) 11 AIR 1924 Mad 103 (104) : 75 Ind Cas 1016 (DB), *Thiruwadi Ayyangar* v. *P. Janaki.*

('32) 136 Ind Cas 824 (824) (DB) (All), *Balbhaddar Upadhya* v. *Sheo Mangal.*

('30) 123 Ind Cas 687 (688) (All), *Ahmad Hussain* v. *Ibrar Husain.* (33 All 101 (FB) and AIR 1923 All 509 followed.)

('10) 7 Ind Cas 200 (201) : 33 All 101 (FB), *Muhammad Sadiqi* v. *Ghaus Muhammad.*

('16) 3 AIR 1916 Cal 801 (802) : 43 Cal 69 : 31 Ind Cas 22 (DB), *Har Shiam* v. *Shyamlal Sahu.*

('98) 2 Cal L Jour 288 (295) (DB), *Surjiram Marwari* v. *Barhamdeo Persad.*

('09) 2 Ind Cas 207 (208) (All), *Dalip Rai* v. *Birnaik Rai.*

('36) 23 AIR 1936 Mad 171 (175) : 160 Ind Cas 137 : 59 Mad 359 (FB), *Lakshmi Amma* v. *Shankara.*

('28) 15 AIR 1928 All 77 (79) : 50 All 218 : 108 Ind Cas 728 (DB), *Maksud Ali Khan* v. *Sheikh Abdullah Khan.*
[But see ('32) 19 AIR 1932 All 489 (490) : 54 All 897 : 139 Ind Cas 107 (FB), *Tota Ram* v. *Ram Lal.*]

off. In other words he was *subrogated* to the rights of the prior charge-holder. But where the mortgagee or charge-holder or incumbrancer himself acquired the ownership of the property, there was no question of any subrogation or substitution of one person to the rights of another, but it was merely a question of *keeping alive* the mortgage.

By the introduction of the new S. 92 and the substitution of the new S. 101 for the old section, the Legislature has abolished the rule of intention in cases falling within their scope. A right of *subrogation* to the rights of a mortgagee does not now depend upon any rule of intention, but is governed by the terms of S. 92.[25] Where a mortgagee or a person having a charge upon immovable property purchases or acquires the rights in the property, the question whether the mortgage or charge is *kept alive* (there being no question of subrogation in such a case) does not also depend upon any rule of intention. The section declares that there shall be no merger as between the mortgagee and any subsequent mortgagee or charge-holder of the same property.[26]

But the section does not provide for a case of an *owner* of property acquiring a charge on the property as, by inheritance.[27] Nor does it provide for a case where a mortgagee acquires the ownership of the property and it is for his benefit to keep it alive, though there are no subsequent incumbrances. In such cases it is conceived that the rule of intention will still be applicable. In the undermentioned case,[28] however, the High Court of Bombay has held that a mortgagee acquiring the rights in the property cannot, under the present section, keep alive the mortgage, if there is no intermediate incumbrance on the property, even if it would be otherwise for his benefit to keep it alive. It is submitted that this view is not correct. The section merely says that there shall, in the circumstances specified in the section, be no merger *as against subsequent incumbrancers*. It does not say that in all other cases where a mortgagee acquires the property there shall be merger.

2. Benefit under the rule of intention must be a benefit at the time the charge is paid off. — As has been seen in Note 1, an intention to keep alive a charge in favour of a party will, under the rule of intention, be *presumed* if it is for the *benefit* of the party that it should be kept alive. But whether it is for the benefit of the party to keep a charge alive must be decided with reference to the circumstances existing *at the time the charge is paid off, or the union of interests takes place*, for otherwise the nature of the title will remain in suspense for an indefinite period.[1] Thus, the possibility of a future claim for

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25. *See* ('33) 20 AIR 1933 Nag 155 (156) : 144 Ind Cas 969 : 30 Nag L R 164, *Mohan Lal* v. *Mohomad Sujat.*

26. ('40) 27 AIR 1940 Pat 64 (65): 184 Ind Cas 825, *Surya Narain* v. *Ram Tarak.*

27. ('42) 29 AIR 1942 Nag 33 (35): I L R (1942) Nag 309 : 199 Ind Cas 814 (DB), *Nemasao Laxman* v. *Madhorao Ganesh.*

28. ('42) 29 AIR 1942 Bom 95 (96): 199 I.C. 723(DB), *Baswannewa* v. *Dodgowda.*

Note 2

1. ('22) 9 AIR 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 912 (DB), *Bai Reva* v. *Valimahomed.*

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pre-emption is not a circumstance from which it can be said that it is for the benefit of the person paying off a charge to keep it alive.[2]

The existence of an intermediate incumbrance is a circumstance which will render it beneficial to a party paying off a charge to keep it alive. But it is only *one* of such circumstances.[3] The fact, for instance, that a property is, at the time of the transaction, under *attachment*, is another circumstance which will render it beneficial to a party to keep the charge alive. (See Note 4.)

3. Renewal of one mortgage by another. — A renewal of one mortgage by another does not necessarily extinguish the prior security. The rule of intention applies to such cases and the prior mortgage will remain if it is for the benefit of the party renewing, to keep it alive.[1] Thus, if there is an intermediate mortgage, the prior mortgage will be kept alive as against the intermediate mortgagee,[2]

('34) 21 AIR 1934 Pat 134 (137) : 13 Pat 200 : 153 Ind Cas 412 (DB), *Mt. Chanda Bibi* v. *Mohanram.*

('42) 29 AIR 1942 Mad 558 (564) : 202 Ind Cas 697 (DB), *Venkatalingama* v. *Parthasarathy.* (AIR 1916 Mad 875 approved.)

('92) 15 Mad 268 (280) : 2 Mad L Jour 95 (DB), *Shan Maun* v. *Madras Building Co.* (On appeal from 13 Mad 383.)

2. ('26) 13 AIR 1926 Oudh 606 (608) : 98 Ind Cas 28: 1 Luck 560 (DB), *Darshan Singh* v. *Arjun Singh.*

('12) 13 Ind Cas 619 (620) : 34 All 268 (DB), *Jugal Kishore* v. *Ram Narain.* [*See also* ('06) 1906 Pun Re No. 98, *Ahmad Shah* v. *Walidad Khan.*]

3. ('42) 29 AIR 1942 Mad 558 (565) : 202 Ind Cas 697 (DB), *Venkatalingama* v. *Parthasarathy.*

Note 3

1. ('13) 18 Ind Cas 199 (201) (DB) (Mad), *Lakshmana Aiyar* v. *Sankaramoorthy.* (*A* selling property to *B* — *B* undertaking to execute mortgage to *A* in respect of unpaid purchase money — *B* executing such mortgage after he has executed a mortgage in favour of *C* — *B's* mortgage being merely a renewal of the vendor's charge for purchase money the charge is kept alive as against *C.*)

('18) 5 AIR 1918 Mad 1033 (1036) : 37 Ind Cas 456 (DB), *Prayag Doss Jee Varu* v. *Ravur Chengama Naidu.*

('35) 22 AIR 1935 Lah 350 (353) : 16 Lah 881 : 156 Ind Cas 795 (DB), *Punjab & Sind Bank Ltd.* v. *Kishen Singh.*

('38) 25 A I R 1938 Oudh 90 (91) : 13 Luck 753 : 173 Ind Cas 271 (DB), *Pitambar Das* v. *Durga Bakhsh Singh.*

('20) 7 AIR 1920 Nag 215 (216) : 60 Ind Cas 525, *Jaganath* v. *Raghunath.*

(1878) 3 Cal 307 (310, 311) (DB), *Goluknath Misser* v. *Lalla Prem Lal.*

(1913) 19 Ind Cas 267 (272) : 35 All 211 : 40 I. A. 105 (PC), *Richard Ross Skinner* v. *Kunwar Naunihal Singh.* (Especially if the renewal is by a person having only a limited estate in the property.)

2. ('41) 28 A I R 1941 All 200 (206) : I L R (1941) All 220 : 195 Ind Cas 533, *Himmat Sahai* v. *Mohd Moin.*

('89) 16 Cal 523 (529) (DB), *Gopal Chunder* v. *Herembo Chunder.*

('86) 10 Bom 88 (90) (DB), *Dullabh Das Devchand* v. *Lakshmandas Sarupchand.*

('11) 9 Ind Cas 205 (206) : 33 All 368 (DB), *Rahimun-Nissa* v. *Badri Das.*

('10) 7 Ind Cas 468 (469) (DB) (All), *Kanhaiyalal* v. *Chhidhu Singh.*

('11) 11 Ind Cas 865 (867) : 35 Mad 642 (DB), *Sellapadi Mahalakshmi Ammal* v. *Sriman Mathvasiddhantha Onnahini Nidhi, Ltd.*

('97) 20 Mad 274 (275) : 7 Mad L Jour 87 (DB), *Alangaran Chetti* v. *Lakshmanan Chetti.*

('18) 5 A I R 1918 Mad 1327 (1328) : 38 Ind Cas 240 (DB), *Velayuda Reddi* v. *Narasimha Reddi.*

and this would be so even if the prior mortgagee obtained the renewal in partial discharge of the prior security or obtained other additional security.[3] In *Tennison* v. *Sweeny*,[4] Lord St. Leonards said :

> " Then another point was started that, as the successive mortgages were for the sum secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-debtors had a right to come before the last mortgage. That is a very novel view of the operation of the deeds. It is clear that the former mortgages continued untouched and operative, notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether by taking a new security for their old debt and for further advances they do not prejudice their original securities."

A similar view was expressed by Vice Chancellor Knight Bruce in *Miln* v. *Walton*.[5] He said :

> "Does a creditor, having a mortgage on the funds of his debtor for part of his debt, necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds for the whole of the debt? If there be no more in the transaction, I apprehend that the earlier mortgage remains in force and maintains its rank notwithstanding the other, and may be dealt with by the creditor separately."

This principle was applied by the Lahore High Court to a case where a prior mortgagee had purchased the rights under a puisne

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('21) 8 AIR 1921 Mad 693 (694) (DB), *Kutti Thevan* v. *Rayappa Goundan*.
('29) 16 AIR 1929 Rang 298 (299) : 123 Ind Cas 141, *Ba Hlaing* v. *Sit Hauk*.
('34) 21 AIR 1934 Rang 7 (7) : 154 Ind Cas 343, *Palaniappa Chettiar* v. *Daw Hnin Thet*. (A I R 1922 P C 11 : 48 Ind App 465 : 43 All 469 and 39 Cal 527 : 39 Ind App 68 (P C) relied on.)
('32) 19 AIR 1932 Oudh 314 (317) : 7 Luck 26 : 139 Ind Cas 626 (DB), *Ram Sahai* v. *Kunwar Sah*.
('39) 26 A I R 1939 Rang 247 (248) : 1939 Rang L R 207 : 184 Ind Cas 284, *Daw Kyin* v. *Ko Ba Tin*. (The doctrine of merger is not applicable to mortgages.)

3. ('13) 19 Ind Cas 18 (19) (DB) (All), *Ram Kishan Das* v. *Fakir Chand*.
('15) 2 AIR 1915 Cal 77 (79) : 25 Ind Cas 500, *Kulanand Singh* v. *Mohan Mandar*.
('24) 11 A I R 1924 Mad 619 (620) : 84 Ind Cas 788, *Sundaramiah* v. *Venkatasubbiah*. (The taking of a new mortgage for a portion of a debt on the earlier mortgage does not extinguish the earlier mortgage.)
('18) 5 A I R 1918 Mad 1327 (1328) : 38 Ind Cas 240 (DB), *Velayuda Reddi* v. *Narasimha Reddi*.
('40) 27 A I R 1940 Pat 65 (70) : 187 Ind Cas 339 (DB), *Singheshwar Singh* v. *Medni Prasad*.
('89) 16 Cal 523 (529) (DB), *Gopal Chunder* v. *Herembo Chunder*.
('41) 28 AIR 1941 All 200 (206) : I L R (1941) All 220 : 195 Ind Cas 533, *Himmat Sahai* v. *Mohd. Moin*.

4. (1844) 1 Jones & Lot 710 : 7 Ir Eq R 511. (Cited in A I R 1928 Lah 301 : 9 Lah 88.)

5. (1843) 60 R R 184 (190, 191) : 2 Y & C C C 354 : 7 Jur 892 : 63 E R 156.

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mortgage and it was held that the rights under the prior mortgage remained in force.[6]

Where, notwithstanding it would be for the benefit of the mortgagee to keep the prior mortgage alive, the intention is clear that the prior mortgage should be extinguished, it will not be kept alive.[7] If the prior mortgagee by taking the subsequent mortgage, *undertakes* to discharge not only his own prior mortgage but also another mortgage on the property, he cannot keep alive his prior mortgage as against the mortgagee whom he had undertaken to pay.[8]

4. Mortgagee taking subsequent sale or mortgage in discharge of the prior mortgage—Latter transaction invalid — Effect. — Where a mortgagee takes a subsequent sale or mortgage in discharge of his mortgage and it turns out that the latter transaction is inoperative or invalid, the prior mortgage remains and is not extinguished.[1] In *Har Chandi Lal* v. *Sheoraj*

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6. ('28) 15 AIR 1928 Lah 301 (303, 304) : 9 Lah 88 : 112 Ind Cas 17 (DB), *Fateh Ali* v. *Gehna.*

7. ('81) 3 All 706 (709) : 1881 All W N 61 (DB), *Badri Prasad* v. *Daulat Ram.*
('89) 13 Bom 348 (351) (DB), *Ram Krishna Sadashiv* v. *Chothmal.*
('35) 22 A I R 1935 Lah 203 (205) : 153 Ind Cas 870, *Dhanpal Singh* v. *Mt. Fahiman.*

8. ('40) 27 A I R 1940 All 540 (543) : 192 Ind Cas 58, *Ramacharan* v. *Raghubir Saran.*
('31) 18 AIR 1931 All 347 (348) : 130 Ind Cas 301, *Balbhaddra* v. *Sheomangal.*

Note 4

1. ('38) 25 AIR 1938 All 418 (423) : I L R (1938) All 714 : 176 Ind Cas 492 (FB), *Kanhaiya Prasad* v. *Mt. Hamidan.*
('33) 20 AIR 1933 Nag 241 (242, 243) : 30 Nag L R 142 : 144 Ind Cas 736, *Ramshanker* v. *Gulab Shanker.*
('33) 20 AIR 1933 Rang 92 (92) : 11 Rang 112 : 143 Ind Cas 829, *Ma Hme* v. *Ma Pon.* (Purchase of property by mortgagee—Subsequent discovery that vendor had only partial interest—Mortgage revives to the extent not covered by such interest.)
('05) 1 Cal L Jour 337 (343) (DB), *Surjiram Marwari* v. *Barhmdeo Persad.*
('82) 1882 Pun Re No. 173, *Khushal Mal* v. *Mul Chand.*
('17) 4 AIR 1917 Lah 443 (443) : 41 Ind Cas 921 : 1917 Pun Re No. 68 (FB), *Mathra Das* v. *Nizam Din.*
(1864) 2 Bom H C R 198 (203) (DB), *Hirachand Babaji* v. *Bhaskar.*
('80) 1880 Bom P J 215 (DB), *Choturam* v. *Dama.* (Sale colourable.)
('32) 19 AIR 1932 Mad 182 (185): 135 Ind Cas 582 (DB), *Appalaraju* v. *Krishnamurthy.*
('80) 2 All 455 (459) (DB), *Basant Rai* v. *Kanauj Lal.* (Sale.)
('25) 12 AIR 1925 Nag 26 (28) : 85 Ind Cas 264, *Ganpat* v. *Mahadeo.*
('96) 19 Mad 160 (161) (DB), *Arumugam* v. *Periasami.*
('08) 31 Mad 439 (441) : 18 Mad L J 306 (DB), *Chama Swami* v. *Padala Ananda.*
('04) 14 Mad L J 485 (487) (DB), *Gurusami Aiyar* v. *Kaveree Boyee Ammal.*
('11) 9 Ind Cas 789 (790) (DB) (Mad), *Balasubramanian* v. *Ramasawmy Chettiar.*
('36) 23 AIR 1936 Mad 61 (62): 59 Mad 44 : 160 Ind Cas 757 (DB), *Polayya Dora* v. *Anantha Patro.*
('14) 1 AIR 1914 Mad 489 (493) : 37 Mad 423 : 15 Ind Cas 343 (DB), *Ariyputhira Padayachi* v. *Muthukumaraswami.*
('13) 21 Ind Cas 978 (979) (DB) (Mad), *Subramania Pillai* v. *Palaniappa Mudali.*

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Note 4

Singh,[2] one Jai Chand mortgaged five-sixths share in a village to one Chatri Lal in 1876. After the death of Jai Chand, his widow Mt. Nandan and his nephew Phul Singh executed another mortgage in favour of Chatri Lal in 1887 in discharge of the previous mortgage. The property mortgaged was the whole village including one-sixth share therein belonging to Phul Singh in his own right. It was found that the later mortgage was not binding on the widow, Mt. Nandan. The mortgagee then sued to enforce the earlier mortgage. Their Lordships of the Privy Council held that he was entitled to do so. They observed :

> "It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu *(inter alia)* of the security of the 13th of November 1876. Pursuant to this intention, he appears to have handed over the mortgage of the 13th of November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th of November, 1876. In their Lordships' opinion, the 41st Section of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby."

The above view was again reiterated by their Lordships of the Privy Council in the undermentioned case.[3]

Where a mortgagee takes a subsequent mortgage or sale in discharge of his mortgage, but at that time the properties are under *attachment* in execution of a money-decree, the subsequent sale or

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('37) 24 AIR 1937 Mad 293 (294): 169 Ind Cas 244, *Ellappa* v. *Sivasubramanian*. (Agreement to sell to mortgagee immovable property mortgaged — Unless title in property mortgaged passes to mortgagee, mortgage is not discharged even if possession is already transferred to him.)

('27) 14 AIR 1927 Nag 83 (84) : 98 Ind Cas 695, *Venkatrao* v. *Ganpat*.

('12) 16 Ind Cas 779 (779) (DB) (Mad), *Enturi Guruwayya* v. *Muppulaneni Butchaya*.

('19) 6 AIR 1919 Oudh 89 (91) : 22 Oudh Cas 349 : 54 Ind Cas 544 (DB), *Mt. Jai Kishori* v. *Afzal Khanam*.

[*See also* ('22) 9 AIR 1922 Cal 114 (115) : 64 Ind Cas 903 (DB), *Bama Charan* v. *Nimai Nandal*. (Mortgagee obtaining possession under invalid agreement of sale is still a mortgagee.)

('39) 26 AIR 1939 Rang 247 (248) : 184 Ind Cas 284 : 1939 Rang L R 207, *Daw Kyin* v. *Ko Ba Tin*.]

2. ('16) 3 AIR 1916 P C 68 (70) : 39 All 178 : 39 Ind Cas 343 : 44 Ind App 60 (PC). (On appeal from 19 Ind Cas 127.)

3. ('38) 25 AIR 1938 P C 123 (127) : 173 Ind Cas 772 : 32 Sind L R 448 : I L R (1938) Mad 646 (PC), *Sethupathi* v. *Chidambaram*.

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Note 4

mortgage is inoperative against all claims enforceable under the attachment. On the principles stated above, the prior mortgage will remain enforceable and will not be extinguished by the subsequent inoperative transaction.[4] A contrary view has, however, been expressed in the undermentioned cases,[5] on the ground that an attachment renders a transfer pending it, inoperative only against claims enforceable under the attachment and not against the transferor himself, and that, the transfer being *partly* operative, the transferee cannot fall back upon the earlier transaction in discharge of which the transfer was taken. It is submitted that this view is not correct. As pointed out by Varadachariar J. in *Mahalakshmi* v. *Somaraju*[6] the question is not whether the transfer is not effective as between the transferor and the transferee, but whether there being the possibility of the transfer being ineffective, as against a third party, it is not to the interest of the mortgagee not to treat his mortgage as extinguished by the transfer.

Where a prior mortgagee sues on his mortgage without making the subsequent mortgagee a party to the suit, and purchases the property in execution of his decree, the purchase is inoperative against the subsequent mortgagee. On the principles stated above, the prior mortgage remains as against the subsequent mortgage.[7]

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4. ('18) 5 AIR 1918 Mad 460 (460) : 38 Ind Cas 468 (DB), *Lingam Krishna Bhupathi* v. *Kovvuri Basivi Reddi.*

('82) 8 Cal 530 (532) (DB), *Gopal Sahoo* v. *Gunga Pershad.* (Private purchase by the mortgagee of the mortgaged property having become void as against the purchaser in execution of the same property, by reason of the property having been under attachment at the time of the conveyance, *held* the mortgagee-purchaser was entitled to fall back upon the lien created by the mortgage.)

('28) 15 AIR 1928 Mad 703 (705) : 111 Ind Cas 266 (DB), *Andi Thevan* v. *Nagaya sami.* (29 Cal 154 : 29 Ind App 9 (PC) relied on.)

('39) 26 AIR 1939 Mad 393 (395) : 189 Ind Cas 17 : I L R (1939) Mad 600 (DB), *Mahalakshmi* v. *Somaraju.* (8 Cal 530 followed; AIR 1922 All 76 and AIR 1933 Mad 879 : 57 Mad 195 dissented from.)

('37) 24 AIR 1937 Rang 359 (360) : 173 Ind Cas 362, *S. S. M. M. Firm* v. *T. A. N. Chettyar Firm.* (8 Cal 530 followed.)

('38) 25 AIR 1938 Mad 465 (466) : 180 Ind Cas 908, *Mariyappa* v. *Ramanuja.*

[*See also* ('25) 12 AIR 1925 Rang 89 (92) : 85 Ind Cas 308, *Hla Ban* v. *Ramanathan Chettiar.* (Case of a vendee pending attachment paying off a prior mortgage.)]

5. ('22) 9 AIR 1922 All 76 (78) : 66 Ind Cas 203 (DB), *Lachman Prasad* v. *Lachmeshwar.*

('33) 20 AIR 1933 Mad 879 (882, 883): 57 Mad 195 : 148 Ind Cas 1121 (DB), *Daso Polai* v. *Narayana Patro.*

('36) 23 AIR 1936 Mad 61 (63) : 59 Mad 44 : 160 Ind Cas 757 (DB), *Dasari Polayya Dora* v. *Anatha Patro.*

('36) 23 AIR 1936 Pat 404 (405): 15 Pat 120 : 163 Ind Cas 391 (DB), *Kedar Nath* v. *Bhagwat Prasad.* (AIR 1922 All 76 relied on.)

[*See also* ('09) 1 Ind Cas 683 (684) (DB) (Cal), *Womesh Chandra* v. *Ram Nath.* (Puisne mortgagee during attachment paying off prior mortgage — *Held*, prior mortgage was extinguished as there was no intention to keep it alive—The effect of the attachment was not discussed or considered.)]

6. ('39) 26 AIR 1939 Mad 393 (395): I L R (1939) Mad 600: 189 Ind Cas 17 (DB). (29 Cal 154 : 29 Ind App 9 (PC) relied on.)

7. ('37) 24 AIR 1937 Mad 769 (773) : 173 Ind Cas 244 (DB), *Natesa Chettiar* v. *Ramalingam Chettiar.*

5. Mortgagee purchasing portion of mortgaged property — Effect. — The purchase of the *whole* of the equity of redemption by the mortgagee will, of course, extinguish the mortgage where there is no subsequent mortgage or charge, against which protection is required. It has been held that where the mortgagee purchases only a *part* of the mortgaged property, the whole mortgage is not extinguished in its entirety, but it is extinguished *pro tanto* in respect of the part purchased.[1] In the undermentioned case[2] Jenkins, C. J., observed that no part of the mortgage is *extinguished* in such a case, but as the doctrine of contribution comes into play in such a case, the mortgagee must, as a purchaser of a part of the property, contribute towards the debt, and consequently can sue only for the balance of the mortgage amount against the remaining properties.

It has been seen in the Notes on S. 92 that there arises no right of subrogation unless the mortgage in respect of which subrogation is claimed is redeemed in *full*. In cases falling under the present section however, it is not necessary, before the benefit of the section can be claimed that the mortgage should have been discharged in full. Thus, a mortgagee purchasing the mortgaged property in *partial* discharge of his mortgage can nevertheless keep the mortgage alive as against a subsequent encumbrancer.[3]

6. Purchase at sale in execution of decree for rent under the Bengal Tenancy Act. — Where a mortgagee himself purchases the property at a sale in execution of a decree for rent under S. 165 of the Bengal Tenancy Act, and *there is no benefit in keeping it alive*, the mortgage is extinguished even though the mortgagee does not take steps to extinguish the mortgage under S. 167 of the Act.[1]

But where there is a subsequent rent-charge on the property, the mortgage will not be extinguished but will be kept alive. Where therefore the mortgagee purchases the property in execution of his

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Note 5

1. See Notes 44 and 45 on S. 60.
('06) 4 Cal L Jour 195 (196, 197) (DB), *Harendra Kumar* v. *Dindayal.*
('34) 21 AIR 1934 Mad 250 (251) : 141 Ind Cas 366, *Chinniah Rowther* v. *Muthuraman.*
('88) 2 C P L R 90 (92), *Ganpat Rao* v. *Ramchand.*
('10) 6 Ind Cas 842 (845) (DB) (Cal), *Mir Eusuff Ali* v. *Panchanan Chatterjee.*
('33) 20 AIR 1933 Pesh 97 (98) : 148 Ind Cas 569, *Bishnu Das Jawahirmal* v. *Chuni Lal.*
[*See also* ('41) 28 AIR 1941 All 200 (204, 205) : I L R (1941) All 220 : 195 Ind Cas 533, *Himmat Sahai* v. *Mahomed Moin.*
('08) 12 Cal W N 745 (746) (DB), *Mutty Lal* v. *Nunda Lal.*]

2. ('02) 26 Bom 88 (91) : 3 Bom L R 628 (SB), *Fakiraya* v. *Gadigaya.*

3. ('36) 23 AIR 1936 Mad 473 (474) : 163 Ind Cas 834 (DB), *Rama Aiyar* v. *T. Bhagavathimuthu.*

Note 6

1. (1900) 28 Cal 12 (15, 16) : 4 Cal W N 735 (DB), *Mastulla Mandal* v. *Jan Mamund Sha.*
('04) 8 Cal W N 332 (335) (DB), *Henchandra* v. *Tafazzel Hosein.* (28 Cal 12 Foll.)
[But see ('99) 4 Cal W N 268 (269) (DB), *Goluk Chunder* v. *Ram Sunker.*]

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decree, and the same property is purchased subsequently by the landlord in execution of a decree on the rent-charge, the landlord cannot oust the mortgagee from possession without anulling under S. 167, Bengal Tenancy Act, the incumbrance which must be deemed to have been kept alive against the subsequent rent-charge.[2]

Where in execution of a decree for rent, the landlord himself purchases a *raiyati* holding, he can, as against a mortgagee of the holding hold his charge for rent as a shield against the mortgagee.[3]

7. **Extinguishment of mortgage by decree of Court.** — See Note 26 on Section 60.

8. **Who can claim benefit of section.** — The benefit of the section can be claimed not only by the mortgagee acquiring the rights in the property, but also by persons deriving title from him.[1] The same was the law under the old section and in cases where the rule of intention applied.[2]

9. **"As between himself and any subsequent mortgagee," etc.** — The section declares that there shall be no merger as between the purchasing mortgagee and *subsequent mortgagees or charge-holders*. It does not prevent the applicability of the doctrine of merger where there are no subsequent mortgages or charges on the property. In the undermentioned case[1] it appears to have been assumed that after the introduction of the present section there can be merger where a mortgagee acquires the rights in the property even though there are no intermediate mortgages or charges. In that case the sons of a mortgagee living with him as members of a joint Hindu family, purchased the mortgaged property, in discharge of the mortgage. There were no intermediate incumbrances. A third person sued for pre-emption and the sons set up the mortgage as a shield. It was assumed for the purposes of argument that the purchase was by the mortgagee himself, but it was held that there was no merger under the present section. It is submitted that this view is not correct, either under the old section or under the new. As

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2. ('12) 13 Ind Cas 785 (787) : 38 Cal 923 (DB), *Bhan Behary Kapur* v. *Khetterpal Sinha*.

[But see ('21) 8 AIR 1921 Cal 599 (600) : 66 Ind Cas 103 (DB), *Mandal* v. *Haripada*. (Submitted not correct — At the time of the mortgagee's purchase, the rent charge had come into existence and therefore there could be no extinguishment of the mortgage. The Privy Council case of *Bhawani Kanwar* 16 I C 210 : 40 Cal 89 (PC) was a case where the rent charge came into existence after the mortgagee's purchase.)]

3. ('02) 6 Cal W N 834 (835) (DB), *Meherunnessa* v. *Sham Sunder*.

Note 8

1. ('38) 25 AIR 1938 Lah 286 (288) : 182 Ind Cas 510 (DB), *Nizam Din* v. *Ram Sukh Das*.

2. ('22) 9 AIR 1922 Mad 249 (253) : 70 Ind Cas 212 (DB), *Venkataramana* v. *Rangiah*. (Mortgagee of *S* who was entitled to keep alive a prior charge, held entitled to hold it up as a shield against subsequent incumbrancer.)

Note 9

1. ('35) 22 AIR 1935 Oudh 445 (446) : 11 Luck 302 : 156 Ind Cas 705 (DB), *Randhir Singh* v. *Rameshar*.

has been seen in Note 2, the possibility of a future claim for pre-emption is not a circumstance from which it can be said that it is for the "benefit" of the mortgagee to keep his charge alive, there being no mesne incumbrances and no other benefit, and consequently, the charge would under the old section be extinguished. The present section prevents the application of the doctrine of merger *only* as against subsequent mortgagees or incumbrancers.

On the other hand, the High Court of Bombay has taken another extreme view namely that where there are no intermediate incumbrances, merger necessarily follows, even though it would be for the benefit of the mortgagee to keep the charge alive.[3] As has been seen in Note 1 this view also is not correct.

10. Charge kept alive—Enforcement. — Where a charge is kept alive under this section or under the rule of intention, it can always be used as a *shield* against subsequent incumbrancers.[1] This being a weapon of *defence*, the rules of limitation do not apply and the charge may be set up as a shield even though, at the time the plea is raised, the enforcement of the charge may have been barred by limitation.[2]

The charge kept alive may also be used by way of *attack*. In other words, the charge may be actively enforced by way of suit.[3] In such a case, however, the enforcement must be within the period of limitation prescribed therefor.[4]

There has been a difference of opinion on two questions arising in this connection :

(1) Where a charge kept alive by A is used as a shield against B, a subsequent incumbrancer, can B *sell* the property in

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2. ('42) 29 AIR 1942 Bom 95 (96) (DB), *Baswannewa* v. *Dodgowda*.

Note 10

1. ('22) 9 AIR 1922 P C 11 (13) : 65 Ind Cas 151 : 48 Ind App 465 : 43 All 469 (PC), *Mt. Sukhi* v. *Ghulam Safdar Khan*.
('13) 20 Ind Cas 864 (865) (DB) (Cal), *Sib Narain* v. *Baikuntha Nath*.
('99) 12 C P L R 70 (72), *Seetaram* v. *Lachman*.
('05) 2 Cal L Jour 202 (213) (DB), *Surjiram Marwari* v. *Barhamdeo Persad*.

2. ('33) 20 AIR 1933 Nag 241 (243) : 144 Ind Cas 736 : 30 Nag L R 142, *Ramshankar* v. *Gulab Shanker*.
('40) 27 AIR 1940 Mad 646 (649), *Sengamuthu* v. *Thayarammal*.
('22) 9 AIR 1922 Mad 249 (254) : 70 Ind Cas 212 (DB), *Venkataramana* v. *Rangiah*.
('39) 26 AIR 1939 All 660 (661) : 185 Ind Cas 126, *Hari Ram* v. *Munshi Singh*.
[But see ('27) 14 AIR 1927 All 638 (640) : 105 Ind Cas 909, *Badri Prasad* v. *Sri Thakurji Maharaj*. (A barred mortgage cannot be used even as a shield.)]

3. ('42) 29 AIR 1942 Mad 558 (565) : 202 Ind Cas 697 (DB), *Venkatalingama* v. *Parthasarathy Rayanimgar*. (AIR 1936 Mad 61 : 59 Mad 44 and AIR 1936 Mad 814 : 59 Mad 1042 referred.)
[But see ('16) 3 AIR 1916 Mad 875 (881) : 29 Ind Cas 916 (DB), *Arumugasundara* v. *Narasimha Aiyer*.]

4. ('27) 14 AIR 1927 All 638 (640) : 105 Ind Cas 909, *Badri Prasad* v. *Sri Thakurji Maharaj*.
('27) 14 AIR 1927 All 417 (418) : 49 All 430 : 100 Ind Cas 670 (DB), *Anpurna Kunwar* v. *Ram Padarath*.
('32) 19 AIR 1932 Oudh 314 (316) : 7 Luck 26 : 139 Ind Cas 626 (DB), *Ram Sahai* v. *Kunwar Sah*.

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Note 10

enforcement of his mortgage *subject* to A's charge or is B bound to redeem A ?

(2) If A's charge does *not* entitle him to *possession* of the property but he has got into possession as a purchaser or in some other way, can he defend his possession against B or the auction purchaser in execution of the decree on B's mortgage ?

On the *first* question, in cases arising before 1929, it was held in one set of cases that B can sell the property subject to A's charge.[5] A contrary view was held, namely, that B's right was only to redeem A and not to sell the property subject to A's charge.[6] The words in the present section "no subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge or *otherwise than subject thereto*," make it clear that B can now sue for sale of the property subject to A's charge.[7]

On the second question it has been held generally that on equitable grounds, A can retain the possession of the property until he is redeemed.[8] A contrary view has been taken in some cases, namely, that A cannot get any better right against B than what he would have had under the charge kept alive and if it did not give him a right to possession as

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5. ('05) 1 Cal L Jour 531 (536) (DB), *Ram Nath* v. *Brahmamoyi.*
('81) 4 Mad 213 (215) (DB), *Vencatachella* v. *Panjanadien.*
('86) 8 All 105 (108) : 1886 All W N 25 (FB), *Raghunath Prasad* v. *Jurawan Rai.*
[*See also* ('34) 21 AIR 1934 Mad 31 (38) : 148 Ind Cas 467 (FB), *Rama Krishnayya* v. *Venkata Somayajulu.*]

6. ('85) 7 All 577 (581, 582) : 1885 All W N 115 (DB), *Janki Prasad* v. *Sri Matra Mautangui Debia.* (Per Mahmood, J., *contra.*)
('85) 7 All 568 (572, 573) : 1885 All W N 112 (DB), *Sirbadh Rai* v. *Raghunath Prasad.* (Per Oldfield, J.; Mahmood, J., dissenting.)
('88) 10 All 629 (629) : 1888 All W N 247 (DB), *Zalim Gir* v. *Ramcharan Singh.*
('12) 13 Ind Cas 939 (940) (DB) (All), *Kanhai Lal* v. *Hulas Singh.*
('91) 13 All 432 (438, 439, 459, 463) (FB), *Matadin Kasodhan* v. *Kazim Husain.*
('10) 5 Ind Cas 132 (133) : 32 All 138 (DB), *Mutiullah Khan* v. *Banwari Lal.*
('32) 19 AIR 1932 Mad 84 (85) : 136 Ind Cas 305, *Abdul Majid* v. *Arunachala.*

7. ('39) 26 AIR 1939 All 660 (661) : 185 Ind Cas 126, *Hari Ram* v. *Munshi Singh.* (AIR 1935 Oudh 411 : 11 Luck 270 followed.)

8. ('03) 7 Cal W N 11 (20) (DB), *Bunwari Jha* v. *Ramjee Thakur.*
('23) 10 AIR 1923 Rang 107 (107) : 74 Ind Cas 151 (DB), *N. N. V. Chetty Firm* v. *K. A. P. L. Chetty Firm.*
('70) 14 Suth W R 233 (235) (DB), *Narain Sahoo* v. *Ochoot Sahoo.*
('33) 20 AIR 1933 Nag 241 (244) : 30 Nag L R 142 : 144 Ind Cas 736, *Ramshankar* v. *Gulab Shankar.* (22 Suth W R 409 : 2 Ind App 7 (PC) followed.)
('35) 22 AIR 1935 Oudh 411 (412) : 11 Luck 270 : 155 Ind Cas 498 (DB), *Salik Ram* v. *Jangjit Bahadur Singh.* (Possession of first mortgagee purchaser cannot be disturbed by subsequent mortgagee until redemption.)
('37) 24 AIR 1937 Oudh 478 (480) : 171 Ind Cas 56 (DB), *Afsar Jehan Begam* v. *Amir Ahmad Khan.* (Subsequent mortgagee cannot recover possession.)
('39) 26 AIR 1939 All 660 (661) : 184 Ind Cas 862, *Hari Ram* v. *Munshi Singh.*
('40) 27 AIR 1940 Mad 646 (649), *Sengamuthu* v. *Thayarammal.*
[*See also* ('22) 9 AIR 1922 Mad 249 (252, 253) : 70 Ind Cas 212 (DB), *Venkataramana* v. *Rangiah.* (Part of mortgaged property sold in execution of mortgage decree and decree partly satisfied—Purchaser can hold property as shield against subsequent incumbrancer (not made party to mortgage decree), to the extent to which the mortgage decree was discharged. 12 I. C. 412 : 35 Mad 183, referred to.)]

against B, he cannot resist delivery of possession to the purchaser in execution of a decree on B's mortgage.[9] Section 101 Notes 10–11

11. Section if retrospective.—There is a difference of opinion on the question whether the section is retrospective in operation. According to the Allahabad[1] and Nagpur[2] High Courts it is retrospective. But according to the Madras,[3] Rangoon[4] and Lahore[5] High Courts it is not retrospective.

Notice and Tender.

Section 102

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Service or tender on or to agent.

[a][Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

[b][Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

[c][Where no person or agent to whom such tender should be made can be found or is known] to the

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9. *See* ('10) 5 Ind Cas 490 (491) (DB) (Mad), *Aravamuthu Iyangar* v. *Kumaraswami Chetty.*
[*See also* ('85) 7 All 568 (573) : 1885 All W N 112 (DB), *Sirbadh Rai* v. *Raghunath Prasad.*]

Note 11

1. ('32) 19 AIR 1932 All 489 (492) : 54 All 897 : 139 Ind Cas 107 (FB), *Tota Ram* v. *Ram Lal.*
2. ('36) 163 Ind Cas 602 (603) (Nag), *Society Gullon* v. *Danraj.*
3. ('42) 29 AIR 1942 Mad 558 (570) : 202 Ind Cas 697 (DB), *Venkatalingama* v. *Parthasarathy.*
4. ('32) 19 AIR 1932 Rang 197 (199) : 10 Rang 465 : 140 Ind Cas 156, *Ko Po Kun* v. *C. A. M. A. L. Firm.*
('36) 23 AIR 1936 Rang 152 (156) : 14 Rang 494 : 163 Ind Cas 645 (DB), *Bank of Chettinad* v. *Ma Ba Lo.* (AIR 1932 Rang 197 : 10 Rang 465 followed.)
5. ('32) 19 AIR 1932 Lah 237 (238) : 138 Ind Cas 699 (DB), *Makhan Mal* v. *Gokal Chand.*

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person desiring to make the tender, the latter person may deposit [a][in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

a. These words were substituted by Section 52 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929) for the words "where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown".

b. This proviso was added, *ibid.*

c. These words were substituted, *ibid.* The third paragraph in the old section was as follows : — "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount."

Synopsis

1. Legislative changes.
2. Scope.
3. Tender to a person who disclaims authority.

1. Legislative changes. — The reasons for the amendment of the section have been stated in the Report of the Select Committee as follows :

"Section 102, which relates to the service of notice on or tender to an agent of a mortgagee allows the mortgagor to apply to the Court for direction if the mortgagee or his agent cannot be found in the District in which the mortgaged property is situate. Even if the mortgagor knows the mortgagee or his agent's whereabouts outside the district, the section allows him to apply to the Court. The third paragraph also contains a similar provision as regards tender. We think that unless the whereabouts of the mortgagee or his agent are entirely unknown to the mortgagor or unless the mortgagee or his agent cannot be found anywhere, the mortgagor should not be entitled to apply to the Court for direction. We propose to omit the words "in the district" in paragraphs 2 and 3 of the section. In paragraph 2, we propose to make it clear that the application for the service of notice shall be made to the Court in which the deposit has been made and not to any other Court. In paragraph 3 we propose to make it clear that the deposit is to be made in the Court in which a suit for redemption could be filed."

2. Scope. — Section 60 provides for a *tender* of the mortgage-money by the mortgagor under certain circumstances. Section 69 provides for *notice* being given to the mortgagor before a mortgagee exercises his power of sale under that section. Section 83 provides for notice being given to the mortgagee of the deposit of the mortgage amount into Court under that section. This section and the next lay down rules of procedure as to the service of such notice or the making of such tender.

Notice :

Suppose, A is the person on whom notice is to be served under Chap. IV and B, the person required to serve such notice. Then —

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(1) If A *can be found* and has *no agent* or has an agent *who is not known*, the section seems to assume that service must be made on A *wherever he may be* and B cannot apply to the Court for directions.

(2) If A resides within the district in which the mortgaged property or part thereof is situate, service must be made on A *himself, whether he has an agent or not*. Service on the agent would not be valid service.

(3) If A resides outside the district and has an agent empowered to receive notice, service on principal or on the agent *wherever he may be* is sufficient.

(4) If A *cannot* be found, and has *no agent or has an agent but he is not known*, then B can apply for directions under the second paragraph of the section. Such application, in the case of notice required to be given by S. 83 should be made to the Court in which the *deposit has been made*. (Proviso.)

Tender :

Suppose, A is the person to whom a tender is to be made under Chapter IV of the Act and B, the person who is entitled to make the tender. Then —

(1) If A *can be found* and has *no agent* or has an agent *who is not known*, tender must be made to A wherever he may be and B cannot deposit the money into Court under the last paragraph of the section.

(2) If A resides within the district in which the mortgaged property or part thereof is situate, tender must be made to A *himself* whether he has an agent or not. Tender to the agent is not a valid tender.

(3) If A resides outside the district and has an agent empowered to accept the tender, tender to the principal or to the agent *wherever he may be* is sufficient.

(4) If A *cannot* be found and has *no agent* or has an agent but he is not known, B can deposit the amount into any Court in which a suit might be brought for the redemption of the mortgaged property.

3. Tender to a person who disclaims authority. — In order that the notice or tender to an agent may be sufficient, he must hold a general power-of-attorney from the principal or must, otherwise, be duly authorized to accept the notice or tender.[1] A tender made to a person who disclaims authority to accept it is made at the risk of the person making it, and, if it is subsequently found that the former had no authority to receive it, the tender fails and has not the effect of stopping interest under S. 84 of the Act.[2] Thus, in the undermentioned

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Section 102 — Note 3

1. ('08) 32 Bom 521 (531) : 10 Bom L R 203 (DB), *Bai Ruttonbai* v. *Fraser Ice Factory, Ltd.*
2. ('08) 32 Bom 521 (531) : 10 Bom L R 203 (DB), *Bai Ruttonbai* v. *Fraser Ice Factory, Ltd.*

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case[3] a tender was made by the mortgagor to one P whose services had been engaged by the mortgagee and who had been assisting the agent of the mortgagee in his attempts to obtain possession of the mortgaged property as per terms of the mortgage deed. He was, however, not recorded as the attorney of the mortgagee and he disclaimed authority to receive a tender on behalf of the mortgagee. It was held that the abovementioned circumstances did not constitute P the agent of the mortgagee and that the tender was bad.

Section 103

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served [a][on or by], or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of [b][Order XXXII in the First Schedule to the Code of Civil Procedure, 1908] shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Notice, etc., to or by person incompetent to contract.

a. These words were inserted by Section 53 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

b. These words were substituted for the words "Chapter XXXI of the Code of Civil Procedure" by Section 53 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Person incompetent to contract."
4. "Legal curator."
5. "Requisite or desirable in the interests of such person."
6. Provisions of Order 32 of the Civil Procedure Code shall, so far as may be, apply.
7. Effect of deposit or tender without guardian ad litem being appointed.

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3. ('08) 32 Bom 521 (531) : 10 Bom L R 203 (DB), *Bai Ruttonbai* v. *Fraser Ico Factory, Ltd.*

1. Legislative changes. — The words "on or by" were inserted by S. 53 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929) after the words "such notice may be served" in order to correct a mere clerical error.

The words "Order XXXII in the First Schedule to the Code of Civil Procedure, 1908" were substituted for the words "Chap. XXXI of the Code of Civil Procedure." The words "Chapter XXXI of the Code of Civil Procedure" in the old section referred to the Code of 1882. Chapter XXXI of the old Code corresponds to O. 32 of the Code of 1908.

2. Scope of the section. — The Code of Civil Procedure, 1908, provides for the appointment of guardians *ad litem* for minors and persons of unsound mind, for the purpose of *proceedings taken against them in Court.* No guardian *ad litem* is appointed in proceedings taken *by* such a person, though he should be represented in such proceedings by a *next friend.* This section provides for the appointment of guardians *ad litem* for persons incompetent to contract, for the purpose of certain acts being done *by* or *against* them, and this, not only in proceedings taken in *Court*, such as a deposit under S. 83 of the Act, but for doing acts *independent of any proceeding* in Court, such as the making of a tender under S. 60 or the service of a notice under S. 69.

A guardian *ad litem* under this section is to be appointed only when there is no legal curator of the property of the person incompetent to contract. Where there *is* such a curator, the notice referred to in the section may be served on or by such curator, and the tender or deposit, made, accepted or taken by him.

In cases where a guardian *ad litem* is necessary to be appointed, the acts specified in the section cannot be said to have been validly done until such guardian is *actually appointed.*

A *tender* under S. 60 or a *notice* under S. 69 or 83 cannot obviously be made to, or served on, a "guardian *ad litem*" until such a person is *actually appointed.*[1] Nor is a *deposit* in Court in favour of a minor mortgagee valid until a guardian *ad litem* is actually appointed inasmuch as notice under the provisions of the second paragraph of S. 83 to the mortgagee is necessary under S. 84 to stop interest running, and such notice cannot be given until a guardian *ad litem* is *actually appointed.*[2]

Section 103 — Note 2

1. ('03) 27 Bom 23 (29) : 4 Bom L R 714 (DB), *Pandurang* v. *Mahadaji.* (Tender.)

2. The words "and the notice required by S. 83 has been served on the mortgagee" were absent in the old S. 84 and the conclusion that for the purpose of a valid deposit in favour of a minor, a guardian *ad litem* must *actually be appointed,* was rested on the provision that the mortgagor should have done "all that has to be done to enable the mortgagee to take the money out of Court." It was held that this cast a duty on the mortgagor. to see that a guardian was actually appointed: *See* ('03) 27 Bom 23 (DB), *Pandurang* v. *Mahadaji.*

('23) 10 AIR 1923 All 183 (184) : 45 All 273 : 71 Ind Cas 278 (DB), *Khannu Mal* v. *Indarpal Singh.*

('22) 9 AIR 1922 All 147 (149) : 44 All 102 : 64 Ind Cas 907 (DB), *Khannu Mal* v. *Indarpal Singh.* (*Contra per* Stuart, J.)

Section 103
Notes 3–5

3. "Person incompetent to contract."—These words must be read in the light of Ss. 11 and 12 of the Contract Act, 1872, which run as follows :

"*11.* Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

"*12.* A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

4. "Legal curator." — A legal curator is a person appointed under any provision of law to protect the property of any person.[1] The guardian of the property of a ward appointed under the Guardians and Wards Act, 1890, a Court of Wards in charge of the estate of a disqualified proprietor, a curator appointed by the Court to take charge of the estate of a deceased person under Part VII of the Succession Act, 1925, curators appointed by the Provincial Government under S. 210 of the said Act, and the manager of the estate of a lunatic under the provisions of the Lunacy Act, 1912, are all, it is conceived 'legal curators' within the meaning of this section. But a natural guardian such as the father or mother of a Hindu minor, cannot be held to be a legal curator and a notice or tender to him without his being appointed a guardian *ad litem* as required by this section is not valid and binding on the minor.[2]

5. "Requisite or desirable in the interests of such person."—In *Pandurang* v. *Mahadaji*[1] Sir Lawrence Jenkins, C. J., dealing with the expression "requisite or desirable in the interests of

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('25) 12 AIR 1925 Mad 1017 (1018, 1019) : 90 Ind Cas 754, *Appa Pai* v. *Somu.*
('14) 1 AIR 1914 Oudh 107 (108) : 16 Oudh Cas 261 : 22 Ind Cas 245, *Shivnath Singh* v. *Manohar Lal.*
('22) 9 AIR 1922 All 355 (355) : 44 All 64 : 64 Ind Cas 413 (DB), *Sheo Saran* v. *Ram Lagan.*
('26) 13 AIR 1926 All 665 (666) : 48 All 611 : 96 Ind Cas 1 (DB), *Gokul Kalwar* v. *Chandar Sekhar.*
('38) 25 AIR 1938 Mad 405 (408) : 182 Ind Cas 287 (DB), *Suppan Chettiar* v. *Rangan Chetty.* (Deposit made before the amendment of 1929.)
[*See also* ('28) 15 AIR 1928 All 311 (312) : 50 All 655 : 103 Ind Cas 570 (DB), *Ganeshi Lal* v. *Rohni Rukumdhuj.* (Deposit in favour of minor mortgagee with an application for appointing mother as guardian — Court refusing to go into the question of minority raised by mother and making no appointment — *Held* that mortgagor had done all that is necessary for the appointment of a guardian—The actual appointment had to be done by Court—Case decided under another point.)]

Note 4

1. Wharton, *Law Lexicon*, 14th Edn., 1938.
2. ('22) 9 AIR 1922 All 355 (355, 356) : 64 Ind Cas 413 : 44 All 64 (DB), *Sheo Saran* v. *Ram Lagan.*

Note 5

1. ('03) 27 Bom 23 (28) : 4 Bom L R 714 (DB).

such person" occurring in the section observed as follows :

> "I pause here for a moment to notice the words *requisite or desirable in the interests of such person*, as it has been suggested that they obscure the meaning of the section. On a fuller consideration I am of opinion that this is not so, and that they are designedly used in reference to distinct events. I will make my meaning plainer by an illustration. If where the *mortgagee* is a minor it is determined by the mortgagor to proceed under Ss. 83 and 84, then it is *requisite* that a notice should be served; if in the case of an infant mortgagor those entrusted with the care of his affairs consider the mortgage-money should be tendered or paid, then it may be *desirable in the interests* of the minor that this should be done."

6. Provisions of Order 32 of the Civil Procedure Code shall, so far as may be, apply. — Where the fact of minority of the person in whose favour a deposit is made under S. 83 of the Act, is disputed, the Court can, under the provisions of O. 32, R. 3 of the Civil Procedure Code, make an enquiry into the matter.[1] Where the proposed guardian refuses to act as such, the Court can under O. 32, R. 4 of the Code, appoint an officer of the Court as the guardian *ad litem* for the purposes of this section.[2]

7. Effect of deposit or tender without guardian ad litem being appointed. — It has been seen in the Notes on S. 84 that in the case of non-possessory mortgages, interest will not cease to run unless the tender or deposit, as the case may be, is valid. In the case of possessory mortgages, the mortgagee will not lose his right to continue in possession and the mortgagor cannot get any mesne profits unless and until a valid tender or deposit has been made.[1] A deposit in favour of a minor usufructuary mortgagee without a proper guardian *ad litem* being appointed for him under the provisions of this section is not a valid deposit, and the mortgagor cannot claim any mesne profits from the former from the date of his deposit.[2]

Note 6

1. ('28) 15 AIR 1928 All 311 (312) : 50 All 655 : 108 Ind Cas 570 (DB), *Ganeshi Lal* v. *Rohni Rukumdhuj*.

2. ('23) 10 AIR 1923 All 183 (184) : 45 All 273 : 71 Ind Cas 278 (DB), *Khannu Mal* v. *Indarpal Singh*. (Letters Patent appeal from A I R 1922 All 147 — The view taken by Lindsay, J., confirmed.)

Note 7

1. See Note 19 on Section 84.

2. ('26) 13 AIR 1926 All 665 (666, 667) : 48 All 611 : 96 Ind Cas 1 (DB), *Gokul Kalwar* v. *Chandar Sekhar*.
('30) 17 AIR 1930 All 609 (610) : 124 Ind Cas 191 (DB), *Mt. Phul Kuer* v. *Rewari Singh*.

Section 104

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Power to make rules.

Synopsis

1. Scope of the section.
2. "Consistent with this Act," etc.

1. Scope of the section. — This section empowers the High Court to make rules consistent with this Act for carrying out in itself and in subordinate Courts, the provisions contained in Chap. IV of the Act.[1] It is an *enabling* provision; it is not obligatory on the High Courts to frame any rules.[2]

Before the year 1908 when Ss. 85 to 90 of this Act were repealed and were re-enacted in the Code of Civil Procedure, 1908, there was a difference of opinion as to whether, in the absence of rules framed under this section, the rules enacted in the Civil Procedure Code, 1882, could be applied to mortgage suits and to the execution of mortgage decrees passed under the provisions of this Act. One set of cases held that they could be applied.[3] In the undermentioned case[4] the High

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Section 104 — Note 1

1. ('02) 25 Mad 244 (254, 271) : 12 Mad L Jour 279 (FB), *Mallikarjanadu Setti* v. *Lingamurti Pantulu.*

2. ('02) 25 Mad 244 (271) : 12 Mad L Jour 279 (FB), *Mallikarjanadu Setti* v. *Lingamurti Pantulu.*

(1900) 4 Cal W N 474 (479) (DB), *Dakshina Mohan* v. *Basumati Debi.*

('08) 12 Cal W N 282 (284) (DB), *Harish Chandra* v. *Jagabandhu.*

3. ('02) 25 Mad 244 (257, 258) : 12 Mad L Jour 279 (FB), *Mallikarjanadu Setti* v. *Lingamurti Pantulu.* (Sections 310A and 311, Civil P. C., held applicable to sales in execution of mortgage decrees.)

(1900) 4 Cal W N 474 (475, 479) (DB), *Dakshina Mohan* v. *Basumati Debi.*

('09) 2 Ind Cas 400 (401) : 31 All 346 (DB), *Than Chand* v. *Jagannath.*

('01) 25 Bom 104 (106, 107) : 2 Bom L R 635 (DB), *Krishnaji* v. *Mahadev.* (Provisions of S. 310A, Civil P. C., 1882, held applicable to sales held in execution of mortgage decrees passed under T. P. Act.)

('08) 12 Cal W N 282 (284) (DB), *Harish Chandra* v. *Jagabandhu.* (Obiter.)

('99) 22 Mad 286 (288) (DB), *Tirumal Rao* v. *Dastaghiri.* (Section 310A applies where a sale of immovable property has taken place under a mortgage decree.)

[*See also* ('10) 6 Ind Cas 813 (815) : 37 Cal 897 (DB), *Bipin Behary* v. *Jotindra Nath.* (Section 291 of the Code of 1882, which was applied to mortgage sales by rules framed by the High Court is not in conflict with the provisions of S. 89, T. P. Act.)

('05) 1 Cal L Jour 31 (36) (DB), *L. J. Mackintosh* v. *N. S. Watkins.*]

4. ('98) 25 Cal 703 (709, 710) : 2 Cal W N 353 (FB), *Kedar Nath* v. *Kali Churn Ram.* (23 Cal 682 overruled.)

[*See also* ('03) 8 Cal W N 102 (104) (DB), *Hatem Ali* v. *Abdul Gaffur.* (Section 258, Civil P. C., does not apply to an application made under S. 89, T. P. Act, the section not having been made applicable by any rule issued by the High Court under S. 104, T. P. Act.)

('10) 5 Ind Cas 101 (102) (DB) (Cal), *Keshab Chandra* v. *Rajendra Nath.* (After the issue by the High Court of the Rules under S. 104, T. P. Act, the provisions of S. 248, C. P. C. of 1882, cannot be held to apply to proceedings in execution of mortgage-decrees, that section not having been extended to such proceedings.)]

Court of Calcutta expressed the view that this section would not have been introduced into this Act if the provisions of the Code were applicable to mortgage suits and the execution of mortgage decrees and that, therefore, the existence of this section must be taken to show that, in the absence of any rules framed under this section, the provisions of the Code would not be applicable to such suits and decrees. The High Court of Calcutta, apparently on this assumption framed rules under this section *extending* certain sections of the Code of 1882 to the execution of mortgage decrees.[4a] The repeal of the sections of this Act relating to the procedure in cases of mortgage suits and their re-enactment in the new Code of Civil Procedure, 1908, makes it now clear that mortgage suits and the execution of decrees passed therein are governed by the provisions of the Code.[4b]

The question, however, remains as to the nature of the rules contemplated by the section. In *Mallikarjunadu Setti* v. *Linganmurti Pantulu*,[5] Mr. Justice Bhashyam Ayyangar observed as follows :

> " Section 104 of the Transfer of Property Act does not, in my opinion, primarily contemplate the making of rules for the execution of decrees passed under Chap. IV of the Act, such rules being already provided for by Chap. XIX of the Civil Procedure Code, supplemented as they are by Ss. 87, 89 and 93 of the Transfer of Property Act. What the section contemplates is the making of rules for 'carrying out the provisions' in the chapter. . . . . The sections relating to foreclosure, sale and redemption do not provide for successive redemptions and foreclosures and for the adjudication and enforcement of the rights of puisne mortgagees and of other persons having an interest in the property comprised in the mortgage who are joined as parties to the suit. No inconsiderable number of mortgages on which suits are brought are really 'anomalous mortgages' and adequate provision is not made in the chapter for dealing with such suits and for working out the rights and liabilities flowing therefrom. The rule-making power conferred on the High Court by S. 104 is, in my opinion, principally intended to regulate the procedure to be adopted for carrying out these and similar provisions contained in the chapter."

The view expressed by Mr. Justice Bhashyam Ayyangar would seem to be applicable even now, though the procedure as to mortgage suits has

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4a. ('96) 23 Cal 682 (685) (DB), *Ashruf Ali* v. *Net Lal.*
('04) 31 Cal 373 (377) (DB), *Shyam Kishen* v. *Sundar Koer.* (Section 291, C. P. Code (1882), made applicable to sales under T. P. Act by the rules made by High Court under S. 104, T. P. Act.)
('07) 34 Cal 150 (159) : 34 Ind App 9 (PC), *Sundar Koer* v. *Rai Sham Krishen.*

4b. ('14) 1 AIR 1914 Oudh 289 (290) : 26 Ind Cas 177, *Allahabad Bank Ltd. Lucknow* v. *Suraj Kuar.* (In the absence of any rules framed by the High Court under S. 104, T. P. Act, fixing the "court rate" the case is governed by S. 34, C. P. Code, and it is quite competent to a Court in a suit on a mortgage bond to award interest at the contract rate of $7\frac{1}{2}$ per cent. per annum till the date of realisation.)
('17) 4 AIR 1917 Mad 128 (131) : 38 Ind Cas 1 (DB), *Ramasami* v. *Govinda.* (Per Bakewell, J.)

5. ('02) 25 Mad 244 (273) : 12 Mad L Jour 279 (FB).

Section 104 Note 1

been dealt with in detail in O. 34 of the Civil Procedure Code, 1908. In cases where the Code does not provide specifically for any particular contingency relating to the carrying out of the provisions of this chapter, rules may be framed under this section.

Can rules be framed under this section which are *inconsistent* with the provisions of the Code ? In the undermentioned case,[6] the question arose whether a rule applicable on the Original Side of the High Court which had been framed by the High Court of Bombay under this section, but which was *inconsistent* with a provision in the Code of Civil Procedure applicable to the case, would prevail over the latter.

Marten, C. J., observed :

> "I would further hold that as the original side rules are specially framed under the Transfer of Property Act to deal with cases arising on the original side, then if and in so far as they are inconsistent, they should prevail over the very general terms of the Civil Procedure Code, which would apply to the mofussil."

On the other hand it was held by the Madras High Court in the case noted below[7] that so far as the Courts subject to the superintendence of the High Court were concerned, no rule could be framed under this section inconsistent with the provisions of the Civil Procedure Code. Mr. Justice Bhashyam Ayyangar observed :

> Section 104 of the Transfer of Property Act must be read subject to S. 15 of the Charter Act which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts which may be subject to its appellate jurisdiction, provided that the rules so made are not inconsistent with the provisions of any law in force. . . . If S. 104 of the Transfer of Property Act were construed as enlarging the powers thus conferred upon the High Court, so as to make it competent for the High Court to substitute its own rules for those contained in the Civil Procedure Code, or to make rules which are inconsistent with the provisions of the Civil Procedure Code, S. 104 of the Transfer of Property Act will be *ultra vires* of the Indian Legislature; for under S. 22 of the Indian Councils Act (24 & 25 Vict., cap. 67) it is beyond the power of the Governor-General in Council to make any law affecting the provisions of any Act passed in the same session of Parliament, and the Indian High Courts Act (24 & 25 Vict., cap. 104) was passed in the same session as the Indian Councils Act . . . . . The power to make rules for regulating the practice and proceedings of the subordinate Courts is not conferred upon the High Court by Letters Patent, but by S. 15 of the Charter Act itself, and such power therefore can in no way be affected by the Indian Legislature."

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6. ('28) 15 AIR 1928 Bom 123 (128) : 108 Ind Cas 794 : 52 Bom 459 (DB), *Vrajlal Jiwandas* v. *Venkataswami.*

7. ('02) 25 Mad 244 (271, 272) : 12 Mad L Jour 279 (FB), *Mallikarjanadu Setti* v. *Lingamurti Pantulu.*

2. "Consistent with this Act," etc. — A rule framed by the High Court under this section must be consistent with this Act. Otherwise it would be *ultra vires*.[1] The rule-making power is further limited to *carrying out the provisions of Chap. IV*. If the rule framed goes beyond this it would be *ultra vires*.[3] Section 104 Note 2

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Section 105

Lease defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Lessor, lessee, premium and rent defined.

Synopsis

1. Applicability of chapter.
2. Essentials of a lease.
3. Lease is an interest in property.
4. Agreement to grant lease.
5. "Right to enjoy."
6. Lease and conveyance of interest in fee simple—Distinction.
7. Contract necessary for lease.
8. Tenancy by payment and acceptance of rent.
9. Kabuliat, rent-note, etc., whether lease.
10. Application for grant of lease with endorsement of sanction, whether lease. See Note 9.
11. Agreement varying rent or other terms of lease, whether lease.
12. Tenancy by acquiescence.
13. Lease and licence compared — General principles.
14. Lease or licence — Test for determination.
15. Occupation as lodger.
16. Occupation as tenant or servant.
17. Market rights.
18. Agreement for cultivation of land, if lease.
19. Possession under void lease — Effect.
20. Who can grant a lease.
21. Lease by de facto proprietor.
22. Lease by or in favour of a minor.
23. Lease of untransferable property.
24. Commencement of lease.
25. Certain time.
26. Term of lease — Mode of determination.
27. Lease entitling lessee to hold as long as he pays rent or as long as he may wish.

Note 2

1. ('98) 25 Cal 703 (708, 709) : 2 Cal W N 353 (FB), *Kedar Nath* v. *Kali Churn*.
2. ('02) 25 Mad 244 (254) : 12 Mad L Jour 279 (FB), *Mallikarjanadu Setti* v. *Lingamurti Pantulu*.

Section 105

28. Lease for indefinite period—Construction of.
29. Lease for a term certain with a provision for continuation thereafter.
30. Lease expressed to be terminable before end of term fixed.
31. Periodic leases.
32. Tenancy at will.
33. Tenancy at sufferance. See Notes 37 to 40.
34. Lease for life.
35. Lease with clause of renewal—General.
36. Covenant for renewal — Enforceability against assignee from lessor or lessee.
37. Lessee holding over after expiration of lease—General.
38. Lessee holding over after expiry of lease — Lessor's assent.
39. Lessee holding over after expiry of lease — Renewal clause in lease—Effect of.
40. Lessee holding over after expiry of lease — Basis of liability for compensation.
41. Permanent lease.
42. Permanent lease and creation of absolute estate—Difference.
43. Permanent tenancy — Onus of proof.
44. Principle of lost grant as applied to permanent tenancy.
45. Permanent tenancy — Presumption of validity of grant in case of tenancies of unknown origin.
46. Permanent tenancy — Presumption of lawful origin. See Notes 44 and 45.
47. Permanent tenancy — Construction of leases.
48. Permanent tenancy — Circumstantial evidence as to —General.
49. Circumstantial evidence as to permanent tenancy — Long and undisturbed possession at fixed rent.
50. Circumstantial evidence as to permanent tenancy — Lease for dwelling or residential purposes.
51. Circumstantial evidence as to permanent tenancy — Successions and transfers.
52. Subsequent arrangement between landlord and tenant — Effect on inference of permanence.
53. Acquisition of permanent tenancy after commencement of tenancy.
54. Permanent tenancy — Acquisition of, by prescription. See Notes 79 to 84.
55. Permanency by estoppel.
56. Permanent lease of property belonging to religious and charitable endowments.
57. Consideration for lease.
58. Premium.
59. Rent—General features.
60. Rent—Illustrative cases.
61. Forms of rent.
62. Rent in kind — Payment of money value.
63. Rent—Service as rent.
64. Variation of rent.
65. Rent free grants.
66. Interest on rent.
67. Lease for premium and usufructuary mortgage — Distinction.
68. Maintenance grants.
69. Resumption of service grants.
70. Damages for use and occupation.
71. Determination of lease.
72. Heritability of leases.
73. Construction of leases. See S. 8, Note 20.
74. Escheat and reversion—Distinction. See Note 6.
75. Zamindari and ryotwari lands — Tenants of.
76. Zuripeshgi lease. See S.58, Note 36.
77. Kanom leases. See S. 58, Note 37.
78. Landlord and tenant — Adverse possession. See Notes 79 to 84.
79. Nature of tenant's possession during tenancy — Adverse possession.
80. Nature of tenant's possession after determination of tenancy—Adverse possession.
81. Tenant encroaching on other land of the landlord — Adverse possession.
82. Possession under invalid lease, how far adverse.
83. Dispossession of lessee by third person — Adverse possession.
84. Acquisition of tenancy by prescription by trespasser.

Section 105 Note 1

1. Applicability of Chapter. — The provisions of this Chapter apply to all leases[1] except agricultural leases.[2] In the case of agricultural leases, such provisions do not apply unless there is a notification by the Provincial Government making them applicable. (See S. 117.) In the absence of such notification therefore an agricultural lease will be governed by local laws and customs. But the principles underlying the provisions in this Act may also be applied as being rules of justice, equity and good conscience, when there is nothing in the local laws to make such principles inapplicable.[3]

In order to determine if a lease is for an agricultural purpose so as to be outside the purview of the provisions of this Chapter, the primary object of the lease is to be considered.[4] The question is one of *construction* in each case.[5] See also Notes under Ss. 106 and 117.

Section 105 — Note 1

1. (1900) 27 Cal 205 (209): 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.* (As the land was not shown to be used for agricultural or horticultural purposes, Bengal Tenancy Act did not apply.)
('27) 14 AIR 1927 All 78 (79) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*

2. ('09) 4 Ind Cas 1124 (1124) (Mad), *Madurai Mudaly* v. *Masilamani Gramani.*
('27) 14 AIR 1927 All 78 (79) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*

3. ('19) 6 AIR 1919 Mad 168 (169) : 42 Mad 203 : 51 Ind Cas 507 (SB), *Kanda Samy Pillai* v. *Ramasami Mannadi.* (Although T. P. Act does not in its terms apply to agricultural leases, definition in S. 105 applies to agricultural leases as well.)
('10) 5 Ind Cas 437 (437): 33 Mad 253 (DB), *Gangamma* v. *Bommakka.* (Although T. P. Act does not apply to agricultural leases, analogy of the Act may be relied upon.)
[*See also* ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithu Lal.* (Plot let for grove.]

4. ('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahman.* (Nature of original tenancy and not of sub-tenancy should be considered.)
('27) 14 AIR 1927 All 78 (79, 80) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*
('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Lease for residential purpose with right to take fruits from trees on the land and plant other fruit trees—Lease not agricultural—T. P. Act applies.)
('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235, *Bir Bikram* v. *Amaddin.* (Lease of tank for rearing and preserving fish and of the banks for grazing cattle —Primary object being the rearing of fish, lease is not for agricultural purpose.)
('73) 20 Suth W R 341 (341) (DB), *Nidhi Krishna* v. *Ramdoss Sen.* (Where the lease is merely of a tank with so much of its banks as is necessary for its use, it cannot be regarded as an agricultural lease because the tank is the principal subject of the lease.)
('31) 18 AIR 1931 Cal 135 (138) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandra Taranath.* (Where the lease is merely of a tank with so much of its banks as is necessary for its use it cannot be regarded as an agricultural lease and no right of occupancy can be acquired in the tank — In this case the surrounding land was of considerable area and the lease being indivisible, it was held that the whole lease was for agricultural purpose.)

5. ('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Lease for residential purposes.)
('36) 164 Ind Cas 837 (839) (Cal), *Chandi Charan* v. *Ashutosh Lahiri.* (Lease for residential purpose—Bengal Tenancy Act is not applicable.)

Section 105 Notes 1–2

This Chapter does not apply to leases granted before the coming into force of this Act.[6] It does not also apply to leases granted in those parts of British India to which the Act does not apply; but even in such cases, the general principles contained in such provisions may be applied.[7]

The provisions of this Chapter do not apply to a lease of land granted by the Government, as the Crown Grants Act of 1895 expressly provides that this Act (Transfer of Property Act) does not apply to transfer of land or interests in land by or on behalf of the Crown.[8] (See also Preamble, Note 4.) But a *municipality* is not outside the provisions of the Act and so a lease granted by a municipality is within this Chapter.[9]

2. Essentials of a lease. — The essential factors of a lease under this section are —

(1) The right must be one as to *immovable* property. The section does not apply to a lease of any other property.

(2) The right must be that of the *enjoyment* of immovable property. This includes the right to the *possession* of the property. (See Note 5.)

('26) 13 AIR 1926 Cal 215 (216) : 90 Ind Cas 104 (DB), *Bidhu Mukhi* v. *Gobinda Chandra*. (The description of 'kaimi maurashi' applied very aptly to a non-agricultural tenancy — The word *raiyat* used in a lease does not necessarily mean an agricultural tenant.)

('31) 18 AIR 1931 Cal 135 (137) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandra Taranath*. (Do.)

(1900) 27 Cal 239 (242) (DB), *Rachhea Singh* v. *Upendra Chandra Singh*. (Lease of ferry tolls is non-agricultural lease—Bengal Tenancy Act is not applicable.)

('26) 13 AIR 1926 Cal 373 (373, 374) : 90 Ind Cas 805 (DB), *Purusottam Mahesri* v. *Panchanan Mazumdar*. (Lease for shop—Bengal Tenancy Act is not applicable.)

('25) 12 AIR 1925 Cal 181 (182, 183) : 79 Ind Cas 648, *Sulaiman Muhammad* v. *Uma Charan*. (Large portion of land covered by tank; still held in the circumstances of the case, the lease was one for agricultural purpose.)

('26) 96 Ind Cas 89 (89) (Cal), *Rakhya Mani* v. *Paramesh*. (Lease held to be horticultural, because it was granted not for enjoying fruit only but also for the purpose of planting trees.)

6. ('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra*. (The definition in Stroud's *Judicial Dictionary* was applied in this case and a maintenance grant was held to be a lease.)

('27) 14 AIR 1927 All 342 (344) : 100 Ind Cas 479, *Sitara Shahjahan Begam* v. *Munna*.

[*See* ('89) 13 Bom 373 (375) (DB), *Vinayak* v. *Baba Shabudin*. (Custom held applicable.)]

7. ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir*. (Principle of S. 116 applied to the Punjab, where the Act does not apply.)

('92) 16 Bom 568 (575, 576), *Rangoonathdas* v. *Morarji*. (Before T. P. Act was extended to Bombay Presidency, its provisions applied as general principles.)]

[*See* ('79) 4 Cal 778 (781): 4 Cal L R 20 (DB), *Tarachand Biswas* v. *Ram Gobind*. (In this case the English common law rule as to covenant for quiet possession was applied to a darpatni lease granted before the T. P. Act.)]

8. ('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad*. (Building lease granted by Government.)

9. ('28) 15 AIR 1928 All 95 (95): 107 Ind Cas 690, *Aminullah* v. *Emperor*. (Lease cannot be determined merely by a resolution passed by the Municipal Board.)

(3) There must be a transfer of such right.[1]

(4) The right transferred must be an *interest* in the property. The grant of a merely personal right of enjoyment is not a lease.

(5) The transfer must be made for a certain time express or implied or in perpetuity.

(6) The transfer must be one for consideration.

(7) The consideration must be of the particular kind mentioned in the section, namely, premium or rent as defined by the section, either or both of them.

A lease being a transfer of an *interest* in immovable property, it is a transfer of property within the meaning of S. 5 and so must comply with the requirements of that and other sections of the Act, so far as they may be applicable.[2]

The definition in this section applies only to leases under this Act. It does not apply to leases not governed by this Act, *viz.*, (a) leases granted before the coming into force of this Act, (b) leases in places to which this Act is not applicable and (c) agricultural leases, except when there is a Government notification making the provisions of this Chapter applicable.

In cases to which this Act applies, there will be no lease unless the essentials of the definition under this section are satisfied. But this does not affect the meaning to be attached to instruments for the purpose of the Registration Act and the Stamp Act. Those Acts contain a wider definition of the term "lease."[3] For instance, the Registration Act includes a kabuliat or an undertaking to occupy, as an instrument of *lease*. But such an instrument will not *per se* amount to a lease under this section as will be seen in Note 9. But the definitions in these special Acts relate only to *procedural* matters. They cannot affect the substantive law on the subject. In other words, an instrument which is not a lease under this section will not be effective to create an interest in property and confer a right of possession, though it may be regarded as a lease for the purpose of registration or stamp duty.

3. Lease is an interest in property.—The right of enjoyment contemplated by this section is an *interest* in the property.[1] Unless

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Note 2

1. Thus, the right of possession of a ryot holding under a zamindar is not one derived from the zamindar and so such ryot is not a tenant of the zamindar in the true legal sense of the term, though loosely called so in common practice. See Note 75.

2. As pointed out in S. 5, Note 5 the word "property" in that section is used in the most comprehensive sense and so there is no doubt that it covers the transfer of such an important right as the right of enjoyment of immovable property.

3. ('33) 20 AIR 1933 All 735 (737) : 55 All 874 : 145 Ind Cas 674 (FB), *In the matter of Burma Shell Oil Storage & Distributing Co. of India, Ltd.* (Stamp Act.)

Note 3

1. ('19) 6 AIR 1919 Mad 168 (169) : 42 Mad 203 : 51 Ind Cas 507 (SB), *Kandasami* v. *Ramasami.* (Provisions of law like S. 39 of the Contract Act which are applicable to mere contracts are not applicable to lease.)
('40) 27 AIR 1940 Cal 89 (90) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anvarali* v. *Jamini Lal.* (Even a lease from month to month is such interest.)
('14) 1 AIR 1914 Cal 485 (486) : 23 Ind Cas 925 (DB), *Hari Mohan* v. *Atal Krishna.*

Section 105 Note 3

there is a transfer of such an interest there can be no lease.[2] The grant of a merely *personal* right of possession will not be a lease. It will only be a licence. (See Note 13.) Hence, where the agreement is not even to give a *personal* right of possession, there can be no question of a lease merely because one person agrees to pay an annual sum to another and such agreement has a *collateral* reference to a transaction which results in the property being transferred to the person by whom the money is agreed to be paid.[3] See also Note 4.

A lease being an *interest* in immovable property, entitling the lessee to possession, a suit for ejectment against a lessee does not lie so long as the lease is in existence.[4] A merely *personal* right of possession

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[*See* ('24) 11 AIR 1924 Rang 278 (279) : 82 Ind Cas 381 (DB), *Azee Meah* v. *Jeewa*. (Lessee was held to be a "transferee of the *premises*" though a limited transferee.)

('37) 24 AIR 1937 All 10 (12) : I L R (1937) All 312 : 166 Ind Cas 812 (DB), *Shyam Sundar Lal* v. *Din Shah*. (A lease is a "contract to transfer *property*" within the meaning of S. 53A of the Act.)]

[But see ('41) 28 AIR 1941 All 56 (59, 60) : I L R (1941) All 17 : 194 Ind Cas 347 (DB), *Ramman Lal* v. *Raghunath Shanker*. (NOTE — In this case, in pointing out the differences between a usufructuary mortgage and a lease the Court observed that there is a transfer of an interest in the property under a usufructuary mortgage while under a lease there is only a transfer of the right of enjoyment of the property — This can only mean that under a mortgage an interest in the *fee simple* is transferred while under a lease only the right of possession is transferred—It cannot be supposed that the Court intended to lay down that a lease does not amount to an interest in the property—It would be a preposterous supposition.)]

NOTE — It may be noted that the section does not expressly state that a lease is a transfer of an *interest* in immovable property, and the transaction is defined as a transfer of a *right* to enjoy immovable property — Notwithstanding this, it is established that a lease is a transfer of an interest in immovable property, *see* 14 AIR 1927 Cal 725 (728).

2. ('26) 13 AIR 1926 Pat 487 (489) : 98 Ind Cas 374 (DB), *Ramehwar Singh* v. *Kitab Ali*. (A *bid-sheet* or *dak fard* showing the bids made at the auction of land for settlement is a *verbal settlement*, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title cannot in such circumstances constitute a lease.)

3. ('02) 25 Mad 603 (611): 29 Ind App 138 (PC), *Subramanian* v. *Arunachalam*. (Collateral agreement to pay a certain sum monthly for five years to the owner of an estate in consideration of his granting a permanent lease is not a part of the lease and does not require registration.)

('34) 21 AIR 1934 Bom 140 (142) : 15 Ind Cas 156 (DB), *Govind Lal Manek Lal* v. *Manekchowk Spinning & Weaving Mills Co.* (Plaintiff's land compulsorily acquired for providing special railway siding to defendant's mill — Arbitration award under which plaintiff is to hand over the compensation money to the mill and receive an annual payment at so much per unit of area from the mill — This is not a transfer of an interest in immovable property by the plaintiff to the mill.)

('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad*. (Raiyatnama executed by a person already in possession held to be only a collateral agreement and not a lease.)

4. ('07) 34 Cal 57 (63, 64) : 5 Cal L Jour 181 (DB), *Deo Nundan Pershad* v. *Meghu Mahton*.

('28) 15 AIR 1928 All 95 (95) : 107 Ind Cas 690, *Aminullah* v. *Emperor*.

('31) 130 Ind Cas 14 (15) (DB) (All), *Qadir Khan* v. *Kesho Das*.

under an agreement will not be *in itself* a good defence to such a suit.[4a]

As to whether a lease is a sufficient interest in the property to entitle the lessee to redeem a mortgage on the property, see S. 91, Note 12.

A lessee has a sufficient interest in the property to entitle him to apply under O. 21, R. 89 of the Civil Procedure Code to set aside a sale of the property in execution.[5] See also the Authors' Commentaries on the Civil Procedure Code, 3rd (1940) Edition, O. 21, R. 89, Note 12.

Under the English law, a lease for a term is only what is known as a *chattel* interest and not a *real* interest, i. e., one corresponding to an interest in immovable property. This is not so under the Indian law,[6] as seen above.

4. Agreement to grant lease.—As seen in Note 3 a lease under this section is a transfer of an *interest* in immovable property. Hence, there must be a present demise to constitute a lease. A mere agreement to grant a lease in future will not be a lease.[1] Such an agreement will merely create a *personal* right and not an *interest* in the property. It is a matter of construction in each case whether the agreement is merely an executory one[2] or a present demise and creates an interest in the

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4a. (1903) 1 K B 577 (580) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams.* (Lease void — Agreement not to eject lessee during his lifetime contained in the lease.)

[But see ('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Tenancy void — Independent collateral agreement not to eject during a certain period is good answer to suit for ejectment. NOTE—Submitted wrong.)]

5. ('28) 15 AIR 1928 Mad 1191 (1191) : 51 Mad 770 : 109 Ind Cas 168 (DB), *Adenna* v. *Chinna Ramayya.*

6. ('19) 6 AIR 1919 Mad 168 (170, 172) : 42 Mad 203 : 51 Ind Cas 507 (SB), *Kandasami* v. *Ramasami.*

Note 4

1. ('29) 16 AIR 1929 Rang 164 (165) : 7 Rang 70 : 117 Ind Cas 255 (DB), *Joseph* v. *Samsunder.*

('10) 6 Ind Cas 443 (444) : 37 Cal 808 (DB), *Panchanan Basu* v. *Chandi Charan.*

(1863) 1 Mad H C R 153 (157) (DB), *Pitchakutti Chetti* v. *Kamala Nayakkan.*

('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (DB), *Secretary of State* v. *Ma Dwe.* (Suit for specific performance of such agreement is not one for the *recovery* of property.)

('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra.*

('78) 3 Cal 322 (324) (DB), *Gunga Persad* v. *Gogun Singh.*

2. ('21) 8 AIR 1921 Cal 127 (128) : 64 Ind Cas 747 (DB), *Harinath* v. *Promotho Nath.*

('21) 8 AIR 1921 Bom 200 (201) : 45 Bom 8 : 57 Ind Cas 971 (DB), *Mahomed Yusuf* v. *Secretary of State.*

('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra Kumar.*

('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra.*

('33) 20 AIR 1933 Rang 220 (221, 222) : 148 Ind Cas 301 (DB), *Syriam Land Co., Ltd.* v. *J. D. Rodrigues.*

[*See also* ('29) 16 AIR 1929 Rang 184 (185) : 7 Rang 144 (DB), *Russa Engineering Works, Ltd.* v. *Wearne Bros., Ltd.* (Assignment by prospective lessee of agreement in his favour for grant of lease — No relationship of landlord and tenant is created between assignor and assignee.)]

Section 105
Note 4

property.[3] The mere fact that an agreement provides that the lease is to commence from a future date[4] or that there is a provision for the execution of a formal document[5] does not make it a merely executory agreement and not a lease. Even where possession is allowed to be taken under the agreement it may amount only to a personal agreement not creating any present interest in the property,[6] the right to take possession pending the grant of the lease being, in such cases, only a licence. But the circumstances of the case may show that apart from the lease that is agreed to be granted, there is another tenancy arising by implication from payment and acceptance of rent.[7]

A mere executory agreement for the grant of a lease under which the promisee enters into possession of the property is not by itself a

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3. ('23) 10 AIR 1923 Oudh 237 (238) : 74 Ind Cas 480, *Mahomed Ali* v. *Syed Hasan Jafar.* (Whether a contract in writing or orally made is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document.)
('14) 1 AIR 1914 Cal 300 (300) : 20 Ind Cas 907 (DB), *Elahi Baksh* v. *Hukum Baksh.*
('19) 6 AIR 1919 Cal 168 (168) : 49 Ind Cas 731 (DB), *Annada Kumar* v. *Hara Durga.*
('10) 8 Ind Cas 44 (46) (DB) (Cal), *Champaklatika Mitra* v. *Nafar Chandra.* (The question whether there was a present demise or merely an agreement to make a demise in future must depend upon the paramount intention of the parties.)

4. ('30) 17 AIR 1930 Bom 210 (212) : 125 Ind Cas 428, *Sultanali Mulla* v. *Tyeb Pir.*
('25) 12 AIR 1925 Cal 1087 (1089, 1092) : 52 Cal 695 : 91 Ind Cas 320, *Ramjoo Mahomed* v. *Haridas Mullick.*
('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Muhammad Baksh.*
('17) 4 AIR 1917 Nag 207 (208) : 42 Ind Cas 372, *Vithu Jairam* v. *Akaram.*
5. ('34) 21 AIR 1934 Mad 418 (419, 420) : 57 Mad 760 : 152 Ind Cas 538 (DB), *Mopurappa* v. *Ramaswami Gramani.*
('30) 17 AIR 1930 Bom 210 (212, 213) : 125 Ind Cas 428, *Sultanali Mulla* v. *Tyeb Pir.*
('86) 10 Bom 101 (104) (DB), *Purmanand Das* v. *Dharsey Virji.*
('25) 12 AIR 1925 Cal 1087 (1093) : 52 Cal 695 : 91 Ind Cas 320, *Ramjoo Mahomed* v. *Haridas Mullick.*
('68) 10 Suth W R 177 (177) (DB), *Nund Ram* v. *Mannoo Bibee.* (Lessor had agreed to treat '*baeena-puttro*' as a pottah in case he failed to execute it.)
('30) 17 AIR 1930 Pat 530 (532) : 122 Ind Cas 158 (DB), *Khodaijatul Kubra* v. *Krishna Pershad.*
6. ('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 949, *Sabdi Bepari* v. *Sheikh Budhai.*
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.* (Reclamation licence with agreement for lease.)
('24) 11 AIR 1924 Cal 558 (560) : 80 Ind Cas 357 (DB), *Lakshan Chandra* v. *Takim Dhali.*
('30) 17 AIR 1930 Pat 356 (357), *Behari Manjhi* v. *Govind Manjhi.* (Lands granted for reclamation.)
(1903) 1 K B 881 (887) : 72 L J K B 564 : 88 L T 795, *Driscoll* v. *Battersea Borough Council.* (Building agreement — Agreement that the builder should enter on the land and build houses thereon, and that a lease should be granted of each house when erected and that the builder should in the meantime pay £200 a year until the leases were granted.)
7. (1861) 3 L T 809 (810) : 30 L J Q B 94 : 122 R R 858, *Anderson* v. *Midland Ry. Co.* (Tenancy at will.)
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.*

Section 105
Note 4

good defence to a suit for ejectment against him by the owner.[7a] Under the doctrine of *Walsh* v. *Lonsdale*[8] such a person would be entitled to an equitable *interest* in the property. It has been held by the Privy Council[9] that this doctrine does not apply to India, but that if the owner sues for the ejectment of the intended lessee the latter can obtain a stay of the suit and sue for specific performance of the agreement to grant him a lease. (See Note 3 on S. 53A.) Apart from this, in proper cases, the promisee under such agreement may be entitled to rely on S. 53A of the Act as a defence to the suit for ejectment.

An agreement for the grant of a lease though not an interest in the property, is an obligation annexed to the ownership of the property within the meaning of S. 40 and is enforceable against transferees of the property with notice of such agreement or gratuitous transferees.[10] (See also S. 40, Note 13.)

Specific performance of an agreement for the grant of a lease will not be enforced unless the terms of the lease can be ascertained with reasonable certainty from the agreement.[10a] See also Note 35.

A person entering into possession under a mere agreement for the grant of a lease may be liable for damages for use and occupation,[11] though he is not liable for *rent*. Further, he may be liable under the agreement for damages for *breach of contract* if he vacates the property before the end of the period for which he has agreed to be in possession by paying rent.[12]

Registration Act:

Under the Registration Act, S. 2(7), an agreement to lease is included within the definition of a lease. But it has been held by the Privy Council[13]

7a. *See* (1903) 1 K B 577 (580) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams*. (Only remedy is damages or suit for specific performance of contract.)

8. (1882) 21 Ch D 9 (15) : 52 L J Ch 2 : 46 L T 858 : 31 W R (Eng) 109.

9. ('31) 18 AIR 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 : 131 Ind Cas 762 (PC), *G. H. C. Ariff* v. *Jadunath*.

10. ('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S. 57*.

10a. ('24) 11 AIR 1924 Cal 346 (347, 348) : 69 Ind Cas 600, *Nava Kishore* v. *Madan Mohan*.

('22) 9 AIR 1922 Bom 404 (404) : 67 Ind Cas 433, *Simon Reuben* v. *Haji Shaikh Mahomed*.)

[*See* (1881) 19 Ch D 233 (239) : 51 L J Ch 329 : 45 L T 599 : 30 W R (Eng) 93, *Marshall* v. *Berridge*. (An executory agreement for a lease does not satisfy the Statute of Frauds, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. *Jaques* v. *Millar*, (1877) 6 Ch D 153 overruled, *Blore* v. *Sutton*, 3 Mer 237 (246), followed.)]

[*See also* ('05) 29 Bom 580 (606) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State*. (Attempt to create interest unknown to law — Lease invalid— Claim to treat it as agreement to grant lease and to have such agreement specifically enforced is also open to the same objection.)]

11. ('12) 15 Ind Cas 432 (432) (Mad), *In re Kaya Ramakrishnamma*.

12. ('27) 14 AIR 1927 Cal 275 (277) : 100 Ind Cas 404 (DB), *Chuni Lal* v. *Gopiram*.

13. ('19) 6 AIR 1919 P C 79 (80) : 47 Cal 485 : 46 Ind App 240 : 53 Ind Cas 534 (PC), *Hemanta Kumari* v. *Midnapur Zamindari*.

Section 105 Notes 4–5

that the definition only applies to an agreement which creates an *interest* in the property. Hence, there is practically no difference between the Registration Act and this Act so far as this proposition is concerned, namely that a merely executory agreement to grant a lease is not a lease.

As to whether a counterpart, kabuliat, rent note, etc., are leases within the meaning of this section, see Note 9. They are leases under the Registration Act.

5. **"Right to enjoy."**—The section defines a lease as the transfer of a right to *enjoy* immovable property. The fundamental conception of a lease is that it is the separation of the right of possession from ownership.[1] Though the section uses the word "enjoy" instead of the word "possess" there is no authority for holding that it contemplates the exclusion of possession when it refers to enjoyment. The word "enjoy" must, therefore, be taken to include possession also. The framers of the section do not seem to have intended to depart from the accepted and well-established connotation of lease in jurisprudence.

No doubt, S. 108 (b) which deals with the lessor's duty to put the lessee in possession of the property, is subject to the opening words of the section under which the parties can exclude the operation of any particular clause by express contract. But this only means that the lessor's duty of *putting the lessee in possession* can be excluded by express contract. It does not mean that the parties can agree that the lessee is to have *no right* of possession. If they do so, then the transaction would not be a *lease*. Hence, it is apprehended that the transfer of a mere right to the *usufruct* of the property without the right of possession will not be a lease.[2]

The word "enjoy" is, however, not used as the *equivalent* of "possess." The connotation of the word "possession" as used in the Act is distinct from "enjoyment" and does not *necessarily* include enjoyment. This is clear from Ss. 58 and 76 of the Act. Those sections show that though a usufructuary mortgagee is entitled to the *possession* of the mortgaged property, he is not entitled to the *enjoyment* of the property. Because, the usufruct of the property is treated as belonging not to the mortgagee but to the *mortgagor*. The mortgagee has only the right to receive such usufruct and reimburse himself for his debt from it. Under a lease, however, the usufruct of the property belongs to the *lessee*. The

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[*See also* ('27) 14 AIR 1927 Cal 275 (276) : 100 Ind Cas 404 (DB), *Chunilal* v. *Gapiram*. (Where there is an oral agreement to grant a lease, a document which merely puts on record the agreement subsequently, does not require registration and is admissible in evidence to prove the oral agreement.)]

Note 5

1. See Salmond, *Jurisprudence*, 1924 Edn., page 456.
2. NOTE—At the same time, the mere fact that *A* is entitled to a share of the usufruct of property in the possession of *B* will not be sufficient to show that a relationship of landlord and tenant exists between the parties and that *A* is the landlord and *B* is the tenant — Thus, a zamindar's right in respect of the land in the occupation of ryots under him is said to be a right to a share of produce — But this does not prove the existence of the relationship of landlord and tenant between the parties. See ('97) 20 Mad 299 (302, 303.)

transfer of a *bare right of possession* without the right to the usufruct is not a lease.[3] Thus, the word "enjoy" seems to be used in the sense of the *beneficial occupation* of property. Such a meaning is not inconsistent with the literal sense of the word. Because, one of the meanings of this word is to *occupy as a good or profitable thing*.[4]

There must be a transfer of the *exclusive* right of possession of the leased property in order to constitute a lease.[5] (See Note 13.) The continuance in the transferor, after the transfer, of any share in the right of possession is detrimental to its character as a lease. This does not mean that there cannot be a lease of an undivided share in joint property. What is meant is that the transferor cannot reserve to *himself* any share in the right of possession.

The right to enjoy, spoken of in this section, is the right to enjoy the property in the manner in which it can be normally enjoyed. (See S. 108, cl. (o).) If the property is a coal or other mine it can only be enjoyed by working the mine. Such a right does not cease to be a lease merely because the mode of enjoyment results in the exhaustion of the property.[6]

A lease only connotes a *right* of possession. Actual entry on the land is not necessary to complete a lease.

Under the present English law also (under the Law of Property Act of 1925) actual entry on the property is not necessary to complete a lease. But before the Act, the tenancy did not become complete until actual entry by the lessee on the property.[7] His interest in the property between the date of execution of the lease and actual entry into possession was known as *interesse termini*.

There is a rule of construction of documents under which a transfer of "rents and profits" of the land without any words of limitation is construed as a transfer of the *land* itself.[8] See also S. 8, Note 12. This is only a rule of *construction* adopted to find out the intention of the parties to a document. It does not mean that a transfer which on construction is ascertained to be intended only as a transfer of the *usufruct* of property is in law a transfer of the property itself. As seen above, such a transfer will not be a *lease* unless the right of *possession* is also transferred.

6. Lease and conveyance of interest in fee simple—Distinction. — A lease of immovable property is only a transfer of the right of *possession* of such property. Although such a right is an *interest* in the property, it is distinct from the ownership thereof. As

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3. ('99) 9 Mad L Jour 290 (295) (DB), *Kongatti Valia Nayar* v. *Subramannian Pattar*. (Liability to account for profits negatives idea of enjoyment.)

4. See Webster, *New International Dictionary of the English Language*, 1914 Edn.

5. ('97) 20 Mad 58 (65): 6 Mad L Jour 281 (FB), *Seeni Chettiar* v. *Santhanathan*.
('99) 9 Mad L Jour 290 (295) (DB), *Kongatti Valia Nayar* v. *Subramanian Pattar*.

6. ('40) 27 AIR 1940 Pat 633 (647) : 20 Pat 13 : 191 Ind Cas 340 (SB), *Income-tax Commissioner* v. *Kamaksha Narain*.

7. See Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 110.

8. ('40) 27 AIR 1940 Pat 516 (525, 526, 535, 536) : 19 Pat 433 : 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon*.

Section 105 Note 6

Salmond points out in his *Jurisprudence*, the ownership of property is only a particular kind of right in it.[1] Thus, the ownership of land denotes the right known under the English law as the fee simple in the land.[2]

But the ownership of property always carries with it the right of possession also. The right of possession, no doubt, *can* be separated and transferred to another person. This is what happens under a lease. But the moment it ceases to belong to any one else, it will automatically come back and vest in the person entitled to the ownership of the property. Hence, where the last holder of a lease dies intestate and without leaving any heirs, the owner of the property automatically gets back the right of possession. The right of possession does not pass by escheat to the Crown in such a case. The reason is that escheat takes place only when a thing does not belong to anybody. It is based on the maxim *quod nullius est, est domini regis* (that which belongs to no one belongs to the King.)[3] But so long as there is a person entitled to the ownership of the property it cannot be said that the right of possession of such property belongs to *no one*. Because, unless such a right is vested in some one else, it always belongs to the person entitled to the ownership of the property.

Where a right passes by escheat to the Crown, the integrity of the right is not in any way destroyed.[4] Hence, the Crown takes the right subject to all burdens which encumber it at the time of the escheat.[5] But, when a reversion takes place on the death of the last holder of a lease, intestate and without leaving any heirs, the leasehold interest merges into the right of ownership and loses its integrity. Hence in such a case all interests to which the leasehold is subject at the time of reversion come to an end along with the leasehold.[6]

When the ownership or an interest in ownership is transferred, the right created is not a lease. Thus, a sale is the transfer of the *ownership* of property.[7] It is a transfer of the *fee simple* in the property, to borrow the language of the English law. Similarly, a mortgage connotes the transfer of an interest in the *fee simple*. A usufructuary mortgage includes not only a right of possession of the property but

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Note 6

1. Salmond, *Jurisprudence*, 1924 Edn., page 277.
2. Salmond, *Jurisprudence*, 1924 Edn., page 277.
3. Broom, *A Selection of Legal Maxims*, 1939 Edn., page 228. (*Bona vacantia* i. e., things in which nobody claims property belong to the Crown.)
4. NOTE—The reason for this, it is conceived, is that escheat to the Crown takes place by the general prerogative of the Crown. The Crown has no pre-existing right in the property—As seen already, escheat takes place because the property belongs to *no one*. Hence, in such a case there is no question of any merger of a lesser right into a greater one with the consequence of the extinction of the lesser right.
5. ('76) 1 Cal 391 (401) (PC), *Sonet Kooer* v. *Himmut*.
6. But see ('29) 16 AIR 1929 Nag 23 (25) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal*. (The assumption to the contrary in this case is not correct.)
7. See Section 54 of the Act.

also an interest in the ownership of property.[8]

7. Contract necessary for lease. — As seen in Note 2 a lease is a "transfer of property" as contemplated by this Act. Hence as required by S. 5 it can only be effected by an act of a living person. A lease cannot be created by a will, as it is not a transfer within the meaning of S. 5, the reason being that a will takes effect only from the death of the testator. (See Section 5, Note 3.) The requirement of *consideration* for a lease under this section shows that it can only be the outcome of a *contract*. Where there is no contract there can be no lease.[1] Merely because one person occupies another person's land a lease will not come into existence.[2] A mere demand of rent by the owner from the person in possession[3] or a mere offer of tenancy by the owner to such person[4] will not create a lease. Similarly, a co-owner occupying a specific portion of the common property does not *ipso facto* become a tenant of the rest, and is only liable to pay them their share of the profits but not rent unless there is an agreement to pay rent.[5] So

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8. *See* ('41) 28 AIR 1941 All 56 (59, 60) : I L R (1941) All 17 : 194 Ind Cas 347 (DB), *Ramman Lal* v. *Raghunath Shanker*. (In this case, in differentiating between a lease and a usufructuary mortgage the Court remarked that the latter is a transfer of an interest in the property while a lease is only the transfer of the right to enjoy the property — This remark can only be understood as meaning that a usufructuary mortgage is a transfer of an interest in the *fee simple* in the property — The word "property" has only been used to indicate the proprietary as contrasted with the possessory right—It cannot be thought that the Court intended to say that a lease is not an interest in the property, a view which is radically wrong and opposed to the entire law on the subject.)

Note 7

1. ('22) 9 AIR 1922 Pat 429 (430) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad*.
('92) 19 Bom 133*n* (134*n*): 1892 Bom P J 406, *Parbhudas Lakshmidas* v. *Fulba*. (Rent-note not intended to be acted upon — No lease.)

2. ('29) 16 AIR 1929 Nag 13 (13) : 114 Ind Cas 622, *Gulab Sing* v. *Nanaji*.
('13) 18 Ind Cas 844 (845) (DB) (Cal), *Matilal* v. *Darjeeling Municipality*.
(1900) 27 Cal 239 (242) (DB), *Rachhea Singh* v. *Upendra Chandra*. (Suit for rent of ferry tolls — Defendant not having entered into any contract with plaintiff but having collected the tolls — Lower Court passing decree for rent holding that the defendant has made himself plaintiff's tenant in respect of the ghats by use and occupation — *Held* that this was wrong and no decree for rent could be passed.)
('89) 1889 All W N 176 (177), *Ali Hussain* v. *Ali Bakhsh*. (Even where an owner sues for ejectment on the allegation of a forfeited tenancy, but fails to prove that there was any tenancy at all the defendant may be held to be mere trespasser.)

3. (1891) 2 Q B 484 (486) : 61 L J Q B 36 : 65 L T 332 : 40 W R (Eng) 37, *Towerson* v. *Jackson*. (Mere demand of rent is only offer of a tenancy.)
('82) 6 Bom 79 (82) (DB), *Kalidas* v. *Vallabhdas*.
('07) 34 Cal 57 (62) : 5 Cal L Jour 181 (DB), *Deonandan Pershad* v. *Meghu Mahton*.

4. ('29) 16 AIR 1929 Rang 164 (165) : 117 Ind Cas 255 : 7 Rang 70 (DB), *E. M. Joseph* v. *Samsunder*.
('10) 7 Ind Cas 750 (750) (DB) (Mad), *Bangat Singh* v. *Bolama Reddi*.

5. ('05) 32 Cal 567 (570) : 3 Cal L Jour 141 (DB), *Girindra Chandra* v. *Sreenath Pal*. (NOTE— There can be a tenancy by arrangement between co-owners—Each co-owner is entitled to the possession of the whole and every portion of the property—So it is possible for one of them to be a transferee of the right of joint possession of the rest.)

Section 105 Notes 7–8

also, an *admission* of a lease by the person in possession or by the owner will not by itself create a lease.[6] But an *express* contract of tenancy is not always necessary. The contract may be implied from the conduct of the parties and other circumstances of the case.[7]

When a lease is contained in writing it can be contained in more than one document.[8]

8. **Tenancy by payment and acceptance of rent.** — The mere fact that one person pays and another receives rent from the former does not necessarily create the relationship of landlord and tenant between them.[1] As seen in Note 7, such relationship can only arise on the basis of a contract between the parties. It is also necessary that there should be an intention to transfer an interest in the property. But payment and acceptance of rent will be an element of *evidence* going to prove the existence of a tenancy.[2] The sufficiency of such evidence for the purpose will depend on the circumstances of each case.[3] If for instance, the tenancy is for an agricultural or manufacturing purpose and is governed by this Act, then, in the absence of an agreement to the contrary, it will be deemed to be one from year to year under S. 106. Such a lease cannot be created under S. 107 except by means of a registered instrument.[4] But if the tenancy is for any other purpose, then it will be deemed to be a tenancy from month to month under S. 106 and such a tenancy may be inferred from payment and acceptance of

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6. ('80) 5 Cal 864 (865) : 6 Cal L R 286 (DB), *Narain Coomary* v. *Ram Krishna.*

7. ('17) 4 AIR 1917 Nag 36 (36) : 46 Ind Cas 909, *Ratnoo* v. *Nabidad.* (Tenant openly breaking up waste land and cultivating it with knowledge of landlord and without any objection by him—Cultivator is licensee first but when improvement and cultivation have continued for a number of years and the cultivator is shown in the village records as tenant a tenancy may be implied.)

8. ('30) 17 AIR 1930 Bom 210 (212) : 125 Ind Cas 428, *Sultan Ali* v. *Tyeb Pir.*
('17) 4 AIR 1917 Mad 274 (276) : 33 Ind Cas 439 (DB), *Morgan* v. *Fernandez.* (It may be a *series of letters.*)

Note 8

1. ('85) 11 Cal 434 (446) (FB), *Hori Das Mal* v. *Mahomed Jaki.* (Person paying rent not estopped from denying title of the person to whom he pays rent.)

2. (1900) 27 Cal 156 (164, 165): 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.* (Tenancy for life held created.)
('76) 1 Cal 391 (399) : 3 Ind App 92 (PC), *Sonet Koeor* v. *Himmut.*
('74) 22 Suth W R 334 (335) (DB), *Lalun Monee* v. *Sona Monee.* (Registration as tenant in landlord's books not necessary.)
('85) 11 Cal 434 (446) (FB), *Hori Das Mal* v. *Mohomed Jaki.*
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.* (Mere agreement to grant lease — Possession given — Payment and acceptance of rent — Tenancy created.)
('25) 12 AIR 1925 Mad 881 (882) : 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
('24) 11 AIR 1924 Cal 535 (535) : 72 Ind Cas 311 (DB), *Bali Mohammad* v. *Janaki Nath.*

3. ('26) 13 AIR 1926 Pat 465 (467) : 5 Pat 415 : 98 Ind Cas 893 (DB), *Abdul Gaffar* v. *F. B. Downing.* (Marfatdari receipts, i. e., receipts granted in the name of payer on behalf of another, do not constitute any relationship of landlord and tenant between the payer and the payee, nor any recognition of the payee's right as tenant.)

4. ('97) 1 Cal W N 142 (143) (DB), *Sheocharan Lal* v. *Purbhoo Dayal.*

rent, provided that such payment and acceptance are sufficient, on the facts of the particular case, to prove an oral agreement of lease accompanied by delivery of possession. Even in the case of a tenancy for an agricultural or manufacturing purpose, the acceptance of rent is sufficient under S. 116 to cause a renewal of an expired lease if a tenant holds over after the expiry of such a lease and the landlord assents to his doing so. In cases not governed by this Act the payment and acceptance of rent may be sufficient to prove a tenancy even in regard to agricultural land, notwithstanding the presumption as to its being one *from year to year*.[5]

A tenancy can arise by implication from payment and acceptance of rent, only where the person, to whom the rent is paid, is the *owner* of the property.[6] Where a trespasser grants a lease of property and the owner accepts rent from the lessee, such acceptance will not amount to confirmation of the lease, the same being void and therefore incapable of confirmation or ratification.[7] But the creation of a *fresh* tenancy may be implied in such a case.[8]

9. Kabuliat, rent-note, etc., whether lease. — The word "transfer" necessarily imports that the act of transfer is to be made by the owner of the property. (See S. 7 of the Act.)[1] Hence a kabuliat, rent-note or other similar document emanating from the transferee cannot by *itself* create a lease.[2] It can however *evidence* a lease, subject to its admissibility in evidence.[3] But an application for the grant of a lease

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5. ('25) 12 AIR 1925 Mad 881 (882): 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
6. ('20) 7 AIR 1920 Cal 693 (693, 694) : 59 Ind Cas 565 (DB), *Chandra Kanta* v. *Adinath Shom.*
('19) 6 AIR 1919 Cal 796 (797) : 51 Ind Cas 397, *Bashiram Nath* v. *Dina Nath.*
7. ('97) 1 Cal W N 142 (143) (DB), *Sheocharan Lal* v. *Purbhoo Dayal.*
(1900) 27 Cal 156 (162) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.* (Same principle applies where a life-tenant grants a permanent lease and the superior landlord accepts rent from the sub-lessee after the death of the life tenant.)
8. (1900) 27 Cal 156 (164, 165) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath.*

Note 9

1. ('07) 30 Mad 322 (323) : 17 Mad L Jour 395 (DB), *Turaf Sahib* v. *Esuf Sahib.*
2. ('26) 13 AIR 1926 Nag 389 (392) : 24 Nag L R 68: 95 Ind Cas 183, *Birdichand Lalchand* v. *Popatlal.* (Rent-note.)
('39) 26 AIR 1939 Lah 423 (424) : ILR (1940) Lah 70 (DB), *Taj Din* v. *Abdul Rahim.* (Do.)
('28) 15 AIR 1928 Nag 153 (156) : 111 Ind Cas 488, *Deolia* v. *Raje Janardhan.* (Kabuliat.)
('40) 27 AIR 1940 Nag 143 (144) : 189 Ind Cas 753, *Tulsiram Rajaram* v. *Govinda Ramji.* (Do.)
('06) 9 Oudh Cas 296 (298, 299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.* (Do.)
('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Raiyatnama by person already in possession held only a collateral agreement.)
('25) 12 AIR 1925 Rang 273 (274) : 3 Rang 379 : 90 Ind Cas 693, *U Tha Nyo* v. *Mg. Kyaw Tha.* (Agreement to cultivate another's land.)
('09) 4 Ind Cas 1039 (1040) : 32 Mad 532 (DB), *Kaki Subbanadri* v. *Muthu Rangayya.* (Undertaking to occupy.)
3. ('71) 16 Suth W R 147 (148) (DB), *Danoollah* v. *Amanutoollah.* (Acceptance by landlord of kabuliat.)

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with the endorsement of sanction on such application may be sufficient to create a lease.[4]

Under the Registration Act, a lease includes a counterpart, kabuliat and an undertaking to cultivate or occupy. (See S. 2 (7) of the Act.)[5]

Such instruments will also be leases under the Stamp Act. Any writing on an application for a lease intended to signify that the application is granted is a lease under the Stamp Act.

10. Application for grant of lease with endorsement of sanction, whether lease — See Note 9.

11. Agreement varying rent or other terms of lease, whether lease. — An agreement *merely* varying the amount of rent payable under an existing lease is not itself a lease.[1] Because, there is no fresh transfer of a right to enjoy immovable property in the lessee's favour in such a case. The agreement merely affects one of the terms on which the right of enjoyment already transferred to the lessee shall be exercised. A right to rent is, no doubt, a right in immovable property and an agreement varying the rent, therefore, will be one *creating* or *limiting* a right in immovable property.[1a] But such a right is that of the *lessor* and not of the *lessee* while there can be no lease unless a right is created in favour of the *lessee*. The same principle will be applicable to agreements involving a variation of other terms of a lease. So long

('11) 10 Ind Cas 489 (490) (DB) (Cal), *Akram Ali* v. *Durga Prosonna.* (Do.)
('06) 9 Oudh Cas 296 (298, 299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.*
[*See* ('92) 19 Bom 133*n* (134*n*) : 1892 Bom P J 406, *Parbhudas Lakshmidas* v. *Fulba.* (Rent-note not intended to be acted upon—No lease.)]

4. ('04) 27 Mad 43 (44) : 13 Mad L Jour 356 (DB), *Ramaswami Ayyar* v. *Thirupathi Naik.*
('81) 7 Cal 703 (707) : 10 Cal L R 121 (FB), *Sufdar Reza* v. *Amzad Ali.*
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.* (When in sanctioning application owner merely agrees to grant a lease in future, there is no lease.)

5. ('76) 1876 Bom P J 36, *Hiralal* v. *Collector of Surat.* (Undertaking to occupy.)
(1900) 2 Bom L R 488 (489) (DB), *Pagi Mania* v. *Lallubhai.* (Rent-note.)
('68) 5 Bom H C R (AC) 92 (94), *Moro Vithal* v. *Tukaram.* (*Bhadekhat* is an agreement between a lessee and a lessor in the nature of a *counterpart of a lease.*)

Note 11

1. (1852) 21 L J Ex 135 : 155 E R 968: 7 Ex 319: 18 L T (O S) 276: 86 R R 664, *Crowley* v. *Vitty.*
('78) 3 Cal 322 (324) : 2 Ind Jur 642 (DB), *Gungapersad* v. *Gogun Singh.* (Agreement by a person who is already a tenant to pay rent at certain rate is not a lease —*A fortiori*, a memorandum of an agreement by such person to pay rent at certain rates is not lease.)
('97) 24 Cal 20 (24) (DB), *Satyesh Chunder Sircar* v. *Dhunpul Singh.*
('22) 9 AIR 1922 Cal 511 (512): 69 I. C. 992 (DB), *Priya Nath* v. *Surendra Nath.*
[*See also* ('08) 35 Cal 470 (475) : 7 Cal L Jour 499 (DB), *Icharan Singh* v. *Nilmony Balidar.* (The mere acceptance of rent at a reduced rate does not constitute a lease.)
('99) 22 Mad 217 (220) : 8 Mad L Jour 256 (DB), *Obai Goundan* v. *Ramalinga Ayyar.* (It does not require registration.)]
[But see ('29) 16 AIR 1929 Lah 291 (292) : 10 Lah 685 : 117 Ind Cas 240 (DB), *Attar Chand Kapur & Sons* v. *Chandu Lal.*]

1a. As will be seen in Note 79, such right is capable of adverse possession and extinction by prescription.

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Note 11

as there is no fresh right of enjoyment transferred to the lessee the agreement will not itself be a lease.

Where the agreement enlarges either the property covered by the lease or the duration of the lease it transfers a fresh right of enjoyment not included in the original lease and so will itself be a *lease*. So also, the variation in the terms of a lease may be of such a nature that it may lead to the conclusion that the agreement was intended to replace altogether the original lease. In such a case it must be held that the original lease has been given up and a fresh lease has been granted. On these principles it was held in the undermentioned cases[2] that the agreements in them were *leases*.

The question whether an agreement varying the rent or other terms of a lease requires registration is different from the question whether such agreement is a *lease*. Under Section 92 (4) of the Evidence Act where the original lease is by a registered document a subsequent *oral* agreement to vary the rent or other terms of the lease will be inadmissible in evidence. If the agreement varying the terms of a lease is embodied in a written instrument it may require registration under S. 17 (b) of the Registration Act although it does not amount to a *lease*. Thus, the right to rent is a right in immovable property. An agreement reducing or enhancing the rent payable under a lease will, therefore, be one limiting or creating a right in immovable property. Where such an agreement is contained in a written instrument it will require registration under S. 17 (b) of the Registration Act if the amount of rent reduced or enhanced is Rs. 100 or more.[3]

In *Lalit Mohan Ghose* v. *Gopali Chauk Coal Co.*[4] the following question was referred to a Full Bench : "Does a document which is not a lease but which varies the amount of rent to be paid under an existing registered lease as also the incidents of such payments, namely, the date of payment and consequences of default of payment, require registration?" The original lease in the case was a compulsorily registrable one under S. 107 of this Act and S. 17 (d) of the Registration Act. The Full Bench answered the question referred to it by stating that a document of the above kind was compulsorily registrable. The decision proceeds on the ground that the amount of rent, the time of payment thereof and consequences of default relate to essential incidents of a lease and that under S. 107, where a lease is of the kind requiring registration under that section, all its essential incidents must also be embodied in a registered document.

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2. ('22) 66 Ind Cas 904 (905) (Lah), *Karim Bakhsh* v. *Natha Singh.* (Duration of lease extended.)
('29) 16 AIR 1929 Cal 462 (463) : 56 Cal 427 : 118 Ind Cas 895 (DB), *Nazar Ali* v. *Indra Kumar.*
('34) 21 AIR 1934 Lah 743 (743) : 148 Ind Cas 558, *Mohammad Din* v. *Sarada.*
('25) 12 AIR 1925 Cal 1171 (1172) : 90 Ind Cas 98 (DB), *Ramchandra Agarwala* v. *Syameswari Dasya.*

3. *See* ('08) 35 Cal 1010 (1012) : 8 Cal L Jour 90 (DB), *Biraj Mohinee Dassee* v. *Kedar Nath Karmakar.*
[But see ('99) 22 Mad 217 (220) : 8 Mad L Jour 256 (DB), *Obai Goundan* v. *Ramalinga Ayyar.* (NOTE—The view expressed in this decision that such agreement does not "relate" to an interest in immovable property and does not require registration is, it is submitted with great respect, not correct.)]

4. ('11) 12 Ind Cas 723 (727) : 39 Cal 284 (FB).

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It may be questioned whether such a view does not involve an undue stretching of the language of S. 107. But the decision is clearly no authority for saying that an agreement merely varying some of the essential incidents of a lease is necessarily a lease.

12. Tenancy by acquiescence.—A's occupation of B's property does not *ipso facto* make A, a tenant of such property. The law requires special factors to bring into existence such a right. The acquiescence of the owner in such occupation is not, in itself, such a factor and by itself cannot create a tenancy.[1] But the acquiescence of B in A's entering into possession and enjoying B's property and doing various things on it will be relevant for the purpose of establishing a tenancy in two ways—

(1) the acquiescence may be evidence of a contract of tenancy which may be express or implied;[2]

(2) the acquiescence may preclude the owner on the principle of estoppel from denying the occupier's claim to be a tenant.[3]

It must depend on the facts of each case, whether there is such acquiescence on the part of the owner as to be sufficient for the occupier of property to rely on it in support of his claim of tenancy.

For a complete discussion of the principle of acquiescence applicable in such cases, see Note 22 on S. 51. See also Note 55.

13. Lease and licence compared—General principles.—A *lease, inter alia*, requires the two following essentials:

(1) There must be a transfer of the right of possession.

(2) Such right must be an interest in the property. If a merely personal right of possession is granted the right will not be a lease. (See Note 3.)

A *licence* differs from a lease in both the above points. Thus:

(1) A licence need not be a right of *possession*. It may be *any* right of user of the property. But it *may* be the right of possession also.

(2) A licence is a merely *personal* right and does not amount to an interest in property. Section 52 of the Easements Act expressly says this.

Note 12

1. ('29) 16 AIR 1929 Nag 13 (13) : 114 Ind Cas 622, *Gulabsing* v. *Nanaji*.
('15) 2 AIR 1915 Cal 494 (495) : 21 Ind Cas 197 (DB), *Raj Krishna* v. *Fakir Dome*.

2. ('15) 2 AIR 1915 Cal 494 (495) : 21 Ind Cas 197 (DB), *Raj Krishna* v. *Fakir Dome*.
('17) 4 AIR 1917 Nag 36 (36, 37) : 46 Ind Cas 909, *Ratnoo* v. *Nabidad*. (Tenant bringing under cultivation waste land adjoining his holding—Landlord looking on and not objecting but on the other hand signing jamabandi papers showing the tenant as tenant of the extra land also—There is implied consent to the tenancy —Tenancy contract may be express or implied from conduct of the parties.)

3. ('05) 29 Bom 580 (610, 611) : 7 Bom L R 27 (DB), *Municipal Corporation of Bombay* v. *Secretary of State*. (In this case the lease was held invalid as being an attempt to create an interest in land unknown to the law — But the lessee was given protection by applying the doctrine of acquiescence — The judgment in this case which was delivered by Jenkins, C. J., contains a very exhaustive and instructive discussion of the subject of acquiescence in such cases.)

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Note 13

From the above the following propositions can be laid down :

(1) Where a right of possession is granted *and* such right amounts to an interest in the property, the right is a lease.

(2) Where a right of possession is not given but only a right of user not involving possession is granted *and* the right does *not* amount to an interest in the property, the right is a licence.

(3) Where a right of possession is granted but such right is not an *interest* in the property but only a personal right, the right is not a lease but a licence.

(4) Where a right of possession is not given but only a right of user not involving possession is given but the right amounts to an interest in the property, such right is neither a lease nor a licence. It is not a lease because the right of possession is not granted.[1] It is not a licence because the right amounts to an *interest* in the property.[2]

Under S. 60 of the Easements Act, a licence can be revoked by the grantor unless —

(a) it is coupled with a transfer of property and such transfer is in force ;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.

But the mere fact that a licence is coupled with a transfer of property[3] or that it has become irrevocable will not make it a lease, unless the elements essential for a lease are present.

As a licence does not create an interest in property, a licensee cannot sue in his own name in respect of the property.[4] Similarly, if

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Note 13

1. But see ('26) 13 AIR 1926 Nag 174 (174, 175) : 92 Ind Cas 683, *Indal* v. *Debi*. (In this case it was held that a right to take cattle, etc., along a defined strip of land was a lease as it possessed the characteristics of an *interest* in land — It is submitted the decision is wrong—Such a right is neither a lease nor a licence.)

2. ('33) 20 AIR 1933 All 735 (736) : 55 All 874 : 145 Ind Cas 674 (FB), *In re Burma Oil Company*.
(1867) L R 2 Q B 200 (202): 36 L J Q B 79: 16 L T 152: 15 W R (Eng) 347, *Hooper* v. *Clark*. (*C* granted and demised the exclusive right and license to take and kill game on certain land with the use of a cottage to the defendant for a term and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise — *Held* that the demise was not a mere licence but the grant of an incorporeal hereditament.)

3. But see ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohuram* v. *Tabo*. (NOTE — An observation capable of the opposite meaning occurs in this case — It is submitted that it is not accurate.)

4. ('26) 13 AIR 1926 Oudh 609 (609, 610) : 96 Ind Cas 410, *Gulab Khan* v. *Lal Mahomed*.
(1889) 42 Ch D 461 (468) : 58 L J Ch 790 : 61 L T 538 : 38 W R (Eng) 136, *Heap* v. *Hartley*.
NOTE — Where, however, a licensee is actually in possession and is ousted by a third party, he can maintain a suit for possession against such third person, as possession by itself confers a title to property, which is good against the whole world except the true owner, see the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 4.

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he is ousted from the property by the owner, he cannot sue him for possession, unless it be under S. 9 of the Specific Relief Act.[5] So also, a licence is not, by itself, a good defence to a suit for ejectment by the owner.

Even if the licence has become irrevocable by the licensee executing work of a permanent character and incurring expenditure thereon, it will not, in itself, be a good defence. The reason is that a suit for ejectment is based on title and it is only a ground based on title, that will be a good defence to such a suit.[6] Prescription and estoppel will be good defences. But they stand on a special footing. Prescription is a form of title. Estoppel precludes the plaintiff from denying the title of the defendant. But though by itself a licence may not be a good defence to a suit for ejectment, it is conceived that the licensee may, on the principle laid down by the Privy Council in *Ariff* v. *Jadunath*,[7] obtain a stay of the suit and sue for an injunction against the owner restraining him from suing him for ejectment. The licensee can also sue for damages for wrongful revocation of the licence.[8]

Some decisions,[9] however, proceed on the footing that an irrevocable licence is a good defence to a suit for ejectment by the owner. It is submitted with respect that the view taken in them is not correct.

Some of them refer also to the ground of estoppel.[10] But it must be noted that the facts, which make a licence irrevocable, will not necessarily be sufficient to sustain a plea of estoppel or acquiescence. (For the nature of facts that will be necessary to sustain a plea of estoppel in such cases, see Note 22 on S. 51.)

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5. ('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346, *Basudeo Rai* v. *Dwarka Ram.*

6. *See* (1903) 1 K B 577 (580) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams.* (Mere agreement not to eject is not *ipso facto* defence to a suit for ejectment.)

7. ('31) 18 AIR 1931 P C 79 (82): 58 Cal 1235: 58 Ind App 91: 131 I.C. 762 (PC).

8. ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohuram* v. *Tabo.* (Revocation of licence contrary to terms of licence.)

9. ('34) 21 AIR 1934 All 517 (519) : 56 All 975 : 149 Ind Cas 389 (DB), *Mathuri* v. *Bholanath.*
('38) 25 AIR 1938 All 32 (34) : 172 Ind Cas 973 (DB), *Mahomed Hasan* v. *Buddhu.*
('27) 14 AIR 1927 All 342 (344) : 100 Ind Cas 479, *Shahjahan Begam* v. *Munna.*
('25) 12 AIR 1925 All 203 (204) : 78 Ind Cas 215, *Amjad Khan* v. *Shafi-Uddin Khan.*
('15) 2 AIR 1915 All 56 (57) : 37 All 91 : 26 Ind Cas 445 (DB), *Rasbehari Lal* v. *Akhai Kunwar.*
('10) 8 Ind Cas 793 (793) (DB) (Cal), *Surnomoyee Peshakar* v. *Chunder Kumar.*
('40) 27 AIR 1940 Lah 18 (19) : 186 Ind Cas 890, *Jogat Singh* v. *District Board, Amritsar.*
('18) 5 AIR 1918 Nag 180 (180) : 48 Ind Cas 723, *Madhusudan Das* v. *Bissuji.*

10. ('40) 27 AIR 1940 Lah 18 (19) : 186 Ind Cas 890, *Jogat Singh* v. *District Board, Amritsar.* (NOTE — This decision seems to proceed mainly on the ground of estoppel, though there is not a sufficient discussion of the questions of fact involved in such a ground.)
('34) 21 AIR 1934 All 517 (519) : 56 All 975 : 149 Ind Cas 389 (DB), *Mathuri* v. *Bholanath.*

Some of the other points of difference between a lease and a licence are :

1. A licence may be granted without writing or registration, unless it is coupled with a transfer of an interest in immovable property. An instrument granting a licence does not require registration.[11] A lease can only be created by a registered instrument, if it is from year to year or for a period exceeding one year or if it reserves a yearly rent.
2. No notice to quit is necessary to determine a *licence* and to bring a suit for ejectment against the licensee.[12] But unless a *lease* is determined by a due notice to quit or in any other recognised mode, the lessor cannot sue for ejectment against the lessee.
3. A lease is normally a transferable right while a licence is not.[13]
4. A lease is a heritable right while a licence is not.
5. A lease is liable to forfeiture by denial by the lessee of the lessor's title. This principle does not apply to a licence.[14]

14. Lease or licence — Tests for determination. — The question whether a right is a lease or a licence according to the principles discussed in Note 13 is one of construction of the grant in each case. In construing such grants, the substance of the transaction must be considered and not merely the nomenclature used by the parties.[1]

The chief tests for determining whether a right is a lease or a licence are as follows :

1. Where the right of possession is not granted but only a right of user not involving possession is granted, the right is only a licence.[2]

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11. ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohu Ram* v. *Tabo.*

12. ('93) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.*

('18) 5 AIR 1918 Cal 601 (602) : 45 Ind Cas 317 (DB), *Gobinda Chandra* v. *Nandadulal.*

('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gyi* v. *Maung Tet.*

13. ('35) 22 AIR 1935 Lah 958 (959) : 16 Lah 608 : 159 Ind Cas 983 (DB), *Ralla Ram* v. *Chuharkana S. T. Committee.*

('24) 11 AIR 1924 All 825 (825) : 84 Ind Cas 284 (SB), *Kallu Shah* v. *Raheem Baksh.* (The mere fact that the license had become irrevocable by the erection of buildings does not necessarily imply that the licensee acquired a right to transfer the license or the building.)

14. ('25) 12 AIR 1925 All 203 (204): 78 I. C. 215, *Amjad Khan* v. *Shafi Uddin.*

('23) 10 AIR 1923 All 403 (403) : 75 Ind Cas 596, *Mt. Durga* v. *Babu Ram.*

('17) 4 AIR 1917 All 395 (396) : 39 All 621 : 40 Ind Cas 443, *Akbar Ali Khan* v. *Shah Muhammad.*

('01) 1901 All W N 157 (157) (DB), *Dharam Kunwar* v. *Fakira.*

Note 14

1. (1904) 1904 App Cas 405 (408) : 73 L J P C 62 : 90 L T 741, *Glenwood Lumber Co.* v. *Phillips.*

(1916) 2 App Cas 54 (59) : 85 L J P C 229 : 114 L T 762, *King* v. *David Allen and Sons, Bilposting Ltd.*

('33) 20 AIR 1933 All 735 (737) : 55 All 874 : 145 Ind Cas 674 (FB), *In re Burmah Shell Oil Storage and Distributing Co. Ltd. of India.*

('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.*

('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 949, *Sabdi Bepari* v. *Budhai.*

('36) 23 AIR 1936 Pat 362 (368) : 163 Ind Cas 525 (DB), *B. N. W. Rly. Co. Ltd.* v. *Janki Prasad.*

2. ('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.*

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Note 14

2. Where the right of occupation is given but not the *exclusive* right of occupation, the right is only a licence. The reason is that a lease necessarily implies an exclusive right of possession of the leased property and is incompatible with the existence of any right of possession in the lessor.
3. Where a right of exclusive possession is given, the right will normally be a lease, although there may be some reservations or restrictions as to the user of the property, provided the general control over the property is in the grantee.[3]
4. Where a right of exclusive possession is given but there is sufficient reason to hold that only a *personal* right and not an interest in the property was intended to be created, the right will be only a licence.

The undermentioned cases[4] fall under the *first* class. In such cases, even an exclusive right of user will not make the right a lease.[5]

As regards the *second* class, the position of a lodger in an inn or hotel is an often-quoted instance. The subject has been dealt with separately in Note 15. The cases noted below[6] will fall under this class.

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3. (1904) 1904 App Cas 405 (408) : 73 L J P C 62 : 90 L T 741, *Glenwood Lumber Co.* v. *Phillips.*

(1911) 2 K B 195 (212) : 80 L J K B 778 : 104 L T 676, *Young* v. *Liverpool Assessment Committee.* (Nature of respondent's business was not consistent with anything but exclusive occupation subject to the control of the customs' authorities.)

('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.*

('23) 10 AIR 1923 Bom 228(229): 88 I.C. 316, *Indian Hotels Co. Ltd.* v. *Phiroz Sorabji.* (Quoting Halsbury's *Laws of England*, Vol. XVIII, page 337, Art. 770.)

('12) 16 Ind Cas 705 (707) (DB) (Cal), *Mahipal Singh* v. *Lalji Singh.* (To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession.)

('25) 12 AIR 1925 Mad 434 (436) : 48 Mad 368 : 86 Ind Cas 688 (FB), *Board of Revenue* v. *S. I. Ry. Co.*

4. ('93) 16 Mad 280 (281, 282) : 3 Mad L Jour 27 (DB), *Ramkrishna* v. *Unni Check.* (Permission to capture elephants.)

('14) 1 AIR 1914 Oudh 272 (273) : 25 Ind Cas 666, *Sadiq Husain* v. *Secy. of State.* (Theka of right to fish and collect produce from nazul land belonging to Government is not a lease but a mere licence. Money payable by thekadar is licence fee and not rent.)

('27) 14 AIR 1927 Bom 115 (117, 122) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakhmichand* v. *Ratanbai.* (Tenants agreeing to use privies in common with others—Tenants are licensees with regard to privies.)

(1895) 1 Q B 484 (492) : 64 L J Q B 84, *Jones* v. *Commissioners of Inland Revenue.* (Agreement to pay annual sum for use of telephonic lines and apparatus.)

('89) 13 Bom 87 (89, 90) (SB), *In re Hormusji Irani.* (Grazing right.)

5. (1916) 2 App Cas 54 (61) : 85 L J P C 229 : 114 L T 762, *King* v. *David Allen and Sons, Billposting, Ltd.* (Agreement giving exclusive permission to affix posters and advertisements to the flank walls of property for a certain period.)

('01) 25 Bom 433 (447) : 3 Bom L R 1, *Heiniger* v. *Dros.*

(1863) 8 L T (NS) 792 (793) : 32 L J Ex 217 : 159 E R 51 : 11 W R (Eng) 786 : 133 R R 605, *Hill* v. *Tupper.* (Grant by canal company of exclusive right to let pleasure boats.)

6. ('07) 35 Cal 82 (99) : 6 Cal L Jour 342 (FB), *Secy. of State* v. *Karuna Kanta.* (Right to hold fair.)

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Note 14

As regards the *third* class, the cases noted below[7] fall under this class. In such cases, the mere fact that the possession is determinable at very short notice or without any *notice* at all will not make the right a licence.[8]

On this part of the subject, the decisions[9] put the proposition somewhat like this: "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or restrictions as to the purposes for which it may be used, it is in law a demise of the land itself." This only means that the right of exclusive possession is *prima facie* a test of a lease and that where such right exists, it will be deemed to be a lease, *unless* there is sufficient reason to hold that only a personal right and not an interest in the property was intended to be granted.

In cases falling under the *fourth* class, the absence of an intention to grant an interest in the property may be gathered from the facts of

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('30) 17 AIR 1930 Oudh 203 (204) : 127 Ind Cas 46 (DB), *Bhaija* v. *Chuttan*. (Use of certain land for the purpose of wrestling ground.)
(1882) 10 Q B D 327 (330) : 52 L J M C 1 : 48 L T 57, *Smith* v. *Lambeth-Assessment Committee*. (Book-stall on railway platform.)
(1895) 1 Q B 484 (493) : 64 L J Q B 84, *Jones* v. *Commissioners of Inland-Revenue*. (Licence to place automatic machines on railway platforms.)
('23) 10 AIR 1923 Bom 228 (229, 232) : 88 Ind Cas 316, *Indian Hotels Co. Ltd.* v. *Phiroz Sorabji*. (Grant of cubicles to keep motor cars on payment of certain rent.)
('25) 12 AIR 1925 Mad 434 (434, 435) : 48 Mad 368 : 86 Ind Cas 688 (FB), *Board of Revenue* v. *S. I. Ry. Co.* (Licence to stack coal on railway platform.)
(1875) 10 C P 402 (408) : 44 L J C P 257 : 32 L T 615 : 23 W R (Eng) 562, *Wells* v. *Kingston-upon-Hull Corporation*. (Permission to use certain dock for the repairs of ships.)
(1875) 10 Q B 444 (448) : 44 L J M C 180 : 33 L T 329 : 24 W R (Eng) 16, *London and Nort Western Railway Co.* v. *Buckmaster*. (Railway company letting stables to certain coal owners on payment of monthly rent—*Held*, railway company was properly rated as occupier, as no exclusive possession over stables was parted with.)
(1901) 1 Ch 578 (581) : 70 L J Ch 263 : 84 L T 48, *Wilson* v. *Tavener*. (Agreement to allow the plaintiff to erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable for a bill posting station at a yearly rent.)
(1868) 3 Q B 350 (357) : 37 L J M C 73 : 18 L T 601 : 16 W R (Eng) 1059, *Watkins* v. *Milton-next-Gravesend Overseers*. (Grant of a right to use moorings fixed in the bed of river as a floating coal depot.)
(1868) 4 Q B 9 (13) : 38 L J M C 39 : 19 L T 378 : 17 W R (Eng) 76, *Grant* v. *Oxford Local Board*. (Boat Club possessed of barge—In absence of exclusive occupation, no rateability.)

7. ('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor*. (Occupation of municipal stables.)
(1911) 2 K B 195 (212) : 80 L J K B 778 : 104 L T 676, *Young* v. *Liverpool Assessment-Committee*. (Premises granted for the purpose of a bonded warehouse.)
('12) 16 Ind Cas 705 (707) (DB) (Cal), *Mahipal Singh* v. *Lalji Singh*. (Lease of *ahar* or reservoir for water.)
('35) 22 AIR 1935 Cal 638 (638) : 159 Ind Cas 235, *Bir Bikram Kishore Manikya* v. *Amanaddin*. (Lease of a tank for rearing and preserving fish—Exclusive right of khas possession given to transferee—Document is a lease and not license.)
8. (1877) 2 App Cas 262 (276) : 46 L J M C 273 : 36 L T 595 : 25 W R (Eng) 383, *Cory* v. *Bristow*. (Permission to lay down moorings in the bed of river Thames—*Held* the grantees were in exclusive possession so as to be liable to poor rate.)
('82) 1882 All W N 100 (100) (DB), *Mulchand* v. *Gardner*. (Government land held at pleasure of the Government.)
9. See cases in foot-note (3).

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the case. Thus, where there is an agreement to grant a lease coupled with a permission to occupy the property in the meanwhile, the permission clearly does not create an *interest* in the property and so is not a lease.[10] Similarly, it has been held that where a catering contract is given to a person and he is granted under the contract, the right to use certain rooms on the premises where the catering is to be done, such right is only a licence and not a lease.[11] So also, agricultural raiyats occupying house sites on the village abadi are only a kind of licensees and not lessees.[12] For other instances, see the undermentioned decisions.[13]

Note — English decisions as to who is an *occupier* of property for purposes of rates, franchise, etc., illustrate typically the difference between a lessee and a mere licensee. An "occupier" may be treated as being in the position of a lessee.

15. Occupation as lodger. — The question, whether a person who occupies rooms in a building is a lodger or an occupying tenant, generally arises under the English law in cases relating to rates and franchise. If he is treated as a lodger, he is a licensee. If he is held to be an occupying tenant, he is a lessee.

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10. ('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 949, *Sabdi Bepari* v. *Budhai.* (Amaldari deed.)

('36) 23 AIR 1936 Pat 372 (377) : 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime and Stone Co. Ltd.* v. *Secy. of State.* (Lessee of a mine allowing the prospective assignee to work the mines pending the grant of consent by his lessor to the transfer—Assignee is licensee.)

11. (1863) 8 L T 697 (699) : 32 L J M C 245 : 11 W R (Eng) 960, *Reg* v. *Morrish.* (Grant of a space for a refreshment-stall in the International Exhibition.)

(1904) 1 K B 713 (718, 719), *Frank Warr & Co. Ltd.* v. *London County Council.* (Grant of exclusive right to supply refreshments in a theatre with permission to use the refreshment rooms in the theatre for that purpose.)

(1901) 85 L T 650 (652) : 50 W R (Eng) 358 : 18 T L R 169, *Edwards* v. *Barrington.* (Grant of exclusive right to use refreshment rooms in a theatre — Affirming (1901) 83 L T 548.)

12. ('27) 14 AIR 1927 All 720 (721) : 105 Ind Cas 878, *Sheoraj Singh* v. *Kunj Behari.*

[*See* ('15) 2 AIR 1915 All 35 (38) : 37 All 144 : 26 Ind Cas 446 (DB), *Abdul Haq* v. *Datti Lal.* (In this case, certain butchers who had been given building sites were held to be lessees holding under building leases.)]

13. ('18) 5 AIR 1918 Nag 180 (180) : 48 Ind Cas 723, *Madhusudan Das* v. *Bissuji.* (Medical adviser allowed to occupy house free of rent.)

('10) 8 Ind Cas 793 (793) (DB) (Cal), *Surnomoyee Peshakar* v. *Chunder Kumar.* (Defendant allowed to occupy house without paying rent.)

('93) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.* (Blacksmith permitted by the mirasdars of a village to occupy a certain house site in the village, on condition of doing work.)

('36) 23 AIR 1936 Pat 362 (368) : 163 Ind Cas 525 (DB), *B. N. W. Rly. Co. Ltd.* v. *Janki Prasad.* (Rights to cultivate castor seeds on a plot of land.)

('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gyi* v. *Maung Tet.* (The owner invited certain persons to live with him as his wife was sick. They continued to live with him after her death — *Held*, they entered with leave and licence of owner.)

[*See* ('12) 15 Ind Cas 385 (386) : 15 Oudh Cas 91 (DB), *Ali Muhammad Khan* v. *Chhedan.* (Grove-holder is *at least* a licencee.)]

The reason why a lodger is not a lessee but only a licensee is that he is not entitled to *exclusive occupation*. Though he is entitled to the *exclusive use* of certain rooms, the circumstances of his occupation show that for purposes of management, etc., the landlord retains control and possession of the property and that the lodger has only the *use* of the rooms.[1]

The question, whether a person is in the position of a lodger or a tenant, thus depends on whether he is entitled to exclusive possession of his rooms or not. This depends on the facts and circumstances of each case. In *Bradley* v. *Baylis*[2] Jessel, M. R., observed as follows :

> "I have been quite unable, so far as I am concerned, to frame an exhaustive definition (as to when a man may be said to occupy as an occupying tenant and when he is merely a lodger) . . . . Some Judges have tried to do so, and, in my opinion, they have failed; and I think it is wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case."

The mere fact that the landlord lives on the premises will not be sufficient to hold that a person occupying rooms in the house is only a lodger and not a tenant.[3] See the undermentioned decisions[4] as to when the possession of such a person can be said to be exclusive and when not.

16. Occupation as tenant or servant. — Where a servant (or agent) of the owner occupies property on his behalf the occupation is in law that of the owner himself and so there is no lease.[1] There is neither a right to exclusive possession nor an interest in the property

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Note 15

1. (1868) 3 Q B 350 (357) : 37 L J M C 73 : 18 L T 601 : 16 W R (Eng) 1059, *Watkins* v. *Milton-next Gravesend Overseers.*
(1906) 1 K B 60 (67, 68, 70): 75 L J K B 310: 94 L T 76: 54 W R (Eng) 225, *Kent* v. *Fittal.* (To entitle a person to the franchise in respect of the occupation of part of a house, he must show that he occupies it separately—If another person is really in control of that part of the house the person living in it has not a separate occupation within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict, c. 26); his occupation is on behalf of his landlord and he is a lodger — On the other hand, if by agreement with his landlord he has an independent occupation, which the landlord cannot control, his occupation is that of a tenant, and entitles him to the franchise as an inhabitant occupier — In such cases the vital question is that of control by the landlord.)
2. (1881) 8 Q B D 195 (219) : 51 L J Q B 183 : 46 L T 253 : 30 W R (Eng) 823.
3. (1906) 1 K B 60 (67) : 75 L J K B 310 : 94 L T 76 : 54 W R (Eng) 225, *Kent* v. *Fittal.*
4. (1871) L R 7 Q B 90 (97) : 41 L J M C 30 : 25 L T 696 : 20 W R (Eng) 179, *Reg.* v. *Georgess Assessment Committee.* (One criterion is whether the landlord retains the control of the outer door and has shewn by his retaining the control of the outer door that he has the control of the whole of the premises.)
(1881) 8 Q B D 195 (216-221) : 51 L J Q B 183 : 46 L T 253 : 30 W R (Eng) 823. *Bradley* v. *Baylis.* (The fact that the landlord does not reside personally but has resident servants who occupy on his behalf part of the house is enough to hold that the landlord is in possession.)

Note 16

1. (1810) 2 Taunt 339 : 2 Leach 1015 : Russ & Ry 185 : 11 R R 605, *Rex* v. *Stock.*

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in such a case. Where a servant's occupation or residence in a house belonging to his master is *required* for the purpose of the service, such occupation is on the master's account. Hence, in such a case, the servant is not a tenant.[2] Where such residence or occupation is not *required* for the purpose of the service, the servant is not prevented from holding as a tenant.[3] But it does not necessarily follow that he holds only as a tenant.[4] The question is one of intention of the parties in each case.

This section recognises service as a form of rent. So, a lease in consideration of service to be rendered is valid. A servant therefore who is allowed to occupy the master's property in lieu of remuneration or as part remuneration for his service, *may* be a tenant. But it is not *necessary* that he should be one. The question depends on whether the right of exclusive possession is granted and whether an intention to create an interest in the property exists.[5] If these elements are present

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2. (1875) L R 10 Q B 422 (429): 44 L J M C 114: 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill*. (Occupation whether as a tenant or servant—*Hughes* v. *Overseers of Chatham*, 5 M & G 54 (78) and *Dobson* v. *Jones*, 5 M & G 112 establish the correct principles—Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties, which the occupier has to perform, the occupation is that of a servant — "Required" means more than the master saying "You must reside in one of my houses, if you come into my service"—The residence must be ancillary and necessary to the performance of the servant's duties: and unless he is required for that purpose to reside in the house and not merely as an arbitrary regulation on the part of the master, he is *not prevented* from occupying as a tenant.)
(1865) L R 1 Q B 72 (75) : 35 L J M C 74 : 148 R R 774 : 13 L T (N S) 364 : 14 W R (Eng) 81, *R.* v. *Spurrell*. (The question is whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master.)

3. (1875) L R 10 Q B 422 (429) : 44 L J M C 114 : 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill*.
(1904) 1 K B 84 (86) : 73 L J K B 13 : 89 L T 724 : 52 W R (Eng) 140, *Dover* v. *Prosser*. (Schoolmaster *permitted* but *not required* by his employers to live in certain house so long as he continued to hold the appointment of schoolmaster—*Held* that the schoolmaster did not occupy the house by virtue of his employment — He was not *required* to reside in the house and the nature of his duties did not necessitate his residing there.)

4. *See* (1865) L R 1 Q B 72 (75) : 35 L J M C 74 : 148 R R 774 : 13 L T (N S) 364 : 14 W R (Eng) 81, *R.* v. *Spurrell*. (The observation suggesting the contrary in this case is too broad.)
('02) 15 C P L R 42 (43, 45), *Bandhu Ganda* v. *Balram*. (NOTE — In this case the rule in English law is stated to be that if the residence of the servant on the property is not necessary for the purpose of the service and is merely permitted by the employer by way of remuneration, an interest in the property is created and there is a tenancy — This is too broad a statement.)

5. ('05) 3 Nag L R 185 (191, 192), *Wasudeo Gharpure* v. *Ganu Kunabi*. (Suppose a landlord *A* says to *B*, 'I let you my field for Rs. 30 a year in tenancy, and I agree that you shall not pay me any rent in cash, while you work as my agent' —Here if *B* accepts, a clear contract of tenancy is created, whether *B* serves *A* or not—If *B* did not serve he would be liable to pay Rs. 30 as rent — But suppose *A* says to *B* 'I engage you as my servant on Rs. 30 a year and instead of paying you Rs. 30 in cash I allow you to take the produce of my *sir* land' — Here there is no intention to enter into a contract of tenancy and if *B* put an end to the special contract of service, there is no other basis upon which he would be liable to pay rent.)

the servant will be a tenant and not a mere licensee,[6] though the occupation is to end on the termination of the service.[7] But if these elements are not present, the servant (or agent) will not be a tenant but only a licensee.[8]

Where an agreement is made between A and B that B should cultivate A's land and as his remuneration take a share of the crops and there is no intention to grant B an interest in the land, the agreement is not a lease but a licence.[9]

17. Market rights. — Applying the general tests laid down in Note 14, if the grant of a right to hold a fair or a hat or a market on a piece of land gives the grantee the right of exclusive occupation of the land and there is no sufficient reason to hold that only a personal right and not an interest in the property was intended to be granted, the grant will amount to a lease. The undermentioned decisions fall under this principle.[1] But where the right of exclusive occupation is not given, the grant will only be a licence and not a lease.[2] Whether an exclusive right of occupation is given or not must be judged from the facts and circumstances of each case.

Persons who are allowed to sell articles in a market or on a road are not lessees but only licensees, because they are not entitled to an exclusive right of occupation of any particular spot.[3]

('24) 11 AIR 1924 Nag 67 (67) : 72 Ind Cas 1012, *Manoharlal* v. *Ramratan.*

6. ('02) 15 C P L R 42 (43, 45), *Bandhu Ganda* v. *Balram.* (Private servant allowed to cultivate occupancy land in lieu of remuneration — *Held*, he was a tenant.)

7. (1875) L R 10 Q B 422 (429) : 44 L J M C 114 : 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill.*

(1904) 1 K B 84 (86) : 73 L J K B 13 : 89 L T 724 : 52 W R (Eng) 140, *Dover* v. *Prosser.*

8. ('05) 3 Nag L R 185 (191, 192), *Wasudeo Gharpure* v. *Ganu Kunabi.* (Agent appointed to carry on duties of mokaddam in village allowed to appropriate usufruct of a particular field in the *sir* land of the proprietor as his remuneration —No lease.)

('88) 1 C P L R 182 (185), *Lala Lachman* v. *Hariram.* (Person engaged as Mukhtyar and given land rent-free in lieu of salary so long as the agency subsisted —Such a person is not a tenant.)

('92) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.* (Person permitted to occupy a house site without payment of rent so long as he did blacksmith's work for the grantor—*Held* licensee and not tenant.)

9. ('11) 11 Ind Cas 32 (32) (Cal), *Biroj Mahammad* v. *Mohabut Mahammad.*

Note 17

1. ('30) 17 AIR 1930 Cal 739 (742, 743): 57 Cal 655: 129 Ind Cas 177 (DB), *Secy. of State* v. *Bhupal Chandra.*

('29) 16 AIR 1929 Cal 197 (199, 200, 201) : 55 Cal 1328 : 115 Ind Cas 185 (DB), *Secy. of State* v. *Sati Prasad.*

('40) 27 AIR 1940 Cal 89 (91): I L R (1939) 2 Cal 254: 186 Ind Cas 625, *Anwarali* v. *Jaminilal Roy.* (Exclusive right to sell fish or let out the land to others for selling fish.)

2. ('08) 35 Cal 82 (93, 100) : 6 Cal L Jour 342 (FB), *Secy. of State* v. *Karunakanta.* (Zamindar granting right to hold fair on land in the possession of tenants.)

3. ('35) 22 AIR 1935 Pat 184 (185) : 154 Ind Cas 877, *Aliar Kunjra* v. *Hazarimull.*

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A person, to whom has been granted the right to collect licence fees from persons selling goods in the municipal market, is not a lessee but only a licensee.[4]

18. Agreement for cultivation of land, if lease. — An agreement for the cultivation of land under which a person is to cultivate another's land and the two are to share the produce in certain proportions may be a lease if there is an intention to transfer an *interest* in the property. But if there is no such intention such agreement cannot create a lease. The matter is one purely of construction in each case.[1] If there is no intention to transfer an *interest* in the property, the right will be a licence. See NOTE 13.

19. Possession under void lease — Effect. — A void lease can confer no title to possession. If the intended lessee enters into possession of the property under a void lease he thereby does not get any interest in the property. The personal agreement implied in a void lease is not by itself a good defence to a suit for possession against the lessee by the lessor.[1] The reason is that a suit for ejectment is one based on *title* and only a ground of *title* can be a good defence to such a suit. A merely *personal* right cannot be a good defence to such a suit.

> The mere fact that an owner sues for possession on the allegation that the defendant is his tenant (whose tenancy has expired) and it is found that the alleged tenancy is void or that the lease-deed is inadmissible in evidence does not disentitle the plaintiff to a decree for possession where he is otherwise entitled to such decree.[2]

A lessee in possession may, however, be entitled to sue for specific performance of the contract to grant a lease which is implicit in the void lease.[3] Even where such a contract is required to be, but has not been, registered, S. 27A of the Specific Relief Act confers on the lessee the right of suing for specific performance.

('28) 15 AIR 1928 Oudh 99 (100, 101) : 3 Luck 282 : 106 Ind Cas 491, *Ram Lal* v. *Badal Khan.*

('08) 35 Cal 82 (89, 91, 99, 100): 6 Cal L Jour 342 (FB), *Secy. of State* v. *Karunakanta.*

4. ('35) 22 AIR 1935 Pat 184 (185) : 154 I. C. 877, *Aliarkunjra* v. *Hazarimull.*

Note 18

1. ('20) 7 AIR 1920 Cal 548 (549): 58 Ind Cas 859 (DB), *Brahmamoyee Barmani* v. *Munsur.* (No lease—A I R 1919 Cal 14 reversed.)

('19) 6 AIR 1919 Cal 264 (265) : 50 Ind Cas 285 (DB), *Pokan Sheikh* v. *Rajni Kamal.* (No lease.)

Note 19

1. (1903) 1 K B 577 (580) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams.*

('05) 29 Bom 580 (606): 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secretary of State.*

[But see ('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Unregistered lease — Independent collateral agreement not to eject for a certain period is good defence to suit for ejectment.)]

2. ('04) 27 All 190 (191) : 1904 All W N 212 (DB), *Beni* v. *Puran Das.*

('38) 25 AIR 1938 All 32 (33) : 172 Ind Cas 973, *Mirza Md. Hasan* v. *Buddhu.*

3. ('36) 23 AIR 1936 Bom 246 (248, 249) : 163 Ind Cas 579, *Chandulal* v. *Keshavlal.* (18 A I R 1931 P C 79 : 58 Cal 1235 : 58 Ind App 91 (PC) relied on.)

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Note 19

Besides this, a lessee in possession may also be entitled to resist the suit for possession by the lessor on the ground of part performance under S. 53A if the conditions contemplated by that section exist.[4]

The lessee may also be entitled to resist the lessor's suit on equitable grounds, such as estoppel, etc. For a discussion of these principles see Notes 12, 20 and 55.

It may be noted here that the *English* doctrine of part-performance or the principle of equity laid down in *Walsh* v. *Lonsdale*[4a] has no application to cases under this Act. Section 53A differs from the English doctrine of part performance in many respects. See Notes on S. 53A.

Notwithstanding the invalidity of the lease, the tenant in possession will have a good title except against the true owner on the well-known principle that possession is a good title against the whole world except the true owner.[5]

A lessee in possession under a void lease will also be in the position of a licensee[6] and not a mere trespasser if the lease has been granted by the true owner and the lessee has entered with the owner's consent. As to the rights of a licensee in possession, see Note 13.

A person who has entered under a void lease is not liable for *rent*.[7] But he may be liable for compensation for use and occupation.[8] He will not be liable for mesne profits where the lease has been granted by the true owner and the lessee has been let into possession by such owner. Because in such a case his possession will not be *wrongful*. But where the invalidity of the lease is due to its having been granted by a person not entitled to the property, the lessee will be liable for mesne profits.[9] In some cases, the lessee may be liable for the amount payable as rent

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4. ('37) 24 AIR 1937 All 10 (12) : I L R (1937) All 312 : 166 Ind Cas 812 (DB), *Shyam Sundar Lal* v. *Din Shah.*

4a. (1882) 21 Ch D 9 (15) : 31 W R (Eng) 109 : 52 L J Ch 2 : 46 L T 858.

5. See Salmond, *Jurisprudence*, 1924 Edn., page 293 — See also Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 4.
[But see ('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud Mondal* v. *Paomocha Sarkar.* (Submitted not correct.)]

6. ('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346 (DB), *Basdeo Rai* v. *Dwarka Ram.*
[*See also* ('15) 2 AIR 1915 All 56 (57) : 37 All 91 : 26 Ind Cas 445 (DB), *Ras Behari Lal* v. *Akhai Kunwar.* (Possession under unregistered gift.)]

7. ('39) 26 AIR 1939 Lah 162 (163), *Mt. Malan* v. *Dayal Singh.*

8. ('06) 9 Oudh Cas 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.*
('10) 8 Ind Cas 668 (673) : 35 Mad 95 (FB), *Ajam Sahib* v. *Meenatchi Devastanam.* (Per Krishnaswami Aiyer, J.)
('32) 19 AIR 1932 Sind 60 (61) : 25 Sind L R 451 : 137 Ind Cas 136 (DB), *Kodulal* v. *Beharilal.*
('29) 16 AIR 1929 All 831 (832) (DB), *Baij Nath* v. *Kundan Lal.*
('38) 25 AIR 1938 Mad 746 (748) : 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipality.*
('12) 15 Ind Cas 830 (831) : 36 Bom 500 (DB), *Ramchandra* v. *Tama.* (Suit for rent — Lease invalid for want of registration — Lessee (defendant) admitting tenancy — Compensation for use and occupation may be decreed and if the rent mentioned in the lease deed is not excessive may be awarded at that rate.)

9. ('11) 11 Ind Cas 381 (381) (DB) (Mad), *Dakshnamurti Pillai* v. *Subbu Iyer.*

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under the void lease, as damages for *breach of contract*, when such contract is provable under the law.[10]

Notwithstanding the invalidity of the lease, the possession of the property coupled with the payment and acceptance of rent and other circumstances may be sufficient to establish by implication a contract of tenancy between the parties.[11] (See also Note 8.)

The intended tenant may also prescribe by adverse possession for a *title* to a tenancy. See Note 82.

Registration :

Where there is an instrument which fulfils the definition of a lease either under the Registration Act or this Act and is compulsorily registrable but is not registered it will not be admissible in evidence (under S. 49 of the Registration Act) to prove the lease or the terms of the lease. But such instrument may be admissible in evidence in a suit for specific performance of the contract to grant a lease or for the purposes of S.53A of this Act. Such an instrument will also be admissible in evidence to prove any *collateral* transaction which does not require to be registered. Thus, the instrument may be admissible in evidence to prove the nature of the lessee's possession and to show that it is not under any claim of ownership.[12] The matter sought to be proved must be distinct from the transaction embodied in the instrument, and must not require registration. Thus, in the above instance, the giving of possession to the lessee would be a transaction distinct from the granting of the lease (which would be complete by the execution of the instrument of lease[12a]), and would not require registration. The intention of the parties in giving and taking possession would thus relate to a collateral matter not requiring registration. Similarly, an *independent* oral agreement of lease may be proved by the unregistered instrument.[13] So also, the rent fixed in the

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10. ('09) 2 Ind Cas 920 (922) : 12 Oudh Cas 140 (DB), *Udit Narayan Singh* v. *Rampal Singh.*

('10) 8 Ind Cas 668 (673) : 35 Mad 95 (FB), *Ajan Sahib* v. *Meenatchi Devastanam.* (Per Krishnaswami Iyer, J. — The question depends on the existence of consideration.)

11. ('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud Mondal* v. *Paomocha Sarkar.*

('16) 3 AIR 1916 Cal 664 (664) : 29 Ind Cas 502 (DB), *Kartik Mandal* v. *Bama Charan Mandal.* (Such tenancy is confined to the portion *actually* in possession of the tenant and will not cover the entire property attempted to be demised.)

('25) 12 AIR 1925 Cal 1171 (1172) : 90 Ind Cas 98 (DB), *Ramchandra Agarwala* v. *Syameswari Dasya.*

('28) 15 AIR 1928 Cal 376 (377) : 116 Ind Cas 155, *Rai Charan Pal* v. *Jadu Nath Pal.*

('31) 130 Ind Cas 14 (15) (DB) (All), *Qadir Khan* v. *Kesho Das.*

('03) 7 Cal W N 90 (93) (DB), *Lala Majlis Sahai* v. *Mt. Narain Bibi.*

[*See also* ('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (In this case, an independent collateral agreement not to eject for a certain period was held to be proved by certain receipts which were not registered.)]

12. ('38) 25 AIR 1938 All 32 (33) : 172 I. C. 973, *Mirza Md. Hasan* v. *Buddhu.*

('31) 130 Ind Cas 14 (15) (DB) (All), *Qadir Khan* v. *Kesho Das.*

12a. See S. 107 which shows that where registration is required delivery of possession is not necessary for the completion of a lease.

13. ('10) 6 Ind Cas 201 (202, 203) (DB) (Mad), *Thambi* v. *Avayambal.*

unregistered instrument may be referred to for determining what would be fair and reasonable compensation for use and occupation.[14] But where the agreement between the parties as to the letting is contained in the instrument and *there is no independent contract of letting*, it is not open to the parties to fall back upon the original agreement, if it is found that the instrument is not admissible in evidence.[15] For other instances see the cases noted below.[16]

20. Who can grant a lease. — Section 7 shows that the following conditions are necessary to entitle a person to transfer property —

(1) he must be the owner of the property or must be authorised to transfer such property ;

(2) he must be competent to contract ;

(3) he can transfer only in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

The above principles are applicable to leases also as they are transfers of property. Thus, a person who is neither the owner of property nor authorised to transfer it cannot grant a lease of it.[1] (See also Note 21.) On the same principle a person cannot grant a lease so as to outlast his own interest in the property. Thus, a sub-lease will not be

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('06) 9 Oudh Cas 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.*

('39) 26 AIR 1939 Lah 423 (425) : I L R (1940) Lah 70 (DB), *Taj Din* v. *Abdul Rahim.*

('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Independent agreement not to eject for a certain period held proved.)

14. ('32) 19 AIR 1932 Sind 60 (61) : 25 Sind L R 451 : 137 Ind Cas 136 (DB), *Kodulal* v. *Beharilal.*

('12) 15 Ind Cas 830 (831) : 36 Bom 500 (DB), *Ramchandra* v. *Tama.*

15. ('22) 66 Ind Cas 904 (905) (Lah), *Firm of Karim Bakhsh Taj-ud-din* v. *Natha Singh.*

16. ('86) 1886 Pun Re No. 68, *Mrs. Martha Pool* v. *Secretary of State for India.* (Lease of furnished building — No separate lease as to furniture and no separate agreement to keep furniture in good repair — Lease inadmissible in evidence for want of registration—Lessor cannot recover damages for breach of covenant to be answerable for loss or damage to furniture.)

('32) 19 AIR 1932 Cal 83 (84) : 59 Cal 396 : 135 Ind Cas 725 (DB), *Haran Chandra* v. *Kali Prasanna.* (Lease deed not admissible to prove permission to erect permanent structures where there is no independent and separate permission apart from the unregistered instrument.)

Note 20

1. ('35) 22 AI R 1935 Lah 958 (958) : 16 Lah 608 : 159 Ind Cas 983 (D B), *Ralla Ram Dina Nath* v. *Small Towns Committee Chuharkana.* (Vesting of public street in local body does not make it *owner* of the soil or empower it to grant leases of a public street.)

('34) 21 A I R 1934 Bom 140 (142) : 151 Ind Cas 156 (D B), *Govindlal Maneklal* v. *Manekchowk Spinning and Weaving Mills Co.* (Person whose land has been compulsorily acquired by the Government cannot grant lease thereof.)

('29) 16 AIR 1929 Rang 184 (185) : 7 Rang 144 (DB), *Russa Engineering Works Ltd.* v. *Wearne Brothers Ltd.* (Agreement by *C* to grant lease to *A*—*A* transferring his rights under the lease to *B* — *B* entering into possession and paying rent to *C*, the lessor directly—No relationship of landlord and tenant is created between *A* and *B*.)

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Note 20

valid after the expiry of the main lease.[1a] So also, a minor not being competent to contract cannot grant a lease. (See Note 22.) The third requirement referred to above is a matter depending on the particular provisions of law that may be applicable in each case. For illustrations of such provisions reference may be made to the Notes on S. 7.

The requirements set forth above are subject to various equitable principles of a general nature. The results of some of these principles may be formulated as follows:

(1) The grantor of a lease cannot dispute its validity on the ground of his own want of title to the property. This is apart from any question of estoppel under S. 115 of the Evidence Act. So, even if the grantee knew about the want of title of the grantor, the latter will not be entitled to dispute the validity of the grant. The principle is based on the maxim that no man can take advantage of his own wrong.[2]

(2) Where the grantor has, by express or implied representation, induced the grantee to believe that the facts necessary to make the grant of a lease valid exist, and the grantee has accepted the grant under such belief, the grantor will be estopped under S. 115 of the Evidence Act from denying such facts. But this principle does not apply to representations as to competency to *contract*.[3] Nor does the principle of estoppel apply to a matter of pure law where both parties are aware of the material facts, as no estoppel can arise from ignorance of law, which both parties must be presumed to know.[4]

(3) Under the doctrine known as feeding the grant by estoppel, where a person not being entitled to any interest in the property professes to grant a lease of it and subsequently acquires an interest in the property, the lease will operate on such interest.[5] For further information on this principle, see the Notes on S. 43.

Unless any such established principle of equity applies to the case, a lease which does not satisfy the requirements of S. 7 will be void and of no effect, even as against the grantor.

1a. ('71) 15 Suth W R 394 (394) (DB), *Abdool Mannah* v. *Buroda Kant.*
('22) 9 A I R 1922 Pat 429 (430) : 1 Pat 764 : 77 Ind Cas 929 (D B), *Jogendra Singh* v. *Kesho Prasad Singh.*
(1900) 27 Cal 156 (162) : 26 Ind App 216 (P C), *Beni Pershad* v. *Dudhnath Roy.*

2. Broom, *A Selection of Legal Maxims*, 10th Edn. 1939, page 192.
[See however ('29) 16 A IR 1929 Cal 433 (434) : 56 Cal 252 : 118 Ind Cas 561, *Nawab of Murshidabad* v. *Bilas Roy.* (In this case there was a statutory prohibition against a certain Nawab to grant a lease for a premium— He granted such a lease—It was held that he was not estopped from disputing the validity of the lease—The decision treats the lessor as not competent to *contract*.)

3. See Pollock and Mulla, *Contract Act*, 6th Edn. 1931, pages 72, 73; Woodroffe and Ameer Ali, *Law of Evidence*, 6th Edn. 1915, page 765.

4. ('95) 18 Mad 53 (58) : 4 Mad L Jour 237 (D B), *Gurulingaswamy* v. *Ramalakshmamma.*

5. ('71) 15 Suth W R 394 (394) (DB), *Abdool Mannah* v. *Buroda Kant.*

Where a lease has been granted by a trespasser and the owner accepts rent from the tenant such acceptance will not amount to a *confirmation* of the lease.[6] Because, in such cases, the lease will be void and incapable of ratification or confirmation. The same principle will apply also to cases where a person with a limited interest in property grants a lease for a period exceeding his own tenure in the property. Thus, where a life-tenant grants a permanent lease, the sub-lease will be void against the superior landlord after the death of the life-tenant and the landlord cannot ratify it by mere acceptance of rent from the tenant inducted by the life-tenant.[7] But in all such cases acceptance of rent by the owner from the person inducted on the land may give rise to an inference of a fresh tenancy by implication[8] on the principles discussed in Note 8.

A lease by a Hindu widow in excess of her powers is not *void* after her death. It is only *voidable* by the reversioner who can, at his option, ratify the lease or repudiate it.[9] Hence, in such a case the acceptance of rent from the tenant by the reversioner will amount to a ratification of the lease by the widow.[10]

Where a Hindu reversioner is entitled to avoid a transfer by a widow he need not get the transfer *set aside* through Court. He can treat it as a nullity and sue for *possession*. This, however, does not mean that the transfer is *void*. Because, as seen above, he can *ratify* the transfer, which will not be possible if the transfer was void.[11]

As to leases by minors see Note 22.

21. Lease by de facto proprietor. — As section 7 provides, a transfer of property can only be made by a person who is entitled to it or who is authorised to transfer it. The mere fact that a person is in *possession* of a certain immovable property will not therefore entitle him to grant a lease of the same when he is not otherwise entitled to do so.[1] And a tenant inducted by such a person can be evicted by the

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6. ('03) 27 Bom 515 (531, 532) : 5 Bom L R 274 (D B), *Fatehsingji* v. *Bamanji.* (Lease by unauthorised person—Acceptance of rent will not estop the owner from questioning the lease.)
('97) 1 Cal W N 142 (143) (DB), *Sheocharan Lal* v. *Purbhoo Dayal.* (Lease granted by trespasser — Acceptance of rent by owner— Lease not binding on purchaser from owner.)

7. (1900) 27 Cal 156 (162) : 26 Ind App 216 (P C), *Beni Pershad* v. *Dudhnath Roy.*

8. (1900) 27 Cal 156 (163) : 26 Ind App 216 (P C), *Beni Pershad* v. *Dudhnath Roy.*

9. ('98) 25 Cal 1 (8) : 24 Ind App 164 (P C), *Madhu Sudan* v. *Rooke.*
('01) 28 Cal 532 (539, 540) : 5 Cal W N 279 (DB), *Sadai Naik* v. *Serai Naik.*
('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna.*

10. ('98) 25 Cal 1 (8, 9) : 24 Ind App 164 (PC), *Madhu Sudan* v. *Rooke.*

11. ('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna.*

Note 21

1. ('22) 9 AIR 1922 Pat 429 (431) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad.*
('04) 31 Cal 703 (706): 8 Cal WN 320 (DB), *Upendra Narain* v. *Pratap Chunder.*
'97) 1 Cal W N 142 (143) (DB), *Sheo Charan* v. *Purbhoo Dayal.*

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true owner without notice. But such a lessee will have a good title as against persons *other* than the owner and his privies.[2]

The view is sometimes expressed that a person inducted on land as tenant by a *de facto* owner of the property who has no title to it is entitled to the tenancy even as against the true owner where both the grantor and grantee have acted in good faith.[3] The view purports to be based on the ruling of the Calcutta High Court in *Binad Lal* v. *Kalu*.[4] But it is submitted that that ruling does not justify any such broad proposition which would so materially reduce the applicability of the general principle already stated, namely, that a person cannot confer a title to anything to which he himself has no title. The decision merely proceeds on the construction of S. 5, sub-s. (2) of the Bengal Tenancy Act and holds that a person let into cultivating possession by a *de facto* proprietor without title is a raiyat within the meaning of that section. The decision does not support the proposition that in every case in which there is a *bona fide* letting by a trespasser who is in possession of an estate without title, the tenancy would be binding on the true owner. There is no doubt, a reference in the judgment to the fact of *bona fides*. But this is only by the way and is not the legal ground on which the decision is based.

22. Lease by or in favour of a minor. — A lease is a transfer of property and as such is governed by S. 7. Hence, a minor, being a person not competent to contract, cannot grant a lease. A lease granted by a minor would be void.[1] He cannot even ratify it on attaining majority, by acceptance of rent or otherwise.[2] But where the lease has been granted by the guardian of a minor in excess of his authority, the lease is not *void* and the minor can ratify it on attaining majority.[3]

Though a lease by a minor is void, it has been held that the Court has power on general principles of equity to require the consideration

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2. ('93) 20 Cal 708 (713) (FB), *Binad Lal* v. *Kalu*.

3. ('07) 5 Cal L Jour 9 (14) (FB), *Peary Mohun* v. *Radhika Mohun*.
('14) 1 AIR 1914 Cal 685 (685) : 24 Ind Cas 434 (DB), *Sukumari Ghose* v. *Haladhar Mandal*.
('04) 31 Cal 703 (706) : 8 Cal W N 320 (DB), *Upendra Narain* v. *Pratap Chunder*.
('22) 9 AIR 1922 Pat 429 (431) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad*.

4. ('93) 20 Cal 708 (712, 713) (FB). (17 Cal 45 approved.)

Note 22

1. ('31) 18 AIR 1931 Mad 147 (148, 149) : 129 Ind Cas 449, *Govinda Kurup* v. *Beekku*. (The mere fact that the instrument evidencing the lease has been executed not by the minor lessor but by the lessee makes no difference.)

2. ('31) 18 AIR 1931 Bom 178 (182) : 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath*. (Further, agreement for renewal of leases in future being a contract is void where the lessor is a minor while executing the lease.)

3. *See* ('12) 13 Ind Cas 606 (607) (DB) (Cal), *Mohoram Sheikh Chaprashi* v. *Telamuddin Khan*. (Lease granted by persons acting on behalf of minor whose authority was not questioned by the minor.)

paid by the lessee to be refunded before he is ejected from the property.[4]

As seen in Note 8 on S. 7 a transfer of property *in favour* of a minor is not void.[5] But where a lease in favour of a minor contains covenants to be performed by him it has been held that the lease would be invalid.[6]

The above view proceeds on the ground that in such cases, the covenants being void under S. 11 of the Contract Act, the lease also would be void for want of consideration. The reasoning will not apply where the lease has been granted in consideration of a premium paid in a lump sum and there is no outstanding covenant to be performed by the lessee.

In *Raghavachariar* v. *Srinivasa Raghava*[7] Sreenivasa Iyengar, J., points out the distinction between cases in which the transfer is in *consideration* of certain promises or covenants and those in which the property transferred is itself *burdened* with certain liabilities, as for instance, the liability to pay taxes.

The transfer in favour of a minor would be void in the former case but not in the latter case.

23. Lease of untransferable property. — A lease being a transfer of property, a valid lease implies that the property leased is *transferable* under the law. Section 6 provides that property of any kind may be transferred except as otherwise provided by this Act or any other law for the time being in force. If therefore a property is not transferable under the law it cannot be leased. Reference may be made to S. 6 and the Notes on it as regards the transferability of various kinds of property. Where a lease covers both transferable and untransferable

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4. ('28) 15 AIR 1928 All 286 (287) : 108 Ind Cas 566 (DB), *Bisheshar Pathak* v. *Rup Narain Singh*. (NOTE—Ss. 64 and 65, Contract Act, will not apply in such cases—But relief is given on general principles of equity. 33 All 779 relied on.)

5. ('29) 16 AIR 1929 All 604 (605) : 121 Ind Cas 398 (DB), *Zafar Ahsan* v. *Zubaida Khatun*. (Mortgage in favour of minor—Minor having paid the full consideration for it he can enforce the mortgage. 30 Cal 539 (PC) distinguished; 33 Mad 312 dissented from.)

('16) 3 AIR 1916 All 366 (368) : 38 All 154 : 35 Ind Cas 23 (DB), *Narain Das* v. *Dhania*. (Sale—Minor purchaser can sue for possession.)

('15) 2 AIR 1915 All 478 (479) : 38 All 62 : 31 Ind Cas 792 (DB), *Munni Koer* v. *Madan Gopal*. (Sale.)

('11) 11 Ind Cas 20 (21) : 33 All 657 (DB), *Ulfat Rai* v. *Gouri Shankar*. (Sale by certificated guardian of minor in favour of minor—Sale upheld.)

('24) 11 AIR 1924 Lah 611 (612, 613) : 5 Lah 317 : 82 Ind Cas 96 (DB), *Thakur Das* v. *Mt. Putli*. (Sale in favour of a minor can be enforced especially when the consideration for the same has been paid and there is no further obligation on the minor.)

('30) 17 AIR 1930 Mad 425 (426) : 120 Ind Cas 77, *Subba Reddy* v. *Guruva Reddy*. (Sale.)

('15) 2 AIR 1915 Mad 412 (414) : 37 Mad 390 : 26 Ind Cas 195 (DB), *Munia* v. *Perumal*. (Sale—Property purchased for minor's benefit by his maternal uncle.)

('19) 6 AIR 1919 Pat 561 (563): 4 Pat L Jour 682: 52 Ind Cas 338 (DB), *Madhab Koeri* v. *Baikuntha*. (Mortgage in favour of minor—He can enforce mortgage.)

6. ('18) 5 AIR 1918 Pat 626 (627) : 3 Pat L Jour 518 : 46 Ind Cas 670 (DB), *Pramila Bali Das* v. *Jogesher Mandal*.

('17) 4 AIR 1917 Mad 630 (645) : 40 Mad 308 : 36 Ind Cas 921 (FB), *Raghava Chariar* v. *Srinivasa Raghava*.

7. ('17) 4 AIR 1917 Mad 630 (645) : 40 Mad 308 : 36 Ind Cas 921 (FB).

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properties but is separable as regards the two kinds of properties, it will be valid with regard to the transferable items. Thus, a lease of temple lands is not wholly invalid simply because the lessee is empowered under the terms of the lease also to manage the temple affairs, the transfer of the right of management being clearly separable from the lease of the land.[1] See also Note 20.

24. Commencement of lease. — Section 5 expressly defines a transfer of property as a conveyance of property in present or in future. Hence a lease which is to commence at a future date is valid.[1] But there must be an actual *conveyance* or *present demise* and not a mere agreement to convey in future. (See Note 4.)

Under S. 110 where no day is fixed for the commencement of a lease, it commences from the making of the lease. The mere fact that rent is fixed according to the Bengali year does not mean that the tenancy is to commence from the beginning of the Bengali year and not the date of the lease.[2]

English law :

(1) Under the English law, the lease must fix a date from which it is to begin. This is not necessary under this section.

(2) Under the English law a lease to commence more than 21 years after the date of the instrument is void. There is no such limit under this Act.[3]

25. "Certain time." — One of the requisites of a valid lease is that it must be granted for a certain time express or implied or in perpetuity.[1] Thus, a provision as to the period of the lease is an *essential* part of a lease. But the period may be express or implied. Further, a provision implied by law or usage will be sufficient for the purpose.[2] This follows from S. 106 which provides that in the absence of

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Note 23

1. ('09) 3 Ind Cas 104 (105) (DB) (Mad), *Ramanathan Chetty* v. *Lakshman Chetty*. (19 Mad 211 relied on.)

Note 24

1. ('30) 17 AIR 1930 Bom 210 (212, 213): 125 Ind Cas 428, *Sultan Ali* v. *Tyeb Pir*.
('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Mohd. Baksh*.
('25) 12 AIR 1925 Cal 1087 (1093): 52 Cal 695: 91 Ind Cas 320, *Ramjoo Mahomed* v. *Haridas Mullick*.
2. ('28) 15 AIR 1928 Cal 392 (396): 55 Cal 435: 110 Ind Cas 368 (DB), *Dinanath* v. *Janaki Nath*.
3. Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 110.

Note 25

1. ('05) 29 Bom 580 (602, 603): 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State*. (Uncertainty as to term will be fatal to validity of lease.)
2. ('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Koomaree* v. *Sheikh Rutton*. (If there is no *express* agreement and a tenant is let into possession and pays rent he becomes tenant-at-will or from year to year or in other words, he holds by the landlord's permission upon what may be the usual terms of such a holding, by the general law, or by local custom and in such a case he is liable to be ejected by a reasonable notice.)
[*See* ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithulal*. (Lease of grove land in United Provinces — No certain time need be stipulated — According to custom and practice of these provinces a lease of grove land exists for such time as the trees stand on that land.)]

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Note 25

a contract or local law or usage to the contrary a lease will be deemed to be one from year to year or from month to month according to the purpose of the lease.[2a]

A lease, however, need not be for a period which is *certain* on the date of the lease. It is sufficient if the period is fixed with reference to a future event on the happening of which the lease will be determined and the period of the lease will *become* certain, although on the date of the lease it may not be possible to say when such event will happen.[3] Thus, the word "certain" in the section means really certain or capable of being *made* certain at a future date.[4]

This is quite clear from the other provisions of this Chapter. For instance, Ss. 106 and 107 refer to leases from year to year. Section 108, cl. (i) refers to a lease of uncertain duration. So also S. 111, cl. (b) refers to the period of a lease being limited conditionally by the happening of a certain event. All these provisions show that the period of a lease need not be certain on the date of the lease. It is sufficient if the period is fixed (by actual contract or by implication of law) in such a way that it can be made certain at a future date.

On this principle a lease for the life-time of the lessee will be a valid lease, because the period of the lease will become certain on the tenant's death.[5] Similarly, it has been held that a lease for the duration of the world war of 1914 was valid.[6] So also, a lease to continue during the existence of certain institutions will be valid.[7] For other instances,

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[But see ('40) 27 AIR 1940 Cal 89 (90): I L R (1939) 2 Cal 254: 186 Ind Cas 625, *Anwarali* v. *Jamini Lal.* (There is a statement which occurs in the course of this judgment that a lease which is silent as to the duration of its term would not be a lease within the meaning of this section. In its literal sense this statement is obviously incorrect.)]

2a. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal.* (Monthly tenancy.)

[*See* ('01) 5 Cal W N 801 (804) (DB), *Durga Mohun* v. *Rakhalchandra.* (This decision seems to be inconsistent with S. 106 in requiring six months' notice to determine a building lease.)

('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.* (Building lease of Government land held to be lease from year to year — Due to Crown Grants Act, T. P. Act did not apply — English common law applied as justice, equity, and good conscience.)]

3. (1789) 3 Term Rep 462, *Goodright D. Hall* v. *Richardson.*

4. ('36) 23 AIR 1936 Lah 890 (891) : 167 Ind Cas 198, *Ramchand Manchanda* v. *H. G. Lush.*

[*See also* ('04) 27 Mad 332 (334) : 13 Mad L Jour 429 (DB), *Sree Sankarachari Swamiar* v. *Varada Pillai.* (The test to determine, whether a particular term in a contract is certain, is not to see whether the term is in itself certain but to see whether it is capable of being made certain — *Id certum est quod reddi certum potest.*)]

5. ('36) 164 Ind Cas 837 (839) (Cal), *Chandi Charan* v. *Ashutosh Lahiri.*

6. (1916) 33 T L R 114, *Great Northern Ry. Co.* v. *Arnold.*

7. ('31) 18 AIR 1931 Bom 466 (471) : 133 Ind Cas 839 (DB), *Ramchandra* v. *Narasinha.* (The "Kesari" and "Maratha" institutions.)

('31) 18 AIR 1931 Bom 178 (181): 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath.* (Lease to last during existence of a certain company is valid—Company is legal entity — AIR 1929 Bom 66 distinguished as being a case of lease to continue during existence of firm which has no legal existence as an entity.)

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see the undermentioned cases.[8]

But where the future event with reference to which the period of a lease is fixed is of so uncertain a character that it would be impossible to say at any time whether such event has happened or not, the period will not be certain. Thus, it was held by the Bombay High Court that a lease, till the lessor provided other suitable land to the lessee was, in the circumstances of the case, uncertain as to the period of the lease and was therefore void.[9] The reason was that the lease did not provide any method for determining the suitability of the land.[10] Even where the parties have intended the lease to go on *indefinitely* and have not laid down any limit of time for the lease either absolutely or relatively as above described, it cannot be said that the lease is for an uncertain time so as to become void under the section. Because, in such a case, the lease is ordinarily construed as being one for the lifetime of the lessee. (See Note 26.)

Where the lease is to go on indefinitely but subject to the liability of being put an end to at any time or at the end of any year or month or similar period, the term of the lease is fixed with reference to the future event which will terminate the lease and is not uncertain for the purpose of this section. Nor is the lease in such a case one for an *indefinite* period, as such period *is defined* though not *certain immediately*. A lease from month to month or year to year will fall under this category. (See Note 26.) A tenancy-at-will is also a lease of this type. (See Note 32.)

The section does not prescribe any minimum period of time for which a lease can be granted. Thus, a lease for a day would be valid.[11] Similarly, a tenancy-at-will would be a valid lease under the section, the term in such a case being fixed with reference to the exercise of will by either party which will terminate the lease. (See Note 32.)

26. Term of lease — Mode of determination. — A lease is the outcome of a contract. Hence the period of the lease is to be determined with reference to the contract between the parties in each case. But a provision as to such period need not be express. It may be implied. Further, such a provision may be implied by law or usage. In the absence of a contract, or local law or usage to the contrary, a lease will be deemed under S. 106 to be one from year to year or from month to month according to the purpose of the lease.

In construing a lease with reference to the period for which it has been granted the following principles must be noted :

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8. ('05) 7 Bom L R 772 (785), *Mahomed* v. *Ezekiel*. (Lease to last as long as the pendency of a mortgage.)

('36) 23 AIR 1936 Lah 890 (891) : 167 Ind Cas 198, *Ramchand Manchanda* v. *H. G. Lush*. (A tenancy for the period during which a tenant remained in the station where the rented premises are situate.)

9. ('05) 29 Bom 580 (602, 603) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State*.

10. See the observations in AIR 1931 Bom 466 which suggest the above explanation for the decision in 29 Bom 580.

11. ('24) 11 AIR 1924 Rang 278 (279): 82 Ind Cas 381 (DB), *Azee Meah* v. *Jeewa*.

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Note 26

(1) A lease need not fix a definite period in terms of years, months and days as the term. Similarly, a lease need not fix a particular year, month and day in the future as the time, up to which the lease is to run. In other words, it is not necessary that on the *date of the lease*, it must be possible to foretell definitely how long the lease is to continue. It is sufficient if the term of the lease is fixed with reference to a future event on the happening of which the lease will come to an end and the term thereof will *become* certain. It is immaterial that on the date of the lease, the time when such event will happen is not certain. (See Note 25.)

(2) Where the parties have not fixed any term either absolutely or relatively as above described but have shown their intention that the lease is to go on indefinitely, the rule of construction discussed in Note 72 will apply. This rule shows that a lease for an indefinite period is *ordinarily* to be construed as enuring at least for the lifetime of the lessee.[1]

(3) The above rule of construction will not apply where the term of the lease has been fixed or can be definitely ascertained. As already seen, such term may be fixed absolutely or relatively. It may be fixed expressly or impliedly. It may be implied, for instance, from the nature and purpose of the lease, the manner in which rent has been reserved and other circumstances. Thus, the fact that a yearly rent is reserved may show that the tenancy is one from year to year.[2] But the test is not a conclusive one.[2a] In some cases, though a yearly rent is reserved, the lease may be held to be merely a tenancy at will.[3] In either case, however, the term of the lease is *fixed*. It is fixed with reference to a future event. This future event is the act by which the tenancy is terminated by either party under the option which he has under the lease. The above illustrations show that the mere fact that the duration of a lease is dependent on the will of the parties does not make it a lease under which a term is *not* fixed. In such cases, the lease is intended to go on *indefinitely* till it is determined by a valid notice or otherwise at the option of the parties. The termination of the lease is made to

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Note 26

1. ('27) 14 A I R 1927 Cal 179 (181, 182) : 99 Ind Cas 200 (DB), *Ashutosh Lahiri* v. *Chandi Charan.*
('21) 8 A I R 1921 Cal 474 (476) : 47 Cal 979 : 60 Ind Cas 984 (DB), *Jogesh Chandra* v. *Mokbul Ali.*

2. (1897) 24 Cal 720 (722, 724) (DB), *Kishori Mohun* v. *Nand Kumar.*
('26) 13 A I R 1926 Cal 558 (558) : 53 Cal 95 : 94 Ind Cas 684 (DB), *Chandi Charan* v. *Ashutosh Lahiri.*
See also Note 31.

2a. ('16) 3 A I R 1916 Cal 358 (359) : 1916 Pun Re (Cr) No. 8 : 34 Ind Cas 311 (DB), *Aklu* v. *Emman.* (Presumption of yearly tenancy from the rent being paid yearly does not apply to the case of lodgings.)

3. ('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankar Das.*

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Notes 26–27

depend entirely on the will of the parties. Still, the above rule of construction cannot be invoked in such cases. It cannot be held that such a lease enures for the lifetime of the grantee.

(4) Even where the future event with reference to which the term of a lease is fixed is *uncertain* in character and it cannot be said at any time whether such event has occurred, it must be held that the parties have fixed a term of the lease. In such a case, the lease will be *void* for uncertainty.[4] It cannot be treated as a lease for the lifetime of the lessee by invoking the above rule of construction. Nor can such a lease be held to be one from year to year or month to month under S. 106. Because, there is a "contract to the contrary" in such a case.

(5) Suppose a lease is intended to go on indefinitely and no term is fixed therefor, (absolutely or relatively) but that there is sufficient reason, on the construction of the lease, to hold that it is intended to confer a *hereditary* interest. Such a lease will not be treated as one for the *lifetime* of the lessee. It will virtually be one in perpetuity. (See Note 72.)

From the above discussion, it follows that wherever it is possible to gather clearly the intention of the parties as to the duration of a lease, there will be no room for the application of the presumption under S. 106. It is immaterial whether the parties have fixed a limit of time (absolutely or relatively) for the lease or have intended the lease to go on indefinitely. In either case, the term of the lease will be determined in accordance with the principles discussed above and not according to the presumption under S. 106.

27. Lease entitling lessee to hold as long as he pays rent or as long as he may wish. — There is a conflict of decisions as to the construction of leases, under which the lessee is entitled to hold as long as he pays rent or performs other obligation under the lease. It is conceived that a lease, under which the lessee would be entitled to hold as long as he requires the property or wishes to have the property, would also fall under the same class. There would be no difference in principle, it seems, between the two classes as regards the determination of their nature from the point of view of duration. In either case, it would be within the power of the lessee to put an end to the lease at any time he thinks fit without reference to the lessor. Hence the two classes of cases have been considered together in this Note.

The decisions fall under the following classes :

(1) Such a lease is a permanent and heritable one.[1]

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4. ('05) 29 Bom 580 (604) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State.*

Note 27

1. ('26) 13 A I R 1926 Bom 374 (374, 375): 95 Ind Cas 524 (DB), *Bai Sona* v. *Bai Hiragavri.* (Lease to last, so long as the lessee regularly pays rent, is a permanent lease and does not terminate on the death of the lessee. Regarding cases like 4 Bom 424, in which it was held that a lease as long as lessee pleased, was a lease for life, held decided on rather fanciful grounds.)

(2) Such a lease is one for the life of the lessee.[2] This is the view generally adopted. The reason given is that the continuation of the lease depends on the *will* of the lessee which cannot be exercised after the lessee's death.[3]

(3) Such a lease is one for a period exceeding one year and requires registration.[4] This view is consistent with (1) and (2) above.

(4) Such a lease is not one for a term exceeding five years within the meaning of the proviso to S. 17, sub-s. (1) of the Registration Act.[5] This view is consistent with the view in (5) below.

(5) Such a lease is a tenancy-at-will.[6] The reason given is that such a lease is really a tenancy at the will of the lessee, which, by implication of law, is a tenancy at the will of both the parties.[7]

[*See also* ('05) 7 Bom L R 401 (404) (DB), *Navalram* v. *Javerilal*. (In this case, it was a building lease for *no* fixed period—There was a clause which ran : 'so long as *we* go on paying the amount of the rent you cannot ask us to remove the building which has been erected on the said land'—*Held* that this included payment not only by the original lessee but also by his successors. In favour of this view, attention was drawn to the change from the singular to plural.)

2. (1903) 1 K B 577 (582) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahms*. (Lease entitling lessee to hold as long as he paid rent regularly—*Held* lease for life.)
('29) 16 A I R 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdul Rahim* v. *Sarafalli*. (Lessee to be entitled to remain in possession so long as he paid the rent.)
('77) 1877 Bom P J 177 (DB), *Suleman* v. *Asmad Isap*. (Lease, under which lessee is entitled to be in possession as long as he chooses, is not mere tenancy-at-will but a lease for the life of the lessee.)
('80) 4 Bom 424 (425) (DB), *Vaman Shripad* v. *Maki*. (Lessee entitled to hold as long as he pleases.)
(1907) 11 Cal W N 809 (811) (DB), *F. W. Higgins* v. *Nobin Chunder*. (Tenancy for 5 years—Provision that tenant might continue thereafter on performing the conditions of the lease—*Held*, the lessee was entitled to hold till death.)
('39) 26 A I R 1939 Cal 423 (424, 425) : 184 Ind Cas 216 (DB), *Mohammad Azizal* v. *Raziuddin*. (Tenancy to continue as long as the lessee paid rent and observed the covenants.)

3. ('29) 16 A I R 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdul Rahim* v. *Sarafalli*.

4. ('22) 66 Ind Cas 904 (905) (Lah), *Karim Baksh* v. *Natha Singh*. (Lease enabling tenant to continue in possession so long as he paid his rent.)
(1900) 2 Bom L R 488 (489) (DB), *Mania* v. *Lallubhai*. (Lease providing that the lessee will vacate the land, in case he failed to pay rent or perform the service agreed upon held to be a lease for a term exceeding one year.)

5. ('04) 27 Mad 43 (45) : 13 Mad L Jour 356 (DB), *Ramaswamy Ayyar* v. *Thirupathi Naik*.
[*See also* ('82) 4 Mad 381 (382) (DB), *Virammal* v. *K. Rungayyangar*. (Lease for indefinite period liable to be terminated by *either* party is not one for a period exceeding five years—Followed in 24 Mad 421.)]

6. ('12) 16 Ind Cas 1002 (1002) : 36 Mad 557 (558) (DB), *Manicka* v. *Chinnappa*. (Lease entitling lessee to hold as long as he may wish or require.)
('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh*. (Lease for a term certain, with option to lessee to continue in possession thereafter as long as he paid the rent.)

7. ('12) 16 Ind Cas 1002 (1002) : 36 Mad 557 (558) (DB), *Manicka* v. *Chinnappa*.

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It is submitted with respect that the view taken in classes 1 and 2 above does not appear to be sound. The view involves the position that the lessee cannot by his own independent will terminate the lease. Because, a lease for life or permanent lease cannot, normally, be put an end to in this way. No doubt, S. 111 includes surrender as one of the modes of terminating a tenancy, and this is applicable to leases for life and permanent leases also. But the surrender referred to in S. 111 is one based on the mutual agreement of the parties. This result, *viz.*, that the lessee cannot leave even if he wants to unless the lessor agrees to his doing so, is obviously against the intention of the parties in such cases.

It seems that the view of the decisions under class (5) is the correct view.

Considered purely with reference to the intention of the parties, it seems to be clear that a lease of the kind in question here is one at the *will* of the lessee. Under English law, a tenancy expressed to be at the will of the lessee is, by implication of law, one at the will of the lessor also. As pointed out by the Madras High Court in *Manicka* v. *Chinnappa*[8] there seems to be no reason why this principle should not be followed in India also. It seems to be based on commonsense and quite in accordance with justice, equity and good conscience.

The decisions under class (4) are consistent with this view.

It is conceived that on the principles discussed in Note 26 the rule, that a lease for an indefinite period will be regarded *prima facie* as a lease for the lifetime of the grantee, will not apply to the kind of leases under discussion here.[9] The reason is that in such cases, the term of the lease is not indefinite but fixed by the lease. The term is fixed with reference to a future event, such as the discontinuance of the payment of rent by the lessee, which will terminate the lease.

It is a question of construction in each case, whether the lessee is entitled to hold as long as he pays the rent or as long as he wishes or requires the property. An agreement by the lessor not to raise the rent, so long as the lessee kept the premises, does not imply that the lessee is to be entitled to keep the premises as long as he wishes.[10] Similarly, where a tenant takes up a property under an agreement that he would pay the assessment, this does not imply that he would be entitled to keep the property so long as he pays the assessment.[11]

See also the undermentioned decision.[12]

28. Lease for indefinite period—Construction of—See Notes 26 and 72.

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8. ('12) 16 Ind Cas 1002 (1002) : 36 Mad 557 (558) (DB).
9. But see ('39) 26 A I R 1939 Cal 423 (425) : 184 Ind Cas 216 (DB), *Mohammad Azizal* v. *Raziuddin*. (The contrary opinion expressed in this case is, it is submitted, not correct.)
10. ('13) 19 Ind Cas 493 (495) (DB) (Lah), *Jamasjee Boga* v. *Duni Chand*.
11. ('85) 1885 Bom P J 160 (DB), *Harcharandas* v. *Sadashiv*.
12. ('28) 15 A I R 1928 Lah 937 (938) : 113 Ind Cas 543, *Rulia* v. *Bodhraj*. (Lease which merely says that the lessor will be entitled to eject the tenant in case of non-payment of rent does not necessarily imply that the tenant could not be ejected so long as he paid his monthly rent—But see 2 Bom L R 488, in which such a lease was held to be one for a period exceeding one year.)

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Note 29

29. Lease for a term certain with a provision for continuation thereafter. — Suppose, a lease is granted for a term certain with a provision that after the expiry of the term the lessee shall be entitled, at his option, to continue to hold for a further period. It is the general view that such a lease is only for the term fixed and the further period is not to be counted as a part of the term.[1] The reason is that in such cases, the actual demise is to be regarded as being only for the term fixed and the provision as to the future as only entitling the lessee, at his option, to a *renewal* of the tenancy.[2]

Where, the right of the lessee to continue in possession after the expiry of the term fixed is subject to the concurrence of the lessor, it is clear, on the above principle, that the lease is to be treated only as one for the period fixed.[3]

But it seems that the above is only a rule of *construction*. Where it is clear from the provisions of a lease that the intention is to confer a further interest on the lessee in continuation of the interest created in the first instance and not merely an option of obtaining a renewal of the lease, the lease will be one for a period exceeding that fixed therein as the primary term.[4]

Note 29

1. ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*
('06) 8 Bom L R 580 (583) (DB), *Yousaf* v. *Poleologo.*
('90) 17 Cal 548 (555, 556), *Boyd* v. *Kreig.*
('32) 19 AIR 1932 Sind 217 (218, 219) : 26 Sind L R 377 : 140 Ind Cas 681 (DB), *Devidas* v. *Aluwalla Bros.*
[See however ('86) 1886 Pun Re No. 68, *Pool* v. *Secretary of State.* (In this case a distinction is made between cases where the option is with the lessee and those in which the option is with the lessor. It is held that in the former case the lease is one for a period exceeding the term fixed and that in the latter case it is not such a lease.)]

2. (1877) 2 Ex D 355 (358), *Hand* v. *Hall.*
[*See also* ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.* (This decision holds that the principle of *Hand* v. *Hall*, (1877) 2 Ex D 355 cited above will apply to such cases. It is said that after the expiry of the term the tenant would be only tenant at will.)]

3. ('68) 5 Bom H C R (A C) 92 (94) (DB), *Moro Vithal* v. *Tukaram.* (Provision that lessee might after six months remain in occupation at a monthly rent, till the lessor called upon him to vacate, did not extend the term for which the lease was granted, as at the conclusion of that term the lessee would be only a monthly tenant of the lessor.)
('77) 26 Suth W R 98 (98) (DB), *Mohunto Southo Pursad Dass* v. *Rughoo Podhan.*
('84) 8 Bom 493 (494) (DB), *Jagjivandas* v. *Narayan.* (A kabuliyat of lease under which the tenant might claim possession of the land for one year but was to pay rent to the landlord so long as the landlord might leave the land with the tenant, did not require registration—There was no interest created by way of lease extending beyond one year.)
('78) 3 Bom 21 (22) (DB), *Apu* v. *Narhari.* (Lease for one year certain containing an expression of the tenant's readiness to hold longer at the same rent should the landlord so desire is not a lease for more than one year.)
('86) 1886 Pun Re No. 68, *Pool* v. *Secretary of State.*

4. ('86) 13 Cal 113 (114) (DB), *Bhobani Mahto* v. *Shibnath Para.* (A zur-i-peshgi lease, granted on the advance of a loan, was in the first place to remain in force for one year. But it further provided that if the loan was not repaid, it will continue in force. *Held* that the lease was for a term exceeding one year.)

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Notes 29–30

In the decisions noted below[5] where a lease was granted for a period of years and contained a provision that the lessee might continue in possession thereafter as long as he performed the conditions of the lease, it was held that the lease conferred a life-interest on the lessee. See also Notes 27 and 37.

30. **Lease expressed to be terminable before end of term fixed.** — A lease, which fixes a certain period as the term thereof but provides that it may be terminated before the end of the term in a certain contingency, is a good lease.[1] Such a lease will be one for the period fixed as the term.[2]

Under S. 110 where a lease is expressed to be terminable before the expiration of the period fixed by it, and the lease omits to mention at whose option it is to be so terminable, the lessee and not the lessor shall have such an option.

('36) 164 Ind Cas 55 (56, 57) (Cal), *Banamali Das* v. *Kamala Kanta Majumdar*. (Lease for fixed period—Clause that tenant will make new arrangement with landlord at end of period and if no such arrangement made, to continue on same rent—*Held* later clause amounted to present demise for further period.)

[*See* ('31) 18 AIR 1931 Nag 128 (128) : 134 Ind Cas 263, *Sadaram* v. *Sundar Singh*. (Lease for five years with provision for enhanced payment of rent in case lessee continued in possession thereafter—*Held* on construction that it was only a lease for five years.)

('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu*. (The mere fact that clause in lease deed for fixed term provides for payment of damages by way of enhanced rent for use and occupation after the term does not mean that the relationship of landlord and tenant continues in such case ; he is liable to ejectment after the period.)]

[*See also* ('82) 4 Mad 381 (382) (DB), *Virammal* v. *Kasturi Rungayyangar*. (Muchalka executed for one fasli to remain in force until the execution of a fresh muchalka for rent less than Rs. 50, is exempted from registration by virtue of notification of Local Government under S. 17 of the Indian Registration Act which exempts from registration leases, the terms granted by which do not exceed five years and the rent does not exceed Rs. 50.)]

5. ('29) 16 AIR 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdulrahim* v. *Sarafalli*.

('07) 11 Cal W N 809 (811) (DB), *F. W. Higgins* v. *Nobin Chunder Sen*.

Note 30

1. *See* (1881) 44 L T 293 (297) : 50 L J Q B 121, *Cheshire Lines Committee* v. *Lewis & Co*. (A lease to *A B* for life, with a proviso that if the lessor wanted it for a certain purpose before *A B's* death, the lease should determine, would be a good lease, if made by deed.)

2. ('22) 9 AIR 1922 Cal 436 (437, 438) : 69 Ind Cas 877 : 49 Cal 507, *Sanjib Chandra* v. *Santosh Kumar*. (Lease for five years, with clause for termination before, in certain event—*Held* lease was for period exceeding one year.)

[*See also* (1869) 4 Q B 293 (305) : 17 W R (Eng) 414 : 38 L J Q B 81, *Morton* v. *Woods*. (That if one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words are void for the repugnancy.)]

[See however ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhsh* v. *Sheo Din*. (Lease for six years and reserving yearly rent and providing that it is determinable at any time by lessor by giving 15 days' notice—*Held* that later clause prevailed and nothing more than tenancy-at-will was created.)]

Section 105
Note 31

31. Periodic leases. — A reference to S. 106 will show that it refers to two forms of leases, the lease from year to year and that from month to month. There are similar leases under the English law also.[1] Such leases may be conveniently called periodic leases.

The following are the essential elements of such leases :

(1) The lease must be intended, normally,[2] to go on indefinitely, till it is terminated by either the lessor or the lessee.[3]

(2) The termination contemplated must be by a notice which satisfies certain requirements. These requirements are[4] —

(a) *In the case of a lease from year to year*, the notice must be at least of six months and must expire with a year of the tenancy.

(b) *In the case of a lease from month to month*, the notice must be at least of 15 days and must expire with a month of the tenancy.

From the above, the following propositions emerge :

(1) A periodic lease can be terminated in any year or month of the tenancy, as the case may be, by a notice which fulfils the requirements above-mentioned.

(2) Such a lease cannot ordinarily be terminated in any other manner.[5]

Both the above elements are necessary to make a lease one from year to year or one from month to month. If either of such elements is wanting, the lease will not be a periodic lease.

As regards the first element. — If the lessor or lessee cannot determine a lease by simply giving a notice which fulfils the above requirements, the lease will not be a periodic lease.[6] Thus, a lease till the lessor provides 'other suitable land' to the lessee and the expiry of six months from the time when the lessor does so, is not a lease from

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Note 31

1. Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 106.
Topham, *New Law of Property*, 4th Edn., 1932, page 254.

2. Such leases are not exceptions to the law that a lease can be determined by surrender or forfeiture.

3. ('94) 17 Mad 218 (219) : 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Veikunta Hegde*.
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir*.

4. NOTE—Section 106 does not *define* a lease from year to year or from month to month and the provision as to notice contained in the section is not given as a part of the *definition* of such leases; it is conceived, that such a provision lays down an *essential* element of such leases for the purpose of the Act.

5. ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir*.

6. (1903) 1 K B 577 (582) : 72 L J K B 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams*. (Lease entitling lessee to hold as long as he paid rent regularly is not a weekly tenancy though weekly rent is reserved. NOTE — In this case, it was assumed that such a lease would be one for the life-time of the lessee—For a criticism of this view see Note 27.)

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year to year.[7] The reason is that the lessor cannot determine the lease by giving notice in *any* year of the tenancy. He can only do so *after* he has provided other suitable land.

As regards the second element. — If a lease can be determined *without* notice, it will not, ordinarily, be a periodic lease.[8] Thus, a lease which can be terminated by the lessor at any time is a tenancy-at-will and not a lease from year to year, although an annual rent may be reserved under the lease.[9] Where a notice is not required to determine a tenancy, the mere fact that it is determinable only at the end of a year or month of the tenancy will not make it a lease from year to year or from month to month.[10]

Suppose, a lease *requires* a notice for its determination. Even then, the lease will not be a periodic lease, if the notice required is not one which is of the kind described above. Thus, take for instance, a lease which provides that it is determinable at 15 days' notice. The lease will not be one from month to month,[11] unless it is provided that the notice must *expire* with a month of the tenancy.

Whether a lease is one from year to year or from month to month is a question of construction of the lease in each case.[12] The mere fact

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[*See also* ('80) 44 L T 293 (297) : 50 L J Q B 121, *Cheshire Lines Committee* v. *Lewis & Co.* (Weekly letting—On the same day, the lessor signing a document saying that the lessee might have the premises till they were required "in order to pull them down" — *Held* on construction that it was only a letting terminable by notice and that the other document was merely a statement assuring the lessee that he would not be disturbed till the lessor wanted the premises.)]

7. ('05) 29 Bom 580 (602) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State.* (Such a lease is void for *uncertainty* as to the term. NOTE — It may be noted that in this case the notice was not required to be one expiring with a year of the tenancy.)

8. ('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram.* (Lease held to be tenancy-at-will, although an annual rent was reserved.)

9. ('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankardas Shivlaldas.*

10. *See* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha Farsi Shirel.* (In this case it was held that the lease was determinable only *at the end* of any year but no previous notice was necessary—It is conceived that such a lease would not be a lease from year to year.)

[*See also* ('16) 3 AIR 1916 Lah 353 (354) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.* (Lease to go on indefinitely but terminable by either party at the end of any month not a lease exceeding one year. NOTE—This necessarily means that it is not a lease from year to year—This decision was followed in AIR 1928 Lah 937.)]

11. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khudabakhsh* v. *Sheodin.* (Such a lease held to be a tenancy-at-will.)

[*See* ('86) 1886 All W N 115 (117) (FB), *Hanso* v. *Har Narain.* (*Held* that such a lease is " *not even* for a month certain" which necessarily implies that it is not a lease from month to month.)

12. *See* ('81) 3 Mad 358 (359) : 5 Ind Jur 636 (DB), *Venkatachellam Chetti* v. *Audian.* (Patta granted for one fasli to remain in force until another patta was granted—*Held*, it was a lease from year to year.)

that the rent is fixed on an annual basis will not necessarily show that a lease is one from year to year.[13]

A lease from year to year or month to month is a *single* lease for the whole period till it is determined.[14] Such a lease is not a succession of distinct leases each for a year or month as the case may be.[15] There is no re-letting at the beginning of each successive period.[16]

Under S. 106, in the absence of a contract, local law or usage to the contrary, a lease for an agricultural or manufacturing purpose will be deemed to be one from year to year and a lease for any other purpose will be deemed to be one from month to month.

32. Tenancy-at-will. — A tenancy-at-will has been defined as arising "when a person lets to another to hold at the will of the lessor or the person letting. The lessee or the person taking the lands is called a tenant-at-will and as he may be turned out when his landlord pleases, so he may leave when he likes."[1] Hence, where a lessor has the option of determining a lease at any time he thinks fit and there is no other limit of time for the lease, the lease will be a tenancy-at-will.[2] In such cases, the law gives the *lessee* also the right of determining the lease at any time he thinks fit. Conversely, a lease under which the *lessee* is entitled to hold the land as long as he wishes (or pays the rent) is really one at the will of the lessee which in law is one at the will of the lessor also and hence is a tenancy-at-will. (See Note 27.)

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13. ('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.*

14. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jaminilal.* (Lease from month to month or from year to year— Tenant holding such a tenancy has an interest for one year or one month certain as the case may be with an accruing interest during every year or month thereafter springing out of the original contract as part and parcel of it.)

15. *See* ('37) 24 AIR 1937 Nag 321 (321) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.* (In this case there is a remark "Even if a lease from month to month is nothing but a succession of definite terms, each of a month's duration . ." It is clear that this is only an assumption for the sake of argument and it was not intended to be laid down that a lease from month to month is a succession of definite terms.)

16. (1894) 1 Q B 164 (167) : 58 J P 213 : 42 W R (Eng) 236 : 10 R 47, *Bowen* v. *Anderson.*

Note 32

1. Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 105.

2. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bahhsh* v. *Sheodin.* (Lease expressed to be for six years but determinable at any time by fifteen days' notice by lessor — *Held*, lease was tenancy-at-will — The later clause was held to override the previous clause as to the term of the lease being six years.)

('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Sheoshankardas.* (Although an annual rent was payable and the lease provided for the payment of the rent from year to year so long as the tenant held possession — 39 Ind Cas 625 (Bom) distinguished as in that case the lessor had no absolute right to determine the tenancy but could only do so in certain contingencies.)

('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram.*

[*See also* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha.* (Landlord entitled to demand possession at the end of any year without any previous notice.)]

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Note 32

A tenancy-at-will cannot arise by presumption under S. 106.[3] When there is no provision as to the duration of a tenancy, it will be presumed to be one from year to year or month to month according to the purpose of the tenancy and not a tenancy-at-will. But an intention to create a tenancy-at-will may be implied and need not be express.[4] It will depend on the facts and circumstances of each case whether the intention of the parties has been to create a tenancy-at-will.[5] Where such a tenancy arises expressly or impliedly, the presumption under S. 106 will not be applicable, such presumption only arising when there is no contract or local law or usage to the contrary.

A tenancy-at-will being an interest in property like any other lease, it must be determined before the lessor can sue for the ejectment of the tenant from the property.[6] As in such cases, the contract itself implies that the lease can be put an end to at any time, a *notice* is not necessary for its determination. It can be terminated by the lessor by a simple demand for possession,[7] and by the lessee by simply communi-

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3. NOTE.—Under the English law also a tenancy at will can only arise by express contract, see Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edn., pages 105, 106.

4. *See* ('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Rutton Bepary*. (Terms of holding as between landlord and tenant are matter of contract—In the absence of express agreement, if the owner lets another into possession and the latter pays rent a tenancy-at-will or from year to year is created.)

5. ('36) 23 AIR 1936 Pat 275 (281, 282) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal*. (Where in a lease deed besides the use of the expression 'bemiadi thica patta' the lease is granted to the lessee and his heirs and they are to pay rent to the lessor and to his disciples and the rent payable is referred to as 'a fixed rent' and moreover the lease permits the lessee not only to enjoy the property himself in any manner he thinks proper by holding it in direct possession by planting orchards, cultivating it' building houses but also to let to tenants as he thinks fit, the lease is a permanent lease and does not create tenancy terminable at the will of the landlord by a notice to quit.)
('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh*. (Lease for one year providing that thereafter the lessee shall pay the annual rent regularly every year—Subsequent to the year, there is only a tenancy-at-will.)
[*See* ('26) 13 AIR 1926 Sind 71 (73) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruq*. (*A* occupying *B*'s land with his permission and without paying rent—*A* is tenant-at-will — Submitted this view is not correct as there can be no tenancy in the absence of consideration in form of premium or rent.)
('26) 13 AIR 1926 Sind 98 (100) : 97 Ind Cas 248, *Mulibai* v. *Vassibai*. (Living on premises without payment of rent, on account of business and family relationship—*Held* a tenancy-at-will was constituted. NOTE—This view is not correct. If tenancy at will is a lease, as it is submitted it is, there cannot be such a tenancy unless there is consideration in the form of premium or rent.)]

6. ('75) 24 Suth W R 172 (173), *Radha Kishore Roy* v. *Sittoo Sirdar*.

7. ('07) 34 Cal 57 (63, 64) : 5 Cal L Jour 181 (DB), *Deo Nandan Pershad* v. *Meghu Mahton*.
('25) 12 AIR 1925 Pat 256 (257, 258) : 85 Ind Cas 77 (DB), *Ramadhani Gope* v. *C. V. Scott*.
('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ram Kishun* v. *Sohila*.
[*See* ('96) 23 Cal 200 (201), *Ramlal* v. *Dinanath*. (In this case it was held that the suit for ejectment might be treated as itself the demand for possession — Submitted this view is not correct as in the absence of such a demand there will be no cause of action for the suit at all.)]

cating to the lessor his intention to give up the lease and actually vacating the property.[8]

The difference between a notice to quit and a demand of possession is this. Notice to quit contemplates the giving of a certain *time* to the lessee within which he has to leave. But a demand of possession does not require any *time* to be given to the lessee for vacating. The demand may be for vacating the property immediately. The idea of notice may also involve the *reasonableness* or otherwise thereof both with regard to the *length* of the notice as well as to the time at which the notice is to expire.[9] Sometimes the *law* itself lays down the limits for these matters, (e. g., S. 106). But though a notice to quit is not *necessary* to terminate a tenancy-at-will, such a notice (by the lessor) will be *sufficient to* terminate it.[10] In the undermentioned case,[11] though the lease provided that it was to be terminable by the lessor at his option, at any time, by giving 15 days' notice, it was held that the lease was a tenancy-at-will. It will be remembered that a *periodic* lease like a lease from year to year cannot ordinarily be determined without a *valid notice*.

[*See also* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha*. (Lease of agricultural land—Tenant entering under agreement that he would pay the amount of the annual rent every year as long as the landlord would keep the *wadi* (part) with him and would give back the same when the landlord would demand it — *Held* that the contract between the parties took the case out of S. 84 of the Land Revenue Code of Bombay of 1879 and that as the rent would not be payable until the end of the year the landlord might put an end to the tenancy and demand the land at the end of any year without giving any previous notice of any particular period but he could not demand immediate possession in the middle of a year.)]

[See however ('12) 16 Ind Cas 351 (352) (DB) (Cal), *Raimala Piprajugi* v. *Shibasundari*. (NOTE—In this case, the judgment says that the suit was for ejectment on the basis that the defendant was a tenant-at-will under the plaintiff and that his tenancy had been determined by a valid notice to quit — But the judgment does not consider whether the tenancy really was one at will and whether notice was necessary for its determination—The judgment merely finds that the notice given in the case was reasonable notice and sufficient to determine the tenancy — But on the whole it appears as if the case is not one under the T. P. Act. 36 Cal 927 which is followed was not such a case.)]

NOTE.—Topham in his *New Law of Property*, 4th Edn., 1932, p. 252, says that a tenancy-at-will is determinable by lessor or lessee by notice. He does not say that a simple demand of possession by the lessor will not be sufficient to determine the tenancy.

8. *See* ('20) 7 AIR 1920 Lah 217 (217) : 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh*. (Tenancy-at-will is not determined by mere non-payment of rent.)
('26) 13 AIR 1926 Sind 71 (74, 75) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruq*. (NOTE—The view expressed in this case that an open assertion by a tenant of title as owner is enough to determine the tenancy, though he does not give up possession is, it is submitted, not correct. It is only a periodic lease such as a lease from year to year that can be determined by simple notice by lessor or lessee. This is the peculiarity of such a lease. The principle does not apply to tenancy-at-will and the lessee cannot determine such tenancy without surrendering possession.)

9. ('09) 2 Ind Cas 656 (659) : 36 Cal 927 (DB), *Paratap Narain* v. *Maigh Lall*.

10. ('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Rutton Bepary*.
('26) 13 AIR 1926 Sind 98 (100) : 97 Ind Cas 248, *Mulibai* v. *Vassibai*.
('36) 23 AIR 1936 Pat 275 (281, 282) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Barelal*.

11. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhsh* v. *Sheo Din*.

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It is sometimes said that a tenancy-at-will is not a *lease* under this section.[12] The reason given is that such a lease is not for a *certain* time express or implied.[13] It is difficult to appreciate this reason.[14] As seen in Note 25 the term of a lease can be fixed with reference to a future event, though it may not be possible to say on the date of the lease, when such event will occur. It is not clear why the act by which the lessor or the lessee may manifest his intention to terminate the lease should not be considered as the event, with reference to which the term of the lease is fixed in such cases.

No doubt, it is considered that a tenancy-at-will is not a *heritable*[15] or *transferable* interest.[16] But this does not necessarily lead to the conclusion that a tenancy-at-will is not a *lease* at all. It is conceived that the above features of such tenancies are only the result of the *presumed* intention of the parties in such cases. The intention being to create an interest whose continuance is to depend on the will of the parties, it is apparently considered, (as it may be very reasonably considered) that the intention is that such interest should be confined in its enjoyment to the grantee personally and should neither be heritable nor transferable. Section 108, cl. (j), under which a lease is transferable, is expressly made subject to there being no contract or local usage to the contrary. It is clear that such a contract may be express or implied. A tenancy-at-will may be regarded as containing such an implied provision against transfer. The non-transferable nature of a tenancy-at-will may thus be only the result of such an implied contract. There does not seem to be anything in *principle* against parties agreeing that a tenancy at the lessor's will should be a heritable and transferable interest. As an instance of a lease which, though terminable at any time at the will of the lessor, was held to be both heritable and transferable, reference may be made to the case of *Lekhraj Roy* v. *Kunhya Singh*.[17] (See Note 72.)

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12. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwar Ali* v. *Jaminilal Roy*.
('33) 20 AIR 1933 Pat 561 (562): 145 Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.
[*See also* ('26) 13 AIR 1926 Sind 71 (73) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruq*. (Permissive occupation without payment of rent is not a regular lease within S. 105—It is a tenancy-at-will.)]

13. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.

14. It may be noted that a tenancy-at-will is referred to as a lease in English text books of authority, like, for instance, Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., pages 106-107. It will also be noted that a tenant at will is referred to as a lessee and the creation of a tenancy-at-will is referred to as letting. A tenancy-at-will is actually referred to as a lease at will. But a tenancy at will is not a "legal estate" under the English law. But this is the result of express statutory enactment. See Topham, *New Law of Property*, 4th Edn., 1932, page 252, foot-notes.

15. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwar Ali* v. *Jaminilal Roy*.

16. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.
('14) 1 AIR 1914 Oudh 220 (221) : 25 Ind Cas 6, *Indal Shah* v. *Bhabuthi Singh*.

17. ('78) 3 Cal 210 (213) : 4 Ind App 223 (PC).

A tenancy-at-will is not a lease for a period exceeding one year for purposes of registration.[18]

It will be noticed that a tenancy-at-will is not a lease for an indefinite period, under which no term is fixed, so as to attract the rule of construction discussed in Note 26, viz., that a lease for an indefinite term enures, generally speaking, for the life-time of the lessee.

33. Tenancy at sufferance. — See Notes 37 to 40.

34. Lease for life. — A lease for the life of the lessee would be a valid lease under this section. Though on the date of the lease the period of such a lease is not certain, it will *become* certain on the death of the lessee and this is enough for the purpose of the requirement as to certainty under this section. (See Note 25.)

The general rule of construction of leases is that where the parties have indicated their intention that the lease is to go on indefinitely but have not fixed any term for the lease, either absolutely or with reference to a future event, the lease is ordinarily to be regarded as one for the life of the grantee, unless there are some words showing an intention to grant a hereditary interest. (See Note 26.)

An estate granted to *A* for life with remainder to *A's* son is different from a *hereditary* estate granted to *A*. In the former case, an interest is conferred by the grant on *A's* son. But in the latter case, *A's* son gets no interest in the property under the grant.[1]

But it must be noted that there cannot be a *lease* for life in favour of *A* with *remainder* to *A's* son. Where there is a lease, a *reversion* to the lessor's estate is essential. Otherwise, the transaction would not be a *lease*. But there can be a lease to *A* for his life with a lease over to his son on the death of *A*. In such a case, *A's* son is not entitled to a *remainder*. He is only entitled to a *leasehold* interest. After the determination of his interest, the property will *revert* to the lessor.

A lease granted for the life of two persons enures till the death of the survivor of them.[2]

A lease for life is regarded as one for a period exceeding one year for the purpose of registration, although on the date of the lease it is not certain whether the life will expire only after a year from the commencement of the lease.[3]

See also Notes 27, 29 and 72.

35. Lease with a clause for renewal — General. — A provision in a lease to the effect that on the expiry of the term of the lease, the lease is to be renewed is a valid provision. Such a provision, however, does not *ipso facto* extend the term of the lease. The provision only entitles the lessee to obtain a new lease in his favour after the

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18. ('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram*.

Note 34

1. *See* ('01) 28 Cal 720 (732, 733) : 28 Ind App 152 (P C), *Pudmanund Singh* v. *G. S. Hayes*.
2. ('24) 11 AIR 1924 Pat 572 (573) : 3 Pat 534 : 78 Ind Cas 511 (D B), *Hari Gir* v. *K. Kamakhya Narain Singh*.
3. ('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Prayag*.

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expiry of the original term.[1] If the lease does not state at whose option the lease is to be renewed, such option would *prima facie* be held to belong only to the lessee.[2] The period, for which the lease is to be renewed, will be the same as the original period unless it is otherwise provided for in the lease.[3] As regards the other terms of the renewed lease, *prima facie* the intention of the parties will be deemed to be that the renewed lease should also contain the same provisions as the original lease.[4] But the lessee will not be entitled to a repetition of the clause for *renewal* in the new lease.[5]

It is a matter depending purely on the interpretation of each lease, whether it contains a provision for renewal. See the undermentioned decisions[6] for illustrative cases. There is no presumption that, unless a

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Note 35

1. (1877) 2 Ex D 355 (358) : 46 L J Q B 603 : 36 L T 765 : 25 W R (Eng) 734, *Hand* v. *Hall.*
('78) 5 Ind App 164 (168) (P C), *Jardine Skinner & Co.* v. *Rani Surut Soondari.*
('26) 13 A I R 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (D B), *Jogesh Chandra* v. *Ananda Charan.* (Following 5 Ind App 164 (P C).)
('90) 17 Cal 548 (555, 556), *Boyd* v. *Krieg.* (A lease for one year containing an option of renewal for a period of one year is not a lease for a term exceeding one year.)
('68) 1 Beng L R (AC) 7 (9) (DB), *Radhika Prasad* v. *Ramsunder Kur.*
('33) 20 AIR 1933 Rang 220 (221, 222) : 148 Ind Cas 301 (DB), *Syriam Land Co.* v. *J. D. Rodriguez.*
[*See also* ('32) 19 AIR 1932 Mad 305 (306) : 55 Mad 519 : 138 Ind Cas 78 (D B), *Valiya Kalyani* v. *Krishnan.* (Subsequent agreement to renew lease does not constitute a present *demise.*)
('03) 30 Cal 831 (837, 838) (DB), *Macnaughten* v. *Rameshwar.* (Unless the parties were agreed to the terms and conditions of the new lease, a mere offer on the part of the lessor to grant a new lease would not amount to the *giving* of such a lease.)]

2. ('12) 17 Ind Cas 180 (183) (DB) (Cal), *Seey. of State* v. *Forbes.* (Option may be exercised by lessee personally or his representative-in-interest.)

3. ('78) 5 Ind App 164 (169) (PC), *Jardine Skinner & Co.* v. *Rani Surut Soondari.*
('21) 8 A I R 1921 Cal 574 (576) : 64 Ind Cas 824 (D B), *Guruprasanna Bhattacharjee* v. *Madhusudan Chowdhury.*
('24) 11 AIR 1924 Pat 560 (561) : 3 Pat 403 : 83 Ind Cas 741 (DB), *Harnarayan Singh* v. *Darshan Deo.*
('24) 11 AIR 1924 Cal 346 (348) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das.*

4. ('12) 17 Ind Cas 180 (183, 184) (DB) (Cal), *Secy. of State* v. *Forbes.*

5. ('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Ananda Charan.*
('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secy. of State* v. *Forbes.*
('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (D B), *Secy. of State* v. *Ma Dwe.*

6. ('19) 6 AIR 1919 Cal 529 (530) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.* (Tenant for a year holding over after one year with landlord's consent — The new tenancy can be terminated by the landlord by giving notice— This right is not affected by the covenant in the lease deed that on the expiry of the period of one year the landlord might settle another tenant on the land if the tenant (previous) refused to pay the additional rent demanded by him.)
('12) 17 Ind Cas 180 (182, 183) (DB) (Cal), *Secy. of State* v. *Forbes.* (Lease for a term with provision that after the expiry of the term the lessor would have *power* to resettle the land with the lessee on a fair rent — *Held* that the clause was

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Note 35

contrary intention is shown, the lessee will have an option of renewal.[7] On the other hand, the *prima facie* presumption is that on the expiry of the term fixed by a lease, the lessee's right is intended to come to an end. But the provision for renewal may be in any form. An express covenant to renew in appropriate technical language is not essential.[8]

A clause for the perpetual renewal of a lease is valid.[9] Thus, for instance, if the original lease is for a period of eleven years, the lessee may be entitled to a renewal of the lease at the beginning of every successive period of eleven years.[10]

A perpetual lease and a lease with a clause for perpetual renewal are not the same.[11] In the former case a perpetual *interest* in immovable property is created once and for all. But in the latter case, the lessee has merely an option of having the lease renewed in his favour at the end of every successive period. The right under such option of renewal is not an *interest* in immovable property.

A covenant for perpetual renewal being a serious derogation from the rights of the landlord must be strictly proved. There must be unequivocal and unambiguous ground for holding that a lease contains such a covenant. Otherwise such a covenant cannot be held to exist.[12]

A covenant for renewal contained in a lease may be specifically enforced as any other contract for the transfer of immovable property,

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intended to be a covenant for renewal and not merely one reserving liberty to lessor to renew—If latter sense were adopted the clause would be entirely superfluous.)

('14) 1 AIR 1914 Cal 382 (384) : 21 Ind Cas 920 (DB), *Bengal Coal Co.* v. *Rajendra Lal.* (Clause providing that if the lessee should be unwilling to take a fresh settlement after the expiry of the present term he and his representatives should be entitled to take away such appurtenances as they might make at their own cost — *Held* that this did *not* constitute a covenant for renewal. NOTE — For a similar case see 9 Ind Cas 923 (924) (Cal).)

('15) 2 A I R 1915 PC 59 (63) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (PC), *Secy. of State* v. *Bai Rajbai.* (First patta expressly providing that there would be no right of renewal — Subsequent pattas not containing this provision— This alone is not sufficient to imply that a right of renewal was conferred.)

7. ('15) 2 A I R 1915 PC 59 (63) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (P C), *Secy. of State* v. *Bai Rajbai.*

8. ('12) 17 Ind Cas 180 (182) (DB) (Cal), *Secy. of State* v. *Forbes.*

9. ('07) 30 Mad 300 (303) : 17 Mad L Jour 189 (DB), *Gopalan Nair* v. *Kunhan Menon.*

10. (1914) 2 Ch 705 (712) : 84 L J Ch 203 : 111 LT 1016, *Wynn* v. *Conway Corporation.*

11. *See* ('33) 20 AIR 1933 Mad 852 (853) : 147 Ind Cas 735, *Raman* v. *Karunakara.* (In this case it was pointed out that though in such cases, the lease may not be strictly in perpetuity the grantee by exercising his option may enjoy the property permanently.)

12. ('37) 24 A I R 1937 All 328 (331) : 169 Ind Cas 145 (D B), *Sewak Ram* v. *Municipal Board, Meerut.*
('07) 30 Mad 300 (303) : 17 Mad L Jour 189 (DB), *Gopalan Nair* v. *Kunhan Menon.*
('12) 17 Ind Cas 180 (182, 183) (DB) (Cal), *Secy. of State* v. *Forbes.*
('15) 2 AIR 1915 P C 59 (62, 63) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (P C), *Secy. of State* v. *Bai Rajbai.*

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and the principles and considerations applicable in both cases would be the same. The undermentioned are illustrative cases.[13]

An agreement to renew a lease may be a term in the lease itself or it may form a separate contract subsequently entered into between the parties. In the former case, it would be a covenant running with the land enforceable both by the original lessee and the assignees of the lease. (See Note 36.) But in the latter case it would be merely a *personal* right of the lessee with whom the contract is made and would not be enforceable by the assignees of the lease.

Stamp.—In the case cited below,[14] it was held that a lease containing a clause for renewal was not an instrument comprising two distinct matters for the purpose of stamp duty.

36. Covenant for renewal — Enforceability against assignee from lessor or lessee.—A covenant for renewal contained in a lease is what is known as a covenant running with the land.[1] The burden and benefit of such a covenant passes with the estate of the covenantor and the covenantee. (See Note 25 on S. 40.) Hence, such a covenant is binding on any person, in whom the property is vested for the time being. Such a covenant is, therefore, enforceable against the transferees of the property from the lessor. The question whether the transfer was for consideration or not, or whether the transferee had notice of the covenant or not, is immaterial in such cases.[2]

But a covenant for renewal contained in a lease granted by a person with a limited interest will not bind the persons who would take

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13. ('24) 11 AIR 1924 Cal 346 (347, 348) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das.* (Covenant in lease for term for renewal at lessee's option — Covenant vague and uncertain as to rent — Specific performance refused.)

('28) 15 A I R 1928 P C 258 (260) : 51 Mad 885 : 55 Ind App 423 : 111 Ind Cas 404 (PC), *Secy. of State* v. *Volkart Bros.* (A lease of land provided among other things, "this lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be deemed reasonable." Before expiry of the term the lessees transferred their interest in a portion of the property and after expiry claimed renewal in virtue of the above clause — *Held* on construction that the covenant only applied to the premises as a whole, and that since lessees lost interest in a portion of the property, the circumstances did not justify a renewal of the lease.)

('25) 12 A I R 1925 Nag 281 (283) : 23 Nag L R 26 : 89 Ind Cas 273, *Onkar Prasad* v. *Badri Das.* (Where a lease contains a condition that renewal of the lease would be dependent upon the performance of certain covenants during the terms of the lease that condition is deemed to have been satisfied if there is no subsisting breach at the time renewal is applied for, although there may have been breaches of covenants during the term of the lease which have been impliedly condoned by the lessor.)

14. ('02) 25 Mad 3 (5, 6) (FB), *Reference under Stamp Act, S. 57.*

Note 36

1. See Note 1 on S. 40 for a discussion of the subject of covenants running with the land. Note 25 on that section deals specially with covenants between landlord and tenant.

('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S. 57.*

2. It would be useful to note in this connexion that an obligation attached to the ownership of immovable property would not bind transferees for consideration without notice, of the property.

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the estate by succession after the expiry of such an interest. Thus, a covenant for renewal contained in a lease granted by a Hindu widow will not bind the reversioners succeeding to the estate after her death.[3]

On the principle referred to above, a covenant for renewal contained in a lease can be enforced by any person in whom the *leasehold* estate is vested for the time being. Thus, the assignee of a lease can enforce such a covenant.[4]

The covenant can also be enforced *against* such an assignee.

Where a lessee holds over after the expiry of the original term with the assent of the lessor and the tenancy is *renewed* under S. 116 from month to month or year to year as the case may be, the lessee has a transferable interest in the property. If he is entitled to an option of renewal of the original lease such option also will pass to an assignee of his interest.[5] It must be noted that in such a case there is no *distinct* and separate lease formed by the holding over under S. 116.[6] The effect of such holding over is to *renew* the old lease on different terms as to the period of the lease. Such a *renewal* implies that the lease is the *same*. The covenant for renewal, therefore, *continues* to be an incident of the lessee's interest in such a case, even after the expiry of the original term. The assignee in such a case gets therefore the *very* lease which contained the covenant for renewal. But if the tenancy formed after the expiry of the original term is not a *renewal* of the original lease but a *fresh* and distinct tenancy the covenant for renewal contained in the original lease would not be an incident of such a *fresh* tenancy and the assignee of such a tenancy would not be entitled to enforce such a covenant.

A mortgagee is not an *assignee* of the lease.[7] Because, the whole of the leasehold estate is not transferred to the mortgagee. It is only an interest in the leasehold estate that is transferred to the mortgagee. But this rule does not apply to an *English* mortgage. In such a case, the property is transferred *absolutely* to the mortgagee. The mortgagor has only a right to a re-transfer of the property on the discharge of the mortgage. (See S. 58.) Hence, an *English* mortgagee would be an assignee of the lease[8] entitled to enforce a covenant for renewal.

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3. ('37) 24 AIR 1937 All 328 (331) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*

4. ('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secy. of State* v. *Forbes.* (Option of renewal may be exercised not only by lessee personally but also by his representative-in-interest, e. g., his trustee in bankruptcy.)
('24) 11 AIR 1924 Cal 346 (347) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das.*
('25) 12 AIR 1925 Nag 281 (283) : 23 Nag L R 26 : 89 Ind Cas 273, *Onkarprasad* v. *Badri Prasad.*
('27) 14 AIR 1927 Cal 100 (102): 91 I.C. 501 (DB), *Benoy Krishna* v. *Fanindra Nath.*

5. ('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*

6. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.* (Section 116 must be regarded as supplemental to and in qualification of cl. (a) of S. 111 which states that a lease determines by the efflux of the time limited thereby.)

7. ('27) 14 AIR 1927 Cal 100 (102) : 91 Ind Cas 501 (DB), *Benoy Krishna* v. *Fanindra Nath.*
('27) 14 AIR 1927 Cal 725 (729 to 733): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*

8. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*

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But it has been held that *specific performance* of a covenant for renewal ought not to be enforced even against an *English* mortgagee of the interest of a lessee holding over after expiry of the original term.[9] The reason given is that specific performance is an *equitable* remedy, and that there is no *equity* in compelling a *mortgagee* to perfect his title so as to become legally liable for rent to the lessor.

An *independent* contract (not forming a covenant contained in a lease) for the renewal of a lease will not run with the land. Such a contract will only give rise to an obligation attached to the ownership of immovable property. Under S. 40, such an obligation will not be enforceable against transferees of the property for consideration *without* notice of the contract.[10] Such a contract will bind only *gratuitous* transferees and transferees for consideration *with notice* of the contract.[11]

37. Lessee holding over after expiration of lease — General. — On the determination of a lease, the lessee's right of possession of the property comes to an end. He has not even a *personal* right of possession not amounting to an interest in the property. Nor is his possession *ipso facto permissive*. Hence in such cases, the lessee is not even in the position of a *licensee*. His possession is, therefore, wrongful.[1] (As to whether and to what extent it can be adverse, see Note 80.) In legal parlance he is known as a tenant at sufferance.[2] Thus, the expression tenant at sufferance does not imply any *existing* tenancy.[3] It refers to an ex-tenant continuing in possession without any right to do so and without any positive permission from the lessor after

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9. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*

10. ('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S. 57.*

11. *See* ('32) 19 AIR 1932 Mad 305 (307) : 55 Mad 519 : 138 Ind Cas 78 (DB), *Valiya Kalyani* v. *Krishnan.* (Case relating to kanom in Malabar.)

Note 37

1. ('90) 13 Mad 249 (253) (DB), *Appa Rau* v. *Ratnam.*
('23) 10 AIR 1923 Bom 398 (398) : 73 Ind Cas 442 (DB), *Gulam Mohiuddin* v. *Dayabhai.*
('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ramchandra Singh* v. *Bhikambar Singh.* (Heirs continuing in possession—After death of life tenant their possession is not rightful.)

2. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('33) 20 AIR 1933 All 756 (758): 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.*
(1900) 2 Bom L R 93 (104) (DB), *Raghunath* v. *Lakshman.*
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ramchandra Singh* v. *Bhikambar Singh.*

3. (1900) 24 Bom 504 (508): 2 BomLR 491 (DB), *Chandri* v. *Daji Bhau.* (Tenant by sufferance is only in by the laches of the owner and so there is no privity between them.)
('09) 3 Ind Cas 566 (567) : 31 All 514 (DB), *Pusa Mal* v. *Makdum Baksh.* (No privity.)
[*See* ('09) 4 Ind Cas 1080 (1080, 1081): 33 Mad 260 (DB), *Subraveti Ramiah* v. *Gundala Ramanni.* (It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the Transfer of Property Act, according to which a lease is determined by efflux of the time limited thereby.)]

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the determination of his tenancy. His position is different from that of a tenant-at-will. In the latter case, there is a *subsisting* tenancy. It follows from the above that a tenant at sufferance can be sued in ejectment by the lessor without there being any notice to quit or even a demand of possession before the suit.[4] But as seen in Note 32 a suit for ejectment cannot be brought by the lessor against a *tenant-at-will* without first determining the tenancy by notice to quit or demand of possession.

A tenant at sufferance cannot, however, be dispossessed by the landlord otherwise than in due course of law.[5] If he is so dispossessed, he can sue for possession against the lessor under S. 9 of the Specific Relief Act.[5a]

A lessee holding over after the expiry of his term without the lessor's assent has a right to the property which is good as against the whole world except the true owner. This is based on the general principle that possession itself constitutes a good title except against the true owner.[6]

If the landlord assents to the tenant continuing in possession after the expiry of a lease, the lease is renewed from year to year or

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4. ('33) 20 AIR 1933 All 756 (758): 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.*
('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('18) 5 AIR 1918 Cal 601 (602): 45 Ind Cas 317 (DB), *Gobindi Chandra* v. *Nanda Dulal.*
(1900) 2 Bom L R 93 (104) (DB), *Raghunath* v. *Lakhshman.*
('21) 8 AIR 1921 Cal 574 (575) : 64 Ind Cas 824 (DB), *Guruprosanna* v. *Madhusudan.*
('23) 10 AIR 1923 Pat 130 (131): 2 Pat 171: 70 Ind Cas 290 (DB), *Raghubir Singh* v. *Jethu Mahton.*
('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*
('36) 164 Ind Cas 837 (840) (Cal), *Chandi Charan* v. *Ashutosh Lahiri.*
('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
('09) 3 Ind Cas 566 (567): 31 All 514 (DB), *Pusa Mul* v. *Makdum Baksh.*
('75) 24 Suth W R 172 (173), *Radha Kishore* v. *Sittoo Sirdar.*

5. ('68) 9 Suth W R 123 (124) (DB), *Sofaoll Khan* v. *Woopean Khan.* (Dispossession by subsequent lessee.)
('05) 29 Bom 213 (216): 7 Bom L R 12 (DB), *Rudrappa* v. *Narsingrao.*
[See however (1891) 1 Q B 730 (732, 733) : 60 L J Q B 464 : 64 L T 538 : 39 W R (Eng) 510, *Jones* v. *Foley.* (After the termination of the tenancy the tenant must give up—The landlord is entitled to enter on the premises and pull down the building and if it unavoidably causes damage to tenant's furniture the landlord is not liable—This does not amount to forcible entry which the landlord is not entitled to do except under a warrant. NOTE — This decision shows that under English law if *force* is not used the dispossession need not be in due course of law.)]

5a. ('05) 29 Bom 213 (216): 7 Bom L R 12 (DB), *Rudrappa* v. *Narsingrao.*
('19) 6 AIR 1919 Bom 97 (98, 99) : 43 Bom 531 : 51 Ind Cas 193 (DB), *Gulam Mahomed* v. *Emperor.*

6. ('67) 8 Suth W R 386 (390) (DB), *Khajah Enaetoollah* v. *Kishen Soondur.*
See also Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 3, Note 5 and Arts. 142 & 144, Note 4.

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month to month under S. 116 according to the purpose of the tenancy. The assent of the landlord may be express or implied. (See Note 38.)

Even where the lease provides for *damages* by way of enhanced rent till the date of vacating the property, if the lessee should continue in possession after the expiration of the term, there would be no subsisting relationship of *landlord and tenant* between the parties after such expiration.[7] Similarly, under English law a contract of tenancy would seem to imply a contract to pay rent till the date of giving up possession of the property, if the lessee should continue in possession after the expiration of the lease.[8] But even this does not necessarily import the continuation of the relationship of landlord and tenant between the parties after the term.[9]

But where by usage, although a lease may be executed nominally for a certain period, a term is *implied* that the lessee and his representatives should be entitled to continue in possession even after the expiry of such period, the lessee or his representative so continuing in possession will not be a tenant at sufferance. It is this principle which underlies the observations of Sadasiva Iyer, J., in the case noted below.[10] In that case he pointed out the inappropriateness of treating as a mere trespasser an agricultural tenant in the Madras Presidency holding over after the expiry of alleged term of his lease. (See also Note 29.)

The term tenant at sufferance has also been applied to the *heirs* of a life-tenant who continue in possession after the death of such tenant.[11] In the undermentioned case[12] the right in question was held to be a *licence* and it was remarked that if it was a *tenure* of any sort, it was a tenancy at sufferance. But as seen already, a licence imports a permission of the owner while a tenancy at sufferance does not import such a permission.

In *Adimulam* v. *Pir Ravuthan*[13] the Madras High Court held that a tenancy at sufferance was a form of tenancy and that it required to be determined before the lessee could be sued in ejectment. This view is not correct and is not good law.

Topham in his *New Law of Property*, 4th Edn., 1932, classes a tenancy by sufferance as a form of *leasehold* interest. He calls it the smallest estate known to the law, though he says the landlord can turn such a tenant out of possession by an action of ejectment without giving him notice. Topham also points out that a tenancy at sufferance is not a *legal* estate under the English law. Topham's classification may be understood in the following light. Although the possession of a tenant at sufferance is *wrongful*, he has a good

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7. ('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu.*
8. *See* ('17) 4 AIR 1917 Mad 901 (902): 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
9. *See* ('19) 4 Ind Cas 1080 (1080, 1081) : 33 Mad 260 (DB), *Subraveti Ramiah* v. *Gundala Ramanni.* (Tenancy at sufferance in England does not interrupt the running of time against the lessor.)
10. ('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshmi Narasayya.*
11. ('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ramchandra Singh* v. *Bhikambar Singh.*
('24) 11 AIR 1924 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *Kumar Kamakhya.*
12. ('18) 5 AIR 1918 Cal 601 (602) : 45 Ind Cas 317 (DB), *Gobinda Chandra* v. *Nanda Dulal.* (*Doe d. Knight* v. *Quigley* (1810) 11 R R 780 referred to.)
13. ('85) 8 Mad 424 (426, 427): 9 Ind Jur 309 (DB).

title except against the *owner* of the property. In this sense, there does not seem to be anything wrong in referring to a tenant at sufferance as having an *estate* in the land. But it is not clear how a tenancy at sufferance can be said to be a form of *leasehold* interest, seeing that there is no privity between the parties in such a case. It is clear that the mere fact that the lessor *suffers* the tenant to continue in possession is not sufficient to create a *leasehold* interest in the legal sense of the term. But a similar objection may be taken also to the use of the word "tenant" and "tenancy" to describe the position of a tenant who holds over after the expiry of his lease without the assent of his landlord. It only seems to be a case of a loose use of terms adopted for the sake of convenience where such loose use is not likely to create any confusion.

It has been held that a tenancy at sufferance, assuming that it is an *interest* in property, terminates on the death of the tenant[14] or on transfer by him.[15]

There is no substantial difference between a tenant at sufferance and a trespasser, as he is sometimes called.[16] But a tenant by sufferance enters by lawful demise or title though he afterwards wrongfully continues in possession. But a trespasser's entry on the property is itself wrongful.

38. Lessee holding over after expiration of lease — Lessor's assent. — Under section 116, if a lessee continues to hold possession of the property after the determination of the lease and the lessor by acceptance of rent from him, or otherwise, assents to his doing so, the lease is renewed from year to year or from month to month according to the purpose of the tenancy. But apart from the provisions of section 116 the payment and acceptance of rent may give rise by implication to a fresh tenancy between the parties after the expiry of the original one. Such a tenancy also would, in the absence of a contract, local law or usage to the contrary, be deemed under S. 106 to be one from year to year or month to month.[1] But there is one

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14. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('85) 8 Mad 424 (426, 427): 9 Ind Jur 309 (DB), *Adimulam* v. *Pir Ravuthan.*

15. ('85) 8 Mad 424 (426, 427): 9 Ind Jur 309 (DB), *Adimulam* v. *Pir Ravuthan.*

16. ('09) 3 Ind Cas 566 (567): 31 All 514 (DB), *Pusa Mal* v. *Makdum Baksh.*
('15) 2 AIR 1915 Low Bur 47 (48) : 8 Low Bur Rul 270 : 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi.*
('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.* (*Roe* v. *Ward*, 1 H Bl 96 followed.)

Note 38

1. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('24) 11 AIR 1924 Pat 560 (563) : 3 Pat 403 : 83 Ind Cas 741 (DB), *Tekait Harnarayan Singh* v. *Darshan Deo.*
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Quadir.* (Transfer of Property Act not applicable but principle of S. 116 applied.)
('11) 9 Ind Cas 141 (146) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao.*
('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.* (Tenancy renewed under S. 116—Tenant has an assignable interest in land and assignee is liable for rent.)
('15) 2 AIR 1915 Cal 64 (65) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Gobardhan.* (Section 116 held inapplicable.)
('10) 6 Ind Cas 339 (340) (DB) (Cal), *Ram Chandra Singh* v. *Bhikambar Singh.* (Lease for life — Death of lessee — Lessee's heirs continuing in possession thereafter.)

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important difference between a tenancy renewed under S. 116 (or under the principle thereof, where such principle is applicable) and a fresh tenancy created between the parties. In the former case, the tenancy continues to be the same.[2] But in the latter case the tenancy is not the same as the original one but a distinct and separate one.

Whether, the tenancy at sufferance by the tenant continuing in possession after the expiry of a tenancy is converted into a tenancy in the legal sense of the term by renewal or otherwise, depends on the facts and circumstances of each case.[3] But slight evidence would be sufficient for this purpose.[4]

Where after the expiry of a tenancy, a fresh lease-deed is executed but it is inadmissible in evidence owing to want of registration, the tenant can fall back upon the tenancy formed or renewed by payment and acceptance of rent and would not be without title.[5]

39. Lessee holding over after expiration of lease — Renewal clause in lease, effect of.—As seen in Note 35, a covenant for renewal contained in a lease does not, by itself, extend the term of the lease, but only entitles the lessee to obtain a fresh lease. Hence, if the lessee continues in possession after the expiration of the original lease, he will not be entitled to any *interest* in the property merely by virtue of the covenant for renewal. If the lessor assents to such holding

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('70) 14 Suth W R 262 (265) (DB), *Lekhraj Roy* v. *Kanhaya Singh*. (Lease for life—Lessee's heirs continuing in possession after lessee's death.)
[*See* ('83) 9 Cal 908 (912) : 13 Cal L R 69 (DB), *Surnomoye* ev. *Denonath Gir*. (But when the ex-tenant is not in exclusive possession but there is a scramble for possession the above principles will not apply.)]

2. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy*.

3. ('25) 12 AIR 1925 Pat 499 (500) : 88 Ind Cas 483 (DB), *Kumar Kamekhya Narain Singh* v. *Bechu Singh*. (Marfatdari receipts given for rent—*Held* no tenancy was created.)
('26) 13 AIR 1926 Cal 952 (953) : 95 Ind Cas 101 (DB), *Sadananda* v. *Jyotish Kanta*. (Where rent receipts are granted with the word 'marfatdar' it is not conclusive that there was no recognition by the landlord of the person who pays the rent as a tenant as per Jenkins, C. J., in 20 Ind Cas 664.)
('25) 12 AIR 1925 Pat 216 (221) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain*. (Where the assignees of an istumrari mokurari lessee are in possession of the property after the death of the lessee, mere receipt of rent by the landlord would not make the assignees tenants from year to year—In order to make them tenants from year to year the rent must have been paid and received upon the understanding that they were so.)
('08) 7 Cal L Jour 90 (94, 95) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain Singh Bahadur*. (Grant for life—Receipts of rent in ignorance of grantee's death do not constitute recognition of the heirs as the tenant on the part of the grantor—No notice to quit is necessary.)

4. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa*.
[*See* ('88) 11 Mad 77 (80), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*. (Whenever a tenant or raiyat gets possession of land for one year and continues in possession at the expiration of that year, he is *prima facie* held to so continue on the terms of that lease.)]

5. ('17) 4 AIR 1917 Mad 735 (736) : 34 Ind Cas 6 (DB), *Govindswamy* v. *Ramaswami*.

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over by the lessee, the lease will be renewed from year to year or month to month under section 116 or a *fresh* tenancy of a similar kind may be created by implication from payment and acceptance of rent. (See Note 38.)

Apart from this, if the lessor sues for the ejectment of the lessee before the expiration of the period for which renewal has been promised, the lessee may be entitled to resist such a suit on various equitable grounds, such as the principle of part performance, the doctrine of *Walsh* v. *Lonsdale*,[1] etc. In such cases, the position of the lessee will be no higher than that of a person who is in possession of immovable property under a contract for the transfer of such property. As seen in Note 4 such a contract does not *ipso facto* constitute a good defence to a suit for ejectment against the intended transferee. For an account of the development of the law regarding the equitable grounds mentioned above, reference may be made to S. 53A and the Notes thereon.

Under the principles discussed in those Notes, the lessee in such cases will not be entitled to rely on the *English* doctrine of part performance, such doctrine having been held inapplicable to India. He will, however, be entitled to rely on the principle of that doctrine *as embodied* in S. 53A, if the conditions required by that section are present. In cases in which specific performance of the covenant can be enforced, the lessee can obtain a stay of the suit for ejectment and sue for specific performance, on the principle laid down in *Ariff* v. *Jadunath*.[2] But it must be noted that the doctrine of *Walsh* v. *Lonsdale*[3] under which the lessee would be entitled to an equitable *estate* in the property, if the contract for the grant of a lease is specifically enforceable, does not apply to India. (See Note 3 on S. 53A.)

Where, for any reason the lessee is not entitled to rely on the above-mentioned grounds of defence, but the tenancy has been renewed from year to year or month to month under S. 116, (or a fresh tenancy of a similar nature has been formed) the lessee can rely on his rights under such tenancy.[4]

As regards the case-law on the subject, some decisions simply hold that a covenant for renewal would be a good defence to a suit for ejectment by the lessor in such cases.[5] With regard to such decisions the caution is necessary that a covenant for renewal will not be a good defence, if specific performance is not enforceable at the date of the suit.

Note 39

1. (1882) 21 Ch D 9 (15) : 52 L J Ch 2 : 46 L T 858 : 31 W R (Eng) 109.
2. ('31) 18 AIR 1931 P C 79 (82): 58 Ind App 91: 58 Cal 1235: 131 Ind Cas 762 (PC).
3. (1882) 21 Ch D 9 : 52 L J Ch 2 : 46 L T 858 : 31 W R (Eng) 109.
4. ('23) 10 AIR 1923 Cal 130 (134) : 69 Ind Cas 707 (DB), *Gajendra Nath* v. *Ashraf Hossain*.
   ('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy*.
5. ('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahman*.
   '23) 10 AIR 1923 Pat 236 (237, 238) : 84 Ind Cas 536 (DB), *Mohit Narayan Jha* v. *Kamal Nath*.

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In *Jardine Skinner and Co.* v. *Rani Surut Soondari Debi*[6] the Privy Council expressed the view that if the lessor sought to turn out the lessee before the expiry of the period for which renewal has been promised, the lessee can *compel* him to renew the lease according to the covenant. This clearly implies that the covenant for renewal must be capable of being specifically enforceable at the time of the suit, if it should be available as a defence to the suit for ejectment by the lessor. Their Lordships have clearly pointed out that the lessee does not get any *interest* in the property merely by virtue of the clause for renewal. This is also the view which accords with the latest decisions of the Privy Council. (See Note 3 on S. 53A.) See also the undermentioned cases[7] which proceed on the same basis.

Some decisions speak of the lessee in such cases as having an *estate* in the property.[8] Others hold that the lessee is in the same position *as if the promised renewal has been made.*[9] Such decisions obviously proceed on the applicability of the doctrine of *Walsh* v. *Lonsdale*[10] to India — a view which is not correct. (See S. 53A, Note 3.)

Where a lessee has been allowed to be in possession of the property for the full term for which renewal had been promised, he cannot thereafter rely on the covenant for renewal in defence to the suit for ejectment by the lessor,[11] because in such a case, there would be no equity in his favour and the covenant for renewal would not be specifically enforceable.

Where a lessee holds over after the expiry of his term and the landlord assents to his doing so, the effect is not to renew the lease for the *full period* provided for under the covenant for renewal but only from year to year or from month to month according to the purpose of the tenancy.[12] Where a lease is thus *renewed* from year to year or month to month, the lease so renewed is only a continuation of the original lease and not a distinct lease.[13] Hence, the covenant for renewal which forms part of the original lease constitutes also a part of the renewed lease, and an assignee of such lease can enforce the covenant. (See Note 36.)

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6. ('77-78) 5 Ind App 164 (168) : 3 Cal L R 140 (PC).

7. ('37) 24 AIR 1937 All 328 (332) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*

('32) 19 AIR 1932 Mad 305 (307) : 55 Mad 519 : 138 Ind Cas 78 (DB), *Valiya Kalyani* v. *Krishnan.* (Case relating to subsequent agreement for renewal.)

('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Annada Charan.* (5 Ind App 164 (P C) followed.)

8. ('31) 18 AIR 1931 Bom 178 (181) : 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath.*

('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

9. ('23) 10 AIR 1923 Pat 236 (238) : 84 Ind Cas 536 (DB), *Mohit Narayan Jha* v. *Kamal Nath Jha.*

('21) 8 AIR 1921 Cal 574 (575) : 64 Ind Cas 824 (DB), *Guru Prosanna Bhattacharjee* v. *Madhusudan.*

('12) 17 Ind Cas 180 (184) (DB) (Cal), *Secretary of State* v. *Forbes.*

10. (1882) 21 Ch D 9 (15) : 52 L J Ch 2 : 46 L T 858 : 31 W R (Eng) 109.

11. ('78) 5 Ind App 164 (169) : 3 Cal L R 140 (PC), *Jardine Skinner* v. *Rani Surut Soondari Debi.*

('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Annada Charan.*

12. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

13. ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

40. Lessee holding over after expiry of lease. — Basis of liability for compensation.—As seen in Note 37 where a lessee holds over after a lease has expired, and the landlord has not assented to such holding over, the lessee's possession is *wrongful*. Hence, he is liable for mesne profits from the date of the determination of the lease.[1] He will not be liable for *rent* as there is no subsisting relationship of landlord and tenant between the parties. Nor will he be liable for damages for *use and occupation*[2] as his continuing in possession is not with the *permission* of the landlord. (See Note 70.) His liability for compensation is *ex delicto* i.e., based on his liability for a *tort* whereas a claim for use and occupation is one arising *ex contractu*, i.e., based on a contract (implied by law).[3]

41. Permanent lease. — This section expressly provides that a lease may be granted in perpetuity.[1] Under English law, a permanent lease is not valid.[2] The question whether a lease is a permanent one or not is one of construction depending on the facts and circumstances of each case. Merely because a lease is silent as to its term, it cannot be held to be a permanent lease. In such a case, it will be deemed to be a lease from year to year or month to month under S. 106.[3] Similarly,

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Note 40

1. ('23) 10 AIR 1923 Bom 398 (398) : 73 Ind Cas 442 (DB), *Ghulam Mohiuddin* v. *Dayabhai Chimanlal.*
('15) 2 AIR 1915 Low Bur 47 (48) : 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mahomed Thambi.*
2. ('10) 7 Ind Cas 492 (493) (DB) (Cal), *Kani Lal* v. *Netai Chand.*
('15) 2 AIR 1915 Low Bur 47 (48) : 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mahomed Thambi.*
[See however ('30) 17 AIR 1930 Mad 434 (438-439) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.* (Lessee entitled to remain in possession after expiration of lease till payment of value of improvements—He is liable not for mesne profits but only for rent at rate fixed under the lease. NOTE—It will be noted that in such a case the possession of the lessee is not wrongful. He is a licensee. The so called rent in this case is really compensation for use and occupation, the rate at which such compensation is to be paid being the same as the rate of rent under the expired lease.)
3. ('35) 22 AIR 1935 Mad 307 (308) : 157 Ind Cas 246, *Gurayya* v. *Sathiraju.*
('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswami Pillai* v. *Ramaswamy Aiyar.*

Note 41

1. ('10) 5 Ind Cas 437 (437) : 33 Mad 253 (DB), *Gangamma* v. *Bommakka.*
2. The following is from Williams and Eastwood, *Principles of the Law of Real Property,* 1933 Edn., page 109 : "There is no limit to the number of years for which a lease may be granted : a lease may be made for 99, 100, 1000, or any other number of years ; the only requisite on this point is, that there be a *definite* period of time fixed in the lease at which the term granted must end ; and it is this fixed period of ending which distinguishes a *term* from an estate of freehold."
3. ('78) 3 Cal 696 (699): 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Sheikh Rutton* (Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy ; but the existence of the custom in such cases must be a matter of proof and no Judge has a right to act upon such customs, unless their existence is duly established.)

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where the lease is intended to go on *indefinitely* and no definite term is fixed for the lease, it will be deemed to be a lease for the life of the lessee, and not a permanent lease. (See Note 28.)

This section refers to the creation of a permanent lease by *act of parties*. But a permanent tenancy can also arise by local usage or Act of the Legislature.[4] Such a tenancy, however, will not be directly governed by the provisions of this Act.

A permanent tenancy can also be acquired by prescription. (See Notes 79 to 81.)

A landlord may also be *estopped* from denying the permanent character of a tenancy. (See Note 55.)

A permanent lease is liable to forfeiture as any other lease.[5] (See also Note 47.)

42. Permanent lease and creation of absolute estate — Difference. — Even a permanent lease is only a transfer of the right of *possession*. The right of *ownership* or any interest therein is not transferred in such a case.[1] This distinguishes a permanent lease from

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[*See* ('02) 25 Mad 507 (513) : 12 Mad L Jour 119 (DB), *Sheshamma Shettati* v. *Chickaya Hegade*. (*A* lets *B* into possession of his land as tenant — *B* claiming permanent tenancy but failing to establish the same—The presumption is that *B* is a tenant from year to year.)]

4. *See* ('24) 11 A I R 1924 P C 65 (67) : 51 Ind App 83 : 47 Mad 337 : 82 Ind Cas 226 (PC), *Naina Pillai* v. *Ramanathan*.

('10) 6 Ind Cas 632 (632) (Cal), *Singheeram* v. *Bhagbat Chander*. (In this case it was held that the *alleged* custom of permanence was not proved.)

NOTE. — Section 83 (2) of the Bombay Land Revenue Code provides for a presumption of permanence to be made in respect of ancient tenancies in certain circumstances.

5. ('98) 2 Cal W N 292 (294) (SB), *Monmohini Dassi* v. *Kali Das Ahiri*.

('97) 24 Cal 440 (448): 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee*.

('83) 9 Cal 908 (912) : 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath Gir*.

('18) 5 AIR 1918 Cal 639 (641): 41 Ind Cas 530 (DB), *Sarada Kripalala* v. *Akhil Chandra*.

('31) 18 AIR 1931 Cal 160 (163) : 130 Ind Cas 564 (DB), *Bejoy Chand* v. *Md. Yasin*.

('33) 20 AIR 1933 Oudh 161 (162) : 8 Luck 377 : 142 Ind Cas 885 (DB), *Bhagwati Prasad* v. *Balgobind*.

Note 42

1. (1859-61) 8 Moo Ind App 327 (338) : 4 Suth W R P C 73 (P C), *Venkataswara Yettiapah* v. *Alagoo Moottoo*. (A portion of a zamindari in the Madras Presidency was held *not* to be a transfer within the words of S. 8 of Madras Regulation 25 of 1802 (which required sales, gifts and transfers of the proprietary rights of zamindars to be registered).)

('28) 15 AIR 1928 P C 234 (237) : 56 Cal 1 : 55 Ind App 320 : 111 Ind Cas 345 (PC), *Bejoy Singh* v. *Surendra Narayan Singh*.

('33) 20 AIR 1933 Bom 97 (98) : 57 Bom 194 : 142 Ind Cas 481 (DB), *Venkatesh* v. *Bhujaballi*.

('15) 2 AIR 1915 Cal 403 (404) : 31 Ind Cas 549 (551), *Madan Mohan* v. *Sashi Bhusan*. (Hence it is doubtful whether a permanent tenant can acquire by prescription easement on the land of another permanent tenant holding under the same landlord.)

('98) 2 Cal W N 292 (294) (SB), *Monmohini Dassi* v. *Kalidas Ahiri*. (Perpetual lease is liable to forfeiture.)

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a sale.[2] This also distinguishes it from various kinds of tenures in India of a permanent and hereditary character. Such tenures, no doubt, do not constitute the *full* ownership of property. They are interests of a subordinate character. But the interest is one in the *ownership* of the property and not merely the right of possession. Hence, the transfers in such cases are of an *absolute* character. The transfer is not merely that of a right which comes back to the transferor, the moment it ceases to belong to a different person. On the right ceasing to belong to any one by the death of the last possessor intestate and without leaving any heirs, it will pass by escheat to the Crown. (See Note 6.)

In *Sonet Kooer* v. *Himmut Bahadur*[3] a mokarrari hereditary tenure granted for the purpose of maintenance by a zamindar in Bengal was held by the Privy Council to be an *absolute* interest in the land of the above kind. A grant of what is referred to in the decisions as "underproprietary rights" will also come under this category. When it is made for a price such a grant has been treated as a sale.[4] On the

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('97) 24 Cal 440 (447) : 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.* (Liable to forfeiture.)

[*See also* ('36) 23 AIR 1936 Cal 727 (734) : 170 Ind Cas 690 (DB), *Mati Lal Daga* v. *Iswar Radha Damodar Chandra.* (Lease for 499 years is different from conveyance in fee simple.)]

[But see ('26) 13 AIR 1926 Cal 993 (994, 995) : 53 Cal 816 : 98 Ind Cas 173 (DB), *Panchu Bala* v. *Jotindra.* (In this case the transaction is referred to as a permanent lease but still held to create an absolute hereditary mokarari tenure.)]

2. ('76) 25 Suth W R 43 (45) (DB), *Ram Golam Singh* v. *Nursingh Suhoy.* (Leases in perpetuity, however small the reserved rent, are not sales.)

('09) 4 Ind Cas 449 (451, 452) : 36 Cal 1003 : 36 Ind App 148 (PC), *Abhiram Goswami* v. *Shyama Charan.*

('12) 14 Ind Cas 717 (718) (Oudh), *Triloki Nath* v. *Sheo Mangal.*

('67) 8 Suth W R 106 (107) (DB), *Moorooly Ram* v. *Huree Ram.*

('27) 14 AIR 1927 Oudh 161 (161) : 101 Ind Cas 193 (DB), *Oudh Behari* v. *Rameshwar Singh.*

[But see ('10) 7 Ind Cas 930 (930) : 33 All 104 (DB), *Lalji Misir* v. *Jaggu Tiwari.* (Where a lease purports to create a perpetual interest in the land reserving merely a nominal rent and is granted in consideration of a substantial sum paid as premium, *held* that the transaction is in reality a sale — Submitted not correct.)]

3. ('76) 1 Cal 391 (398) : 3 Ind App 92 (PC).

4. ('35) 22 AIR 1935 Oudh 217 (225) : 10 Luck 392 : 153 Ind Cas 334 (FB), *Jagdeo Singh* v. *Ram Naresh Singh.*

('25) 12 AIR 1925 Oudh 714 (714) : 87 Ind Cas 347, *Har Bux Singh* v. *Ram Autar.*

('24) 11 AIR 1924 Oudh 426 (428) : 27 Oudh Cas 243 : 84 Ind Cas 667 (DB), *Sant Baksh Singh* v. *Bhawani Prasad.* (In every instance the question whether a document is a sale or permanent lease will depend on a construction of all its terms.)

('24) 11 AIR 1924 Oudh 203 (204) : 27 Oudh Cas 167 : 77 Ind Cas 79 (DB), *Ram Narayan* v. *Ram Sukh.*

('22) 9 AIR 1922 Oudh 229 (230) : 68 Ind Cas 966, *Saheb Baksh* v. *Thakur Din.*

('22) 9 AIR 1922 Oudh 81 (81, 82) : 65 Ind Cas 97 : 24 Oudh Cas 310, *Zulfar Khan* v. *Sant Baksh Singh.*

('10) 8 Ind Cas 725 (726) : 14 Oudh Cas 41 (DB), *Ram Autar* v. *Drigpal.*

[But see ('14) 1 AIR 1914 Oudh 360 (360, 361) : 17 Oudh Cas 299 : 25 Ind Cas 855 (DB), *Data Ram* v. *Deo Kali.* (A grant by a superior proprietor of under proprietary rights by means of leases, (birt sankalap) giving heritable and transferable rights in lieu of a premium taken in advance, and an annual rent reserved thereby, cannot be treated as a sale.)]

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same principle an inam is different from a permanent lease.[5] So in *Tarachand Biswas* v. *Ram Govind Chowdhry*[6] it was held by the Calcutta High Court that putnis, darputnis, seputnis, etc., in India are not mere leases but substantial interests in land. But at the same time it was held that such transactions were not out and out sales in spite of the payment of consideration. It was held that the transferee under such a transaction was entitled to possession. In *Arumugham* v. *Subramaniam*[7] Varadachariar, J., pointed out in his Judgment of Reference to the Full Bench that under Indian law, an *under-tenure* is not the same as *tenancy*.

Whether a transaction is a permanent lease or a sale or the creation of a subordinate proprietary right is a question depending on the facts and circumstances of each case. The payment of something corresponding to rent is not a conclusive test. Such payment is quite consistent even with a sale. In the undermentioned cases[8] the transaction was held to be a *lease* and not a sale or any other kind of transfer of a proprietary interest. In the cases noted below,[9] the transaction was held to be a

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5. ('26) 13 AIR 1926 Mad 526 (528) : 92 Ind Cas 814 (DB), *Seetayya Garu* v. *Appadu*.
6. ('79) 4 Cal 778 (781, 782) : 4 Cal L R 20 (DB).
7. ('37) 24 AIR 1937 Mad 882 (891) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB).
8. ('24) 11 AIR 1924 All 60 (61) : 75 Ind Cas 404 (DB), *Bhairo Tiwari* v. *Ramnath Rai*.
('23) 10 AIR 1923 All 560 (561) : 74 Ind Cas 971, *Inder Deo* v. *Ram Chariter*.
('23) 10 AIR 1923 Bom 146 (147) : 77 Ind Cas 952 (DB), *Chaturbhai Lallubhai* v. *Moti Bhai Bapuji*.
('20) 7 AIR 1920 Cal 47 (48) : 55 Ind Cas 500, *Kailash Nath* v. *Kamakhya Charan*.
('07) 1907 Pun Re No. 136 : 1907 Pun W R No. 189, *Bhagwan Das* v. *Sidher*.
('26) 13 AIR 1926 Mad 55 (57) : 48 Mad 821 : 90 Ind Cas 725 (DB), *Venkatacharyulu Ayyavarlam* v. *Venkatasubba Rao*.
('95) 8 C P L R 33 (35), *Bisni Ram* v. *Ram Prasad*. (In spite of the use of the word "sell" it was held the instrument was a lease.)
('42) 29 AIR 1942 Oudh 151 (155) : 17 Luck 401 : 197 Ind Cas 665, *Bhondu Singh* v. *Mahadeo Singh*.
('27) 14 AIR 1927 Oudh 161 (161) : 101 Ind Cas 193 (DB), *Oudh Behari* v. *Rameshwar Singh*.
('24) 11 AIR 1924 Oudh 203 (204, 205) : 27 Oudh Cas 167 : 77 Ind Cas 79 (DB), *Ram Narayan* v. *Ram Sukh*.
('22) 9 AIR 1922 Oudh 229 (231) : 68 Ind Cas 966, *Saheb Baksh Singh* v. *Thakur Din Singh*.
('12) 14 Ind Cas 717 (718) (Oudh), *Triloki Nath* v. *Sheo Mangal*.
('32) 19 AIR 1932 Pat 97 (98) : 11 Pat 98 : 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjas Agarwalla*.
9. ('79) 4 Cal 327 (330) (DB), *Bejoy Chunder* v. *Kally Prosonno*. (A person who holds as owner on the terms of paying a fixed sum annually to the former owner is not a lessee.)
('29) 16 AIR 1929 Lah 583 (583, 584) : 119 Ind Cas 734 (DB), *Lachhu* v. *Mela Ram*.
('14) 1 AIR 1914 Lah 290 (292) : 23 Ind Cas 970 (DB), *Amar Singh* v. *Sadhu Singh*.
('41) 28 AIR 1941 Oudh 12 (14) : 190 Ind Cas 782, *Maharaja Pande* v. *Kali Din Pande*.
('33) 20 AIR 1933 Oudh 329 (331) : 143 Ind Cas 887, *Ram Anand* v. *Ram Das*.
('30) 17 AIR 1930 Oudh 300 (301) : 5 Luck 721 : 123 Ind Cas 53, *Gopal Sahu* v. *Nand Kumar*.
('21) 8 AIR 1921 Oudh 240(241): 65 I.C. 707, *Lachhman Das* v. *Bhagwant Ram*.

sale or other kind of transfer of a proprietary right, notwithstanding the reservation of a payment corresponding to rent.

Where the transaction is a permanent lease, on the death of the last holder of the lease intestate and without leaving any heirs, the interest will revert to the grantor on the principle discussed in Note 6.[10] But if the interest is an *absolute* one it will pass by escheat to Crown.[11]

A lease in perpetuity is not recognised as a lease under the English law. It is treated as a transfer of the fee simple. But this section expressly provides that a lease may be one in perpetuity.

The decision of the Privy Council in *Sonet Kooer's case*, referred to above, must not be taken to lay down that on the death of the last holder of a permanent *lease*, intestate and without leaving any heirs, his interest will pass by escheat to the Crown and not revert to the grantor of the estate. The interest in question in that case is expressly held to be an *absolute* one. In *Panchubala* v. *Jotindra*[12] the interest is referred to as a permanent *lease* and yet is held to be an *absolute* interest which escheats to the Crown on the death of the last holder intestate and without leaving any heirs. Reliance is placed for this purpose on the decision in *Sonet Kooer's case*. It looks as if their Lordships have not correctly appreciated the decision in *Sonet Kooer's case*.

43. Permanent tenancy — Onus of proof. — Where the relationship of landlord and tenant is established between two persons and the tenant claims that the tenancy is a permanent one, it is for him to prove his claim. It is not for the landlord to prove that the tenancy is not permanent. Unless the contrary is proved, the law will presume the tenancy not to be permanent. This principle is recognised in S. 106 which provides that, in the absence of an agreement to the contrary, a lease will be deemed to be one from year to year or from month to month according to the purpose of the lease. It is true that a tenancy may be permanent by custom or under a statutory provision, irrespective

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('27) 14 AIR 1927 Pat 254 (255) : 6 Pat 358 : 103 Ind Cas 435 (DB), *Secy. of State* v. *Natabar Mangraj*.

('26) 13 AIR 1926 Pat 80 (80) : 90 Ind Cas 352 (DB), *Prasana Kumar* v. *Kalyan Charan*.

[*See also* ('20) 7 AIR 1920 Cal 693 (693, 694) : 59 Ind Cas 565 (DB), *Chandra Kanta* v. *Adinath Shom*. (*A* transferring to *B* a share of lands and then receiving rent for long time — This alone does not create a tenancy where the facts show that the parties were in co-ordinate position.)

('37) 24 AIR 1937 Lah 97 (98) : I L R (1937) Lah 202 : 172 Ind Cas 104 (DB), *Ganesha* v. *Sadiq*. (Vendee entered in mutation proceedings as tenant—No lease but sale.)]

10. ('24) 11 AIR 1924 All 60 (61) : 75 Ind Cas 404 (DB), *Bhairo Tiwari* v. *Ramnath Rai*.

[But see ('26) 13 AIR 1926 Cal 993 (994, 995) : 53 Cal 816 : 98 Ind Cas 173 (DB), *Panchu Bala* v. *Jotindra*. (In this case the transaction is referred to as a permanent lease and yet it is held to create an absolute estate which escheats to the Crown on the death of the last holder intestate and without leaving any heirs.)]

11. ('76) 1 Cal 391 (402) : 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut Bahadur*. (Absolute hereditary mokurari tenure.)

('26) 13 AIR 1926 Cal 993 (994, 995) : 53 Cal 816 : 98 Ind Cas 173 (DB), *Panchubala* v. *Jotindra*. (In this case the interest is referred to as a permanent lease yet held to be an absolute interest.)

12. ('26) 13 AIR 1926 Cal 993 (994, (995) : 53 Cal 816 : 98 Ind Cas 173 (DB).

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of the agreement between the parties. But in every case it is for the tenant to establish that by agreement, custom or law his tenancy is permanent.[1] So, in *Nainapillai* v. *Ramanathan*[2] the Privy Council observed as follows :

"It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence

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Note 43

1. ('20) 7 A I R 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 : 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan*. (Permanent occupancy right claimed against ryotwari pattadar.)
('29) 16 A I R 1929 P C 156 (157) : 52 Mad 549 : 56 Ind App 248 : 116 Ind Cas 601 (PC), *Subrahmanya Chettiyar* v. *Subrahmanya Mudaliyar*.
('24) 11 A I R 1924 P C 65 (66) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC), *A. S. N. Nainapillai* v. *T. A. R. A. Rm. Ramanathan*.
('05) 32 Cal 51 (61) : 31 Ind App 149 (PC), *Nilratan Mandal* v. *Ismail Khan Mahomed*.
('89) 16 Cal 223 (232) : 16 Ind App 6 (PC), *Secretary of State* v. *Luchmeswar Singh*.
('61) 8 Moo Ind App 327 (332) (PC), *Venkataswara Yettiappah Naicker* v. *Alagoo Moottoo Servagaren*.
('29) 16 A I R 1929 Cal 37 (38, 40, 41) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal*.
('26) 13 A I R 1926 Cal 322 (325) : 90 Ind Cas 781 (DB), *Jabeda Khatun* v. *Mohammad Mozaffar*.
('14) 1 A I R 1914 Mad 564 (567) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya*.
('22) 9 A I R 1922 Bom 402 (402, 403) : 47 Bom 4 : 76 Ind Cas 71 (DB), *Narayan* v. *Pandurang*.
('19) 6 A I R 1919 Mad 293 (296, 301) : 52 Ind Cas 247 (DB), *Ponniah Nadan* v. *Deivanai Ammal*.
('02) 25 Mad 507 (510) : 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*.
('90) 13 Mad 249 (253) (DB), *Rangayya Appa Rau* v. *Kadiyala Ratnam*.
('88) 11 Mad 77 (80) (DB), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*.
('11) 9 Ind Cas 141 (142) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao*. (Mokhasa right set up.)
('31) 18 A I R 1931 Bom 436 (444) : 134 Ind Cas 721 (DB), *Hiralal* v. *Secy. of State*. (Origin of lease known—Lease is title of lessee—He is therefore responsible for preserving it and for producing it to substantiate his claim—Its loss does not entitle him to an inference in his own favour.)
('21) 8 A I R 1921 Bom 454 (454) : 63 Ind Cas 935, *Sidhanath* v. *Chiko*.
('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunuo Coomaree* v. *Sheikh Ruttan*.
('07) 5 Cal L Jour 178 (179) (DB), *William M. Grant* v. *Mrs. Robinson*.
('97) 24 Cal 440 (446) : 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee*.
('31) 18 A I R 1931 Mad 577 (578, 579) : 133 Ind Cas 369, *Gopala* v. *Juvappa*.
('99) 22 Mad 264 (266), *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi*.
[*See also* ('85) 1885 Bom P J 160 Reprint P. 150 (150) (DB), *Harcharandas* v. *Sadashiv*. (Person executing kabuliyat in favour of inamdar and taking possession of land under such kabuliyat in consideration of the agreement contained therein to pay the assessment—Whether kabuliyat must be deemed by virtue of *local usage* to imply a term that the lessee is to be entitled to continue in possession as long as he pays the assessment, is a matter in regard to which the onus of proof is on the tenant.)]

2. ('24) 11 A I R 1924 P C 65 (66, 67) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC).

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that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant .... A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature."

In *Seturatnam Aiyar* v. *Venkatachela Goundan*[3] the Privy Council said as follows :

> " Permanence is not a universal and integrent incident of an under-ryot's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title and possibly by other means."[4]

Where, however, the entire evidence on both sides is once before the Court, the question as to onus of proof is not material and is purely of academic interest and the issue as to permanence will be determined on the evidence before the Court and not with reference to the question of burden of proof.[5]

Where a tenant sets up a permanent tenancy but fails to establish his claim, he can fall back upon any lesser title which may be proved.[6]

44. Principle of lost grant as applied to permanent tenancies. — Under S. 107 a permanent lease can only be created by a registered deed. But neither writing nor registration was necessary for the granting of such a lease before this Act was passed.[1] Under S. 2, rights created under leases granted before the Act are not affected by the provisions of this Act.

If such lease has been granted by a written instrument, then under S. 91 of the Evidence Act, the terms of the lease can only be proved by

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3. ('20) 7 A I R 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 : 56 Ind Cas 117 (PC).

4. *See also the following cases to the same effect* :
('29) 16 A I R 1929 P C 156 (157) : 52 Mad 549 : 56 Ind App 248 : 116 Ind Cas 601 (PC), *Subrahmanya Chettiyar* v. *Subrahmanya Mudaliyar.*
('32) 19 A I R 1932 Cal 398 (403) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*

5. ('22) 9 A I R 1922 P C 292 (302) : 45 Mad 586 : 49 Ind App 286 : 68 Ind Cas 538 (PC), *Chidambara* v. *Veerama Reddi.*
('20) 7 A I R 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 : 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan.*
('31) 18 A I R 1931 Bom 436 (443) : 134 Ind Cas 721 (DB), *Hiralal* v. *Secy. of State.*

6. ('90) 13 Mad 249 (253) (DB), *Rangayya Appa Rau* v. *Kadiyala Ratnam.*

Note 44

1. ('29) 16 AIR 1929 Cal 37 (38) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.*
('79) 3 Bom 340 (344, 345), *Babaji* v. *Narayan.* (A sanad is not indispensable to the proof of mirasi tenure. Mirasi right or perpetuity of tenure, like other facts, may be proved by various means.)

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producing such document or by secondary evidence thereof. In such cases, the question whether a permanent lease has been granted will be a question of construction of the document. But in case of ambiguity in the document evidence of the conduct of the parties and other circumstances would be admissible to prove the nature of the interest created.[2] Such evidence would also be admissible for a similar purpose, if no direct evidence is forthcoming of a *verbal* lease. Where the origin of the tenancy is not known, then the history and mode of enjoyment of the property and other circumstances connected with it constitute the only evidence, from which to infer the nature of the tenancy.[3] But there is an important distinction between the last-mentioned case and the two cases previously mentioned.

This distinction consists in the presumption of an origin in a lawful title which would be applicable to a case where the origin of the tenancy is *not known*. This presumption does not apply where the origin of the tenancy is *known*. In such cases, circumstantial evidence, where admissible, must establish *conclusively* that the tenancy is a permanent one.[4] No doubt, under S. 114 of the Evidence Act, the Court *may* presume the grant of a permanent tenancy, if the proved facts make such grant *likely* in the opinion of the Court. But the Court is not *bound* to presume such grant. But where the origin of the tenancy

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2. ('25) 12 AIR 1925 Cal 340 (340, 341) : 80 Ind Cas 898 (DB), *Lal Ghose* v. *Nilkantha Das.*

3. ('25) 12 AIR 1925 Cal 340 (340, 341) : 80 Ind Cas 898 (DB), *Lal Ghose* v. *Nilkantha Das.*
('24) 11 AIR 1924 Cal 465 (466) : 73 Ind Cas 2 (DB), *Makhan Lal De* v. *Arun Bala Devi.*
('24) 11 AIR 1924 Cal 156 (157) : 80 Ind Cas 580 (DB), *Kazemini Mutwali* v. *Manik Chandra.*
(1900) 27 Cal 570 (582) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*
('74) 21 Suth W R 386 (387, 388) (DB), *Nidhee Kristo* v. *Nistarinee Dossee.* (The maxim *optimus interpres rerum usus* (usage is the best interpreter of things) applies even to cases of landlord and tenant.)
('25) 12 AIR 1925 Cal 309 (315) : 52 Cal 43 : 85 Ind Cas 103 (DB), *Abdul Hakim Khan* v. *Elahi Baksha Sha.*
('29) 16 AIR 1929 Cal 37 (38) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.*

4. *See* ('29) 16 AIR 1929 Cal 37 (38) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.* (NOTE.—In this case the origin of the tenancy was not known. But the question is treated as purely one of *inference* from facts and the presumption of lawful origin is not considered as capable of making any difference. The case shows the degree of proof that would be necessary if the question is one of *inference*. In such cases, it is stated by Mukerji, J. (page 41 of AIR 1929 Cal) that the well known rule of circumstantial evidence will apply, viz., that the evidence must be of such a nature that it can possibly lead to no other *inference*. There is no reference to S. 114 of the Evidence Act under which if the evidence makes the grant of a permanent tenancy *likely* the Court *may* presume such grant till the contrary is proved. But it should be taken that his Lordship includes an inference drawn by means of a presumption under S. 114 of the Evidence Act within his proposition. Because, when a Court chooses to presume a fact under S. 114, and the presumption is not rebutted, "no other inference would be possible" in the circumstances of the case.)

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is *not known*, the presumption of a lawful origin is one of *law* which the Court is *bound* to make if the evidence justifies such a presumption. Further, much less evidence would be sufficient to justify such presumption than would be necessary to make a grant of permanent tenancy *likely*. To raise such presumption of origin in a lawful title, it is sufficient if the evidence is such that a grant of permanent tenancy is in its nature practicable and *reasonably capable of being presumed* without doing violence to the probabilities of the case.[5] This presumption of lawful origin is also referred to as the presumption of a "lost grant", it being presumed that there was a grant, the evidence of which has been lost.

But apart from the presumption of lawful origin above referred to, even considering the matter as one of likelihood under S. 114 of the Evidence Act, the fact that the origin of a tenancy is not known will make it easier to draw an inference of permanence in favour of the tenant than if the origin of the tenancy is known.[6]

When can the origin of a tenancy be said to be not known ? It has been held by the Calcutta High Court that where it is known who the original parties to a lease were, the mere fact that the date of the letting is not known will not make the tenancy one of unknown origin.[7] In a Bombay case,[8] the date of a tenancy was known but the records containing evidence as to the terms of the lease were destroyed during riots. It was held that the tenancy was not of unknown origin. Decisions bearing on S. 83 (2) of the Bombay Land Revenue Code may usefully be referred to in this connection.[9]

In the case-law on this subject there is generally no reference to the presumption of lawful origin or lost grant. But there is no room for thinking that such a presumption is considered not applicable to such cases. In *Nainapillai* v. *Ramanathan*[10] the Privy Council remarked

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5. ('30) 17 AIR 1930 P C 103 (105) : 57 Cal 1293 : 57 Ind App 125 : 123 Ind Cas 722 (PC), *Md. Muzaffaralmusavi* v. *Bibi Jabeda Khatun.*

6. ('29) 16 AIR 1929 Cal 37 (38) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.*

(1900) 27 Cal 570 (582) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.* (In this case there was a kabuliyat from which it was held a *fresh* tenancy commenced.)

('26) 13 AIR 1926 Cal 634 (635) : 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu.* (Tenancy for residential purposes—Origin known—*Held* not permanent.)

7. ('32) 19 AIR 1932 Cal 398 (402) : 137 I. C. 658 (DB), *Narendra* v. *Sannyasi.*

8. ('31) 18 AIR 1931 Bom 436(444): 134 I.C. 721 (DB), *Hiralal* v. *Secy. of State.*

9. See for instance—(1900) 2 Bom L R 93 (95) (DB), *Raghunath* v. *Lakshuman.*

10. ('24) 11 AIR 1924 P C 65 (72) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC). (NOTE.—As their Lordships have stated that the only possible way in which a permanent tenancy could be proved in the case was by a lost grant, their discussion of the probabilities of the case must be taken to relate to the question whether a lost grant can be presumed in the case. They hold that in the circumstances of the case, a lost grant cannot be presumed. This is what they mean by saying that such grant is "not even suggested", and not that the *plea* has not been taken and therefore they are not going to consider the question. In AIR 1930 P. C. 103 their Lordships presumed the *legality* of a permanent grant but in this case they refused to do so. This is because in AIR 1930 P. C. 103, there was sufficient material before the Court to presume the legality, while in this case there was no sufficient material for the purpose.)

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that "as no grant of a right of permanent occupancy has been produced or even alleged, it is not apparent how a right of permanent occupancy could have been obtained by the defendants or by any predecessor in title of theirs, except by a lost grant or grants, and that is not even suggested." This clearly implies that in their Lordships' opinion the presumption of "lost grant" may apply to such cases. And in *Abdul Hakim* v. *Elahi Baksha*[11] Chakravarti, J., expressly stated that the principle on which a permanent tenancy is proved by circumstantial evidence in cases of tenancies of unknown origin is the principle of lost grant. Rankin, J., in *Kamal Kumar* v. *Nandalal*,[12] however, considered that the reference to a "lost grant" in such cases is "confusing and misleading." It would appear that in his Lordship's view such a theory is useful only where there is a question of the *lawfulness* of a permanent grant. As permanent tenancies before the Transfer of Property Act could be created without writing or registration, there could be no question of any legal defect on account of their mode of creation and where there is no question of any other legal defect the theory of lost grant need not be invoked. But his Lordship has overlooked the observations (above referred to) in *Nainapillai* v. *Ramanathan* which show that the presumption of lost grant may be usefully resorted to in such cases, even though the *legality* of the grant may not be in question.

As already pointed out, this presumption is distinct from an *inference* of permanent tenancy and may establish such tenancy, even though as a mere matter of inference from evidence such tenancy may not be held as proved. In *Muhammad Mazaffaralmusavi* v. *Bibi Jabeda Khatun*,[13] the Privy Council expressly applied the presumption of a lawful origin to a case of permanent tenancy. No doubt, in that case, their Lordships were concerned with the *legality* of the grant. But their Lordships' observations are quite general and do

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[*See also* ('20) 7 AIR 1920 P C 67 (70) : 43 Mad 567 : 47 Ind App 76 : 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan*. (NOTE — Confirming on evidence the finding of the High Court that a permanent tenancy had been granted, the Privy Council observed "nor is it in their opinion (opinion of Privy Council) to be regretted that effect has been given to the very long possession, 'immemorial' in the High Court's view, of the defendants and their predecessors.")]

11. ('25) 12 AIR 1925 Cal 309 (315) : 52 Cal 43 : 85 Ind Cas 103 (DB).

12. ('29) 16 AIR 1929 Cal 37 (41) : 56 Cal 738 : 116 Ind Cas 378 (DB). (NOTE — Both the learned Judges in this case, (Rankin and Mukerji, JJ.) treat the question as one purely of inference of fact, though the tenancy was of an unknown origin. Mukerji, J., pointedly says that the circumstantial evidence in support of the claim of permanent tenancy must be so strong that it can possibly lead to no other inference. This brings out clearly what difference it would make if the presumption of lost grant is resorted to. For raising such presumption, the above high degree of proof is not necessary. It is not even necessary that the grant of permanent tenancy must be *likely* on the evidence in the case. It is sufficient if such grant is *reasonably capable of being presumed* from the evidence, which is a very different thing from the grant being *likely*.)

13. ('30) 17 AIR 1930 P C 103 (105) : 57 Cal 1293 : 57 Ind App 125 : 123 Ind Cas 722 (PC).

not imply that they are confined to cases where the *legality* of a grant is questioned. The principle of lost grant was referred to and applied in as old a decision as *Gooroo Pershad Roy* v. *Bykunto Chunder Roy*,[14] and though this does not seem to have been a case of *permanent tenancy*, it shows that the principle is of general application.

The following passage from *Muhammad Mazaffaralmusavi* v. *Bibi Jabeda Khatun*[15] shows the nature of a presumption of lawful origin and how it differs from an *inference* of such origin under S. 114 of the Evidence Act :

" The presumption of an origin in some lawful title, which the Courts have so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. Hence their Lordships cannot accept the appellant's contention that the provisions of the Evidence Act, S. 114, prevent the inference of a consent by the Kazi in the absence of any evidence of an application to the Kazi for leave, or some other proved fact of that kind. The matter is one of a presumption, based on the policy of the law, but even considered as an inference from proved facts, the leave presumed is a thing, which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to *de jure*. In a case such as this, where it is necessary to indicate what particular kind of lawful title is being presumed, the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed, without doing violence to the probabilities of the case. The presumption is not an "open sesame," with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point, where time has obliterated any record of the original commencement."

Note. — The reference to the permission of the kazi in the above passage is to be understood in this way. If the kazi had permitted the transaction it would be valid.

45. Permanent tenancy — Presumption of validity of grant in case of tenancies of unknown origin. — It has been seen in Note 44 that in the case of tenancies of unknown origin it may be presumed from the circumstances of the case that a permanent interest was granted, although as a matter purely of inference from evidence such a result may not necessarily follow. This presumption is one based on the *policy of the law* and is not a part of the law of *evidence*. The presumption will apply not only to the *factum* of a grant but also as to its *legality*. In *Muhammad Mazaffaralmusavi* v. *Bibi Jabeda Khatun*,[1] the presumption was applied to the legality of the grant of a permanent lease by the mutwalli of a wakf. It was held that the permission of the kazi which would have validated the lease must be presumed, in the circumstances of the case, although they

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14. ('66) 6 Suth W R 82 (83) (DB).
15. ('30) 17 AIR 1930 P C 103 (105) : 57 Cal 1293 : 57 Ind App 125 : 123 Ind Cas 722 (PC).

Note 45

1. ('30) 17 AIR 1930 P C 103 (105) : 57 Cal 1293 : 57 Ind App 125 : 123 Ind Cas 722 (PC). (Affirming AIR 1926 Cal 322.)

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might not be sufficient to make such permission *likely* within the meaning of S. 114 of the Evidence Act. The decision followed *Bawa Magniram* v. *Kasturbhai*,[2] where a similar presumption was made in respect of legal necessity for a permanent lease granted by the shebait of a mutt. But it *Nainapillai* v. *Ramanathan*[2a] the Privy Council refused to presume the grant of a permanent lease in the circumstances of the case and one of the grounds given for its decision was that the lands in question were the property of a temple which could not be alienated except for legal necessity. In this case, their Lordships approved of the decision of the Calcutta High Court in *Satya Sri* v. *Kartik Chandra*[3] in which it was held that though normally the circumstances of the case would have been sufficient to justify a presumption that a permanent lease was granted, no such presumption could be made if the property was a debutter property. But these and similar decisions[4] have to be considered with reference to the clear enunciation of the law by the Privy Council in *Muhammad Mazaffaralmusavi* v. *Bibi Jabeda Khatun* and cannot be regarded as affecting the proposition that the *legality* as well as the *factum* of a permanent lease can be presumed, if on the evidence before the Court such legality is reasonably capable of being presumed. The above decision also shows that this rule applies to transfers of property belonging to religious and charitable endowments. The decision in *Nainapillai* v. *Ramanathan* must be taken to mean only that in that case the materials before the Court were not sufficient to draw the presumption of legality. From their Lordships' judgment it appears that such materials were not even sufficient to raise a presumption of the *factum* of the grant. As regards the decision of the Calcutta High Court in *Satya Sri* v. *Kartik Chandra* it is not clear if it was a case where the origin of the tenancy was *unknown*. If the origin was *known*, then the presumption mentioned in *Muhammad Mazaffarlmusavi* v. *Bibi Jabeda Khatun* would not apply. In such a case the question would purely be one of presumption of *fact* under S. 114 of the Evidence Act and it may be considered that their Lordships have held that it cannot be presumed under that section that what is *prima facie* an illegal act has been committed. The presumption referred to in *Muhammad Mazaffaralmusavi* v. *Bibi Jadeda Khatun* based, as it is said to be, on the policy of the law, is, it is clear from that decision, not subject to any such considerations.

46. Permanent tenancy — Presumption of lawful origin. — See Notes 44 and 45.

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2. ('22) 9 AIR 1922 PC 163 (165): 46 Bom 481: 49 Ind App 54: 66 I. C. 162 (PC).
[*See also* ('96) 19 Mad 485 (496) : 6 Mad L Jour 247 (DB), *Chokalingam Pillai* v. *Mayandi Chettiar*.]

2a. ('24) 11 AIR 1924 P C 65 (72) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC).

3. ('12) 13 Ind Cas 596 (596) (DB) (Cal).

4. ('30) 17 AIR 1930 Mad 434 (435, 436) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal*.
[*See* ('32) 19 AIR 1932 Cal 398 (403) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannayasi Charan*.]

47. Permanent tenancy — Construction of leases. — Where there is an instrument creating the tenancy, the question whether it is a permanent tenancy is one of construction of the instrument. The main rules as to construction of deeds have been discussed in S. 8, Note 20 and these rules will apply to such cases also. Under such rules, where the document is ambiguous or of doubtful import, the Court is entitled to take into consideration the surrounding circumstances and the mode of enjoyment of the property and the actings of the parties in coming to a conclusion if a permanent interest has been granted. In such cases, the Court can hold that a permanent tenancy has been granted, notwithstanding that the instrument itself is not clear on the point.[1] As to the nature of evidence that will be useful in this connexion, see Notes 48 to 51. But where the meaning of the document is clear, this course is not open to the Court and it must confine itself to the words used in the instrument.[2]

In considering the question whether an instrument confers a permanent lease, the use of formal words conveying the idea of

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Note 47

1. ('75) 24 Suth W R 176 (177) (PC), *Watson and Co.* v. *Mohesh Narain.*
('72) 14 Moo Ind App 247 (256) : 11 Beng L R 71 (PC), *Kooldeep Narain* v. *Government.* (Ghatwali tenure—Omission of words of inheritance does not show conclusively that the tenure is not hereditary — It being shown that ghatwali tenure had descended from father to son for several generations, it was held that it was an hereditary tenure.)
('69) 12 Moo Ind App 263 (268) : 11 Suth W R P C 10 (PC), *Suttosurrun Ghosal* v. *Mohesh Chunder.*
('67) 11 Moo Ind App 433 (463, 466) : 9 Suth W R P C 3 (PC), *Dhunpat Singh* v. *Gooman Singh.*
('85) 1885 Bom P J 205 (DB), *Narayan* v. *Ramchandra.* (The question whether a lease creates a permanent tenancy is to be determined by the terms of the instrument itself, but to a certain extent by the circumstances existing at the time of its execution and further by the conduct of the parties since its execution.)
('01) 3 Bom L R 768 (770) (DB), *Babu* v. *Sitaram.* (The mere fact that words of inheritance do not occur in a lease does not make it the less a permanent lease, if from the language of the document, taken as a whole, the object of the lease and other surrounding circumstances, such as the conduct of the parties, it appears that their intention was that it should operate as a lease in perpetuity.)
('28) 15 AIR 1928 Cal 392 (394) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janaki Nath.*
('25) 12 AIR 1925 Cal 340 (340, 341) : 80 Ind Cas 898 (DB), *Lal Ghosh* v. *Nilkantha Das.*
('18) 5 AIR 1918 Cal 823 (824) : 41 Ind Cas 227 (DB), *Jagadish Chandra* v. *Bisweswari Debya.*
('18) 5 AIR 1918 Cal 639 (641) : 41 Ind Cas 530 (DB), *Sarada Kripalala* v. *Akhil Chandra.*
('75) 24 Suth W R 301 (301) (DB), *Nubo Doorga* v. *Dwarka Nath.*
('70) 14 Suth W R 107 (107) (DB), *Kuroonakur Mahotee* v. *Neeladhro.*
('19) 6 AIR 1919 Mad 886 (886) : 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha.*
('29) 16 AIR 1929 Pat 376 (382) : 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*

2. ('29) 16 AIR 1929 Pat 376 (382) : 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*
('31) 18 AIR 1931 Cal 160 (162): 130 I. C. 564 (DB), *Bejoychand* v. *Md. Yasil.*

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permanency and the title of the document will have some importance. But this is not a factor which will be conclusive. The task of the Court is to consider the document as a whole and not to attach undue importance to the use of formal expressions by the parties. Hence, a document may be held to confer a permanent lease, notwithstanding the absence of any specific formal expressions denoting permanence.- Similarly, notwithstanding the use of such expressions, the Court may hold that a permanent lease has not been granted. Thus, words providing that the lessee is to enjoy the property from generation to generation and words to similar effect *prima facie* indicate a permanent right,[3] and their absence is a factor *against* permanence.[4] But their presence[5] or absence[6] is not conclusive either way.

The following considerations may be noted in interpreting such documents:

The fact that a lease has been granted for the purpose of reclamation does not necessarily prove the lease to be permanent.[7]

Where a lease has been granted for the purpose of erecting buildings, the fact may indicate that the lease is a permanent one.[8]

Where the terms of a lease and other circumstances indicate on the whole the grant of a permanent lease, the mere fact that the

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3. ('76) 1 Cal 391 (398) : 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut.*
('26) 13 AIR 1926 Cal 533 (535) : 53 Cal 270 : 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.*

4. ('67) 11 Moo Ind App 433 (463, 466) : 9 Suth W R P C 3 (PC), *Dhunpat Singh* v. *Gooman Singh.*
('30) 17 AIR 1930 Mad 434 (435, 436, 437) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.*
('91) 15 Bom 704 (707), *Ramabai Saheb* v. *Babaji.*
('02) 6 Cal W N 134 (140) (DB), *Ismail Khan* v. *Kali Krishna.*
('01) 5 Cal W N 846 (855, 856) (DB), *Ismail Khan* v. *L. P. D. Broughton.*
(1900) 27 Cal 570 (582) : 4 Cal W N 210 (DB), *Ismail Khan* v. *Jaigun Bibi.*
('06) 33 Cal 511 (530):3 Cal L Jour 306 (DB), *Shama Charan* v. *Abhiram.*

5. ('26) 13 AIR 1926 Oudh 72(74): 89 I.C. 221, *Kalka Singh* v. *Bishunath Singh.*
('89) 1889 Oudh S C No. 155, p. 184 (185), *Babuain Sheopal* v. *Raja Rampal.*
('25) 12 AIR 1925 Mad 732 (733) : 87 Ind Cas 433, *Rama Rao* v. *Thimmappa.*
('26) 13 AIR 1926 Oudh 260 (261) : 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh.*

6. ('29) 16 AIR 1929 Nag 23 (25) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal.*
('05) 32 Cal 648 (651) : 9 Cal W N 463 (DB), *Promada Nath* v. *Sri Gobind.*
('86) 12 Cal 117 (130) : 12 Ind App 205 (PC), *Tulshi Pershad* v. *Ram Narain.*
('18) 5 AIR 1918 Cal 459 (459) : 41 Ind Cas 875 (DB), *Baikanta Nath* v. *Lakshan Chandra.*

7. ('82) 8 Cal 664 (673) : 9 Ind App 33 (PC), *Bilasmoni* v. *Sheo Persad.*
('24) 11 AIR 1924 Pat 560 (561) : 3 Pat 403 : 83 Ind Cas 741 (DB), *Tekait Harnarayan* v. *Darshan Deo.*

8. ('05) 32 Cal 648 (651) : 9 Cal W N 463 (DB), *Promoda Nath* v. *Sri Gobind.*
('35) 22 AIR 1935 All 492 (493) : 154 I.C. 305 (DB), *Md. Ismail* v. *Jawahir Lal.*
('14) 1 AIR 1914 Cal 300 (300) : 20 Ind Cas 907 (DB), *Elahi Baksh* v. *Hukum Bahsh.*
('99) 26 Cal 204 (216) : 2 Cal W N 718, *Rungo Lall* v. *Wilson.*
('91) 1891 Bom P J 248 reprint p. 131 (132) (DB), *Nagapaya* v. *Anantaya.* (The condition about permission to build and to surrender the land showed a certain want of equality of benefit inconsistent with the theory of permanent tenancy.)

lease contains a provision for forfeiture in case of non-payment of rent or for other reason does not make the lease not permanent.[9]

Though a clause restraining transfer is *prima facie* inconsistent with the grant of a permanent right, it is not conclusive.[10]

Though the fixing of rent without any liability for enhancement may suggest permanence, such liability for enhancement does not necessarily import that the lease is not permanent.[11]

A substantial premium suggests permanence.[12]

A clause which throws the entire cost of improvements on the lessee may indicate some degree of continuity but not necessarily perpetuity.[13]

See also the undermentioned cases.[14]

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9. ('07) 34 Cal 358 (361, 362, 363) : 5 Cal L Jour 208 (DB), *Meghlal* v. *Rajkumar.*

('33) 20 AIR 1933 Oudh 161 (162) : 8 Luck 377 : 142 Ind Cas 885 (DB), *Bhagwati Prasad* v. *Balgobind.*

('32) 19 AIR 1932 Cal 764 (765, 766) : 59 Cal 1282 : 140 Ind Cas 743 (DB), *Bhabataran Pahari* v. *Trailokyanath.*

('10) 7 Ind Cas 549 (550) : 37 Cal 918 : 37 Ind App 198 (PC), *Bhagwat Sahai* v. *Bipin Behary.*

10. ('32) 19 AIR 1932 Cal 764 (766) : 59 Cal 1282 : 140 Ind Cas 743 (DB), *Bhabataran Pahari* v. *Trailokyanath.*

('26) 13 AIR 1926 Cal 533 (535) : 53 Cal 270 : 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.*

('17) 4 AIR 1917 Cal 746 (783) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*

('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prasad* v. *Prosanna Kumar.*

('21) 8 AIR 1921 Cal 474 (475, 476) : 60 Ind Cas 984 (DB), *Jogesh Chandra* v. *Mokbul Ali.*

('89) 13 Bom 373 (375) (DB), *Vinayak* v. *Baba Shabudin.*

11. ('31) 18 AIR 1931 P C 207 (209) : 133 Ind Cas 732 (PC), *Janaki Nath* v. *Dina Nath.*

(1900) 2 Bom L R 93 (95) (DB), *Raghunath* v. *Lakshuman.*

('26) 13 AIR 1926 Cal 533 (535) : 53 Cal 270 : 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.*

12. ('17) 4 AIR 1917 Cal 746 (783) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*

('31) 18 AIR 1931 P C 207 (209) : 133 Ind Cas 732 (PC), *Janaki Nath* v. *Dina Nath.*

13. ('17) 4 AIR 1917 Cal 746 (783) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*

('30) 17 AIR 1930 Mad 434 (437) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.*

14. ('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahaman.* (Where an under-raiyati lease provided that the tenant was at no time to be ejected from the land, but that, after the expiry of nine years, a fresh settlement would be made and until it was made the conditions of the kabuliyat were to remain in force — *Held* that the lease was intended to be a permanent lease.)

('05) 8 Oudh Cas 61 (64, 65) (DB), *Madho Singh* v. *Deputy Commissioner of Bara Banki.* (Lease providing that lessee should remain in possession on payment of annual rent and should not be ejected so long as he paid rent regularly — *Held* lease was not permanent.)

Section 105 Note 47

The significance of various vernacular expressions which are commonly used in lease deeds in this country with reference to the question whether a permanent tenure is created is discussed below :

The words "miad" or "bila miad" simply mean 'without any term.' They do not in themselves import a permanent lease. But along with other circumstances they may indicate such lease.[15]

The words "putra poutradi krame" support the theory of permanence.[16]

('26) 13 AIR 1926 Cal 558 (558): 53 Cal 95: 94 Ind Cas 684 (DB), *Chandi Charan* v. *Ashutosh Lahiri.* (A man may have a permanent right of tenancy in a house and a site but he would not necessarily have the same right to another piece of land adjoining it of which he had taken settlement for the purpose of enlarging the compound of the house.)

('17) 4 AIR 1917 Cal 746 (783) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.* (The fact that a lease is in favour of two persons points to the conclusion that though some measure of continuity was desired, perpetuity was not intended.)

('32) 19 AIR 1932 P C 105 (108) : 138 Ind Cas 234 (PC), *Bechu Singh* v. *Kumar Kamakhya.* (The plaintiff sued in ejectment alleging the defendants to be yearly tenants — Defendants set up raiyati or occupancy rights under Chota Nagpur Tenancy Act — *Held* on construction of the patta under which the defendants originally came into possession and the facts of the case that the defendants were not entitled to raiyati rights in the land.)

('30) 17 AIR 1930 Mad 434 (435) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.* (Grant for indefinite period is *prima facie* for lessee's life only.)

('31) 18 AIR 1931 Nag 128 (128) : 134 Ind Cas 263, *Sadaram* v. *Sundar Singh.* (Kabuliat stating that the tenant would pay rent at Rs. 10 for five years and would give up possession after five years and that if he further remained in possession he would pay Rs. 25 as rent — *Held* that this did not mean that he had the right to occupy the sites for ever subject simply to the payment of Rs. 25 per annum.)

('88) 11 Mad 77 (79, 80) (DB), *Thiagaraja* v. *Giyana Sambandha.*

15. ('17) 4 AIR 1917 Pat 46 (46) : 2 Pat L Jour 180 : 39 Ind Cas 658 (DB). *Parshan Kuer* v. *Tulsi Kuer.* (Mere fact that the deed confers mineral rights on the lessee or on the heirs and successors of the lessee will not make the lease a permanent one.)

('31) 18 AIR 1931 P C 207 (209) : 133 I. C. 732 (PC), *Janaki Nath* v. *Dina Nath,*

('29) 16 AIR 1929 Pat 68 (70) : 115 Ind Cas 554 (DB), *Kamakhya Narayan* v. *Bechu Singh.* (Lease held not permanent.)

('22) 9 AIR 1922 Pat 161 (162): 6 Pat L Jour 687: 65 Ind Cas 303 (DB), *Kangali-charan* v. *Surja Narain.* (Bemiyadi tenancy does not necessarily mean that it can never be a permanent lease although there is no rule that it imports a permanent tenancy.)

('24) 11 AIR 1924 Pat 88 (89) : 2 Pat 452 : 77 Ind Cas 32 (DB), *Forbes* v. *Hanu-man Bhagat.* (Provision for erection by lessee of pucca buildings with lessor's consent indicated permanent tenure.)

('36) 23 AIR 1936 Pat 275 (277) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal.* (Lease held permanent.)

('25) 12 AIR 1925 Oudh 270 (271) : 78 Ind Cas 47, *Kalu Singh* v. *Hansraj.* (The words "bila miad" in their common acceptance may mean either undetermined or perpetual — The terms of the document must be examined in order to see which of the two meanings applies to the particular document.)

16. ('23) 10 AIR 1923 Cal 505 (505) : 76 Ind Cas 586 (DB), *Golam Rahaman* v. *Kundu Choudhri.*

('16) 3 AIR 1916 Cal 664 (665) : 29 Ind Cas 502 (DB), *Kartic Mandal* v. *Bama Charan.*

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Note 47

The term "mirasi" denotes heritability and permanence of tenure.[17]

The term "mourasi" implies a permanent heriditary tenure.[18]

But the words "istimrari mokarari" do not in themselves import the idea of heritability.[19] But they may establish a permanent

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('26) 13 AIR 1926 Oudh 260 (261) : 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh*.
(The use of the word "aulad" does not show that the lease is hereditary.)

17. ('23) 10 AIR 1923 Cal 705 (706) (DB), *Ajimannessa* v. *Pannalal*. ("Miras" is an Arabic word meaning heritability.)
('91) 15 Bom 407 (408) (DB), *Vithu* v. *Dhondi*.
('69) 4 Mad H C R 153 (161) (DB), *Saminathaiyan* v. *Saminathaiyan*. ("Mirasidar" in Tanjore district is a hereditary tenant under the Government — Tenancy is determinable on default in payment of the motha faisal assessment payable for the land and the tenant is subject to no restriction in regard to the disposition of his right and interest.)
('94) 18 Bom 507 (511) (DB), *Vithalbowa* v. *Narayan*.

18. ('29) 16 AIR 1929 Cal 454 (456) : 56 Cal 180 : 117 Ind Cas 534, *Giribala* v. *Kedar Nath*.
('18) 5 AIR 1918 Cal 459 (459): 41 Ind Cas 875 (DB), *Baikanta Nath* v. *Lakshan Chandra*. (The words "istumirari mourasi mokarrari" have always been held to mean permanent and heritable.)
('35) 62 Cal L Jour 551 (559) (DB), *Prodyat Kumar* v. *Hirendra Nath*.
('23) 10 AIR 1923 Cal 705 (706) (DB), *Ajimannessa* v. *Pannalal*.

19. ('28) 15 AIR 1928 P C 146 (148) : 7 Pat 649 : 55 Ind App 212 : 109 Ind Cas 663 (PC), *Kumar Kamakhya* v. *Ram Raksha*.
(1900) 27 Cal 156 (165, 166): 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath*.
('86) 12 Cal 117 (130) : 12 Ind App 205 (PC), *Tulshi Pershad* v. *Ram Narain*.
('17) 4 AIR 1917 Cal 746 (783, 785) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narayan* v. *Chota Nagpur Banking Association*.
('03) 30 Cal 883 (892, 893) (DB), *Narsingh Dyal* v. *Ram Narain Singh*.
('03) 30 Cal 20 (32) : 7 Cal W N 314 (DB), *Agin Bindh Upadhya* v. *Mohan Bikram*.
('26) 13 AIR 1926 Cal 322 (325): 90 Ind Cas 781 (DB), *Jabeda Khatun* v. *Mohommad Mozaffar*.
('86) 8 All 569 (572) : 1886 All W N 227 (DB), *Gaya* v. *Ramjiawan Ram*.
('26) 13 AIR 1926 Oudh 260 (261) : 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh*.
('24) 11 AIR 1924 Pat 572 (573) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *Kumar Kamakhya*.
('25) 12 AIR 1925 Pat 216 (219) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain*.
('82) 8 Cal 664 (672, 673) : 9 Ind App 33 (PC), *Bilasmoni* v. *Raja Sheopersad*.
('80) 5 Cal 543 (555 to 558) : 5 Cal L R 138 (DB), *Sheo Pershad* v. *Kally Dass*.
(1851-54) 5 Moo Ind App 467 (498): 1 Sar 472 (PC), *Bengal Government* v. *Nawab Jafur*.

NOTE. — In some early decisions of the Calcutta High Court, for instance, 12 Suth W R 3 and 5 Suth W R 101, it was held that the words "istimrari mokarari" by themselves imply a perpetual and heritable tenure, unless their effect is curtailed by other factors—1 Cal 391 (P C) also may seem capable of being interpreted as supporting this view — But in that case the words "generation to generation" also were used and the Privy Council gave this as the reason for their decision that the tenure was an absolute, hereditary mokarari one — The later decisions of the Privy Council, as well as of the High Courts, leave no doubt in the matter.

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and heritable right, when there are also other factors indicative of such right.[20]

The word "purakudi" does not imply a permanent occupancy right.[21] So also, the expression "ulavadai mirasdar" does not import a permanent tenancy.[22]

Mulgeni is a permanent lease.[23]

"Taluk" imports a permanent tenure.[24] So also the word "zamindari".[25]

See also the undermentioned cases.[26]

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20. ('76) 1 Cal 391 (398) : 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut.* (The words "generation to generation" imported heritability.)
('17) 4 AIR 1917 Cal 746 (749) : 43 Cal 332 : 36 Ind Cas 321 (SB), *Ram Narayan* v. *Chota Nagpur Banking Association.* (Words "from generation to generation" or similar words are not indispensable to show permanency.)

21. ('04) 27 Mad 291 (299) : 31 Ind App 83 (PC), *Mayandi Chettiyar* v. *Chockalingam.*
('88) 11 Mad 77 (78) (DB), *Thiagaraja* v. *Giyana Sambandha.* (5 Mad 345 referred to.)
('99) 22 Mad 264 (267) (DB), *Rangasami Reddi* v. *Pandara Sannadhi.*

22. ('99) 22 Mad 264 (267) (DB), *Rangasami Reddi* v. *Pandara Sannadhi.*
('04) 27 Mad 291 (299): 31 Ind App 83 (PC), *Mayandi Chettiyar* v. *Chokkalingam Pillai.*
[*See also* ('24) 11 A I R 1924 P C 65 (74) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC), *Nainapillai* v. *Ramanathan.* ('Kudimiras' does not import permanent right.)

23. ('10) 5 Ind Cas 437 (437) : 33 Mad 253 (DB), *Gangamma* v. *Bommakka.*
('94) 17 Mad 218 (219, 220):3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta Hegde.*
('91) 15 Bom 407 (413) (DB), *Vithu* v. *Dhondi.* (Mulgenidar is substantially the same as mirasdar.)

24. ('69) 12 Suth W R 413 (415, 416) (DB), *Tarini* v. *Watson.*
('18) 5 A I R 1918 Cal 799 (800) : 38 Ind Cas 56 (D B), *Upendra Lal* v. *Jogesh Chandra.*
('21) 8 A I R 1921 Cal 474 (475, 476) : 47 Cal 979 : 60 Ind Cas 984 (DB), *Jogesh Chandra* v. *Makbul Ali.*
('13) 21 Ind Cas 47 (48) (DB) (Cal), *Budyar Rahman* v. *Matiar.*

25. ('03) 25 All 1 (15) : 29 Ind App 203 (P C), *Rampal Singh* v. *Balbhaddar.*

26. ***Leases held not permanent.***
('85) 9 Bom 419 (422) (DB), *Gangabai* v. *Kalapa.* (The words : "You must pay every year Government dues and enjoy the fields along with the garden lands without disturbance *(sukhrup rahane)*, besides the fixed amount there will be no oppression, on account of cesses" *held* do not create a permanent tenancy but only a tenancy from year to year.)
('17) 4 AIR 1917 Mad 826 (826) : 33 Ind Cas 57 (DB), *Murugappa* v. *Rangasami.* (A lease should not be regarded as permanent merely because it prescribes no time, even when the lessee occupies the land for 60 years at a low rate of rent.)
('31) 18 A I R 1931 Bom 466 (469, 470) : 133 Ind Cas 839 (DB), *Ramchandra* v. *Narasinha.* (Lease for "aniyamit" period—Held not permanent.)
('14) 1 A I R 1914 Bom 294 (296) : 39 Bom 316 : 27 Ind Cas 523 (DB), *Yeshwant* v. *Keshavrao.* (Term "fazendari," although indicating nature of rent, does not necessarily decide nature of tenure.)
('01) 4 Oudh Cas 264 (267), *Balgovind* v. *Raja Rampal.* (Sankalp rent free grant held not to be a perpetual lease.)
('92) 15 Mad 199 (202) (DB), *Rajaram* v. *Nara Singa.* (Words "Kayam saswata" do not *per se* convey an estate of inheritance.)
('19) 6 AIR 1919 Mad 897 (898, 899):46 Ind Cas 62 (DB), *Rama Iyenger* v. *Guruswami.* (Kayam saswatham patta.)

48. Permanent tenancy — Circumstantial evidence as to — General. — As seen in Note 44, even the presumption of lawful origin or lost grant is not independent of all evidence. There must be sufficient evidence before the Court to make a grant of permanent tenancy reasonably capable of being presumed.[1] Hence, whether such presumption is resorted to or not, the question of permanent tenancy, where an *express* grant is not established, is one depending on the facts and circumstances of each case.[2]

('32) 19 AIR 1932 Cal 398 (404) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sanyasi Charan.* (Word 'bharatia' is seldom used with regard to a permanent tenant.)
('16) 33 Ind Cas 264 (264) (Oudh), *Tribhuvan Dat* v. *Muhammad Abdul Hasan.* (No interest after the life of the lessee or grantee is created by the use of '*hamesha*' or '*dawami*'.)
('89) 1889 Bom P J 321 reprint page 325 (326) (DB), *Gangadhar* v. *Mahadu.* (The use of word 'nehemi' in the lease—The word not occurring in the clause defining the duration of the tenancy but in the clause providing the deduction to be allowed by the landlord from the highest assessment—Permanent tenancy held not created.)
('26) 13 AIR 1926 Oudh 260 (261) : 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh.* ("Dawami" does not necessarily import permanency or heritability.)

Leases held permanent.

(1859-61) 8 Moo Ind App 327 (330) : 4 Suth W R P C 73 (PC), *Vencataswara* v. *Alagoomoottoo.* (A 'cuttoogootaga' lease is a lease in perpetuity.)
('76) 1876 Bom B J 227 (DB), *Gangava* v. *Konher.* (Use of word "nirantar" confers a perpetual interest.)
('27) 14 A I R 1927 All 788 (789) : 100 Ind Cas 652 (DB), *Abdul Karim* v. *Gauri Shankar.* (The word "intiqal" is a word of wide import and certainly includes a transfer by way of perpetual lease.)
('90) 1890 Bom P J 211, reprint page 420 (421) (DB), *Narsingrao* v. *Narayanrao.* (In this case the word 'nirantar' was immediately followed by the words 'as long as you please' and hence the case of 1876 Bom P J 227 which held this word to mean perpetual, could not be followed.)
('85) 1885 Bom P J 205 (DB), *Narayan* v. *Ram Chandra.* (The words 'kayam karun dilhe' at least in the district of Ratnagiri imports a permanent tenure.)
('19) 6 AIR 1919 Mad 886 (886) : 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha.* (Expressions "saswatham" and "kayam" ordinarily import permanent lease.)
('07) 34 Cal 358 (361) : 5 Cal L Jour 208 (DB), *Meghlal* v. *Rajkumar Thakur.* (Lease including the words "Mai hak hakuk" convey to the lessee all the lessor's rights and interest in the land demised including subsoil rights and it is a permanent lease.)
('31) 18 A I R 1931 Cal 87 (89) : 129 Ind Cas 855 (DB), *Eshaque Miah* v. *Dula Miah.* (Words "sanba sani kaimi asat jotedari" indicate a permanent right.)
('28) 15 A I R 1928 Cal 392 (395) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janaki Nath.* ("Sarasari bemiadi kabuliyat.")
('23) 10 A I R 1923 Cal 705 (706) (DB), *Ayimannessa* v. *Panna Lal.* (Words "mireshorotto janmaiya" indicate permanent tenancy.)

Note 48

1. NOTE.—In AIR 1924 PC 65=47 Mad 337=51 Ind App 83 (PC) having expressly held that a permanent tenancy in the case could only be proved, if at all, by a lost grant, their Lordships consider the circumstances of the case and hold that a permanent tenancy is not established—This can only be understood as a decision that the materials before the Court were not such as to justify the presumption of lost grant—But in AIR 1930 P C 103=57 Cal 1293 = 57 Ind App 125 (PC) their Lordships considered the materials before the Court as sufficient to justify such a presumption.
2. ('32) 19 AIR 1932 Cal 398 (400) : 137 I. C. 658 (DB), *Narendra* v. *Sannyasi.*

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Note 48

The following are the elements which are usually taken into consideration in determining the permanent nature of a tenancy[3]: 1. The unknown origin of the tenancy. 2. Long and undisturbed possession by the tenant and his predecessors in title. 3. The payment of the same rent for a long period. 4. The tenancy being for residential or building purposes. 5. The erection of pucca buildings, etc., by the tenant on the land without any objection by the landlord. 6. The tenancy having been held by the same family, generation after generation. 7. Transfers of the tenancy and their recognition by the landlord.

But the above is not an exhaustive enumeration. None of these factors are by themselves conclusive. But the co-existence of a number of them will be of more or less probative force according to the circumstances of a case in establishing a permanent tenancy. In determining the question, therefore, the facts and circumstances of a case must be considered as a *whole*. It is their *cumulative* effect that must be considered.[4]

For the sake of greater convenience, however, the decisions bearing on the subject have been summarised in the following Notes 49 to 51 under headings which have reference to some of the main factors involved in such cases. See also the undermentioned cases.[5]

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3. ('19) 6 AIR 1919 P C 11 (11): 47 Cal 1: 1919 Pun Re No. 81: 46 Ind App 131: 50 Ind Cas 749 (PC), *Afzalunnissa* v. *Abdul Karim*. (Their Lordships quoted with approval the headnote in 28 Cal 738 the chief points of which were : Long possession, transfers by succession or sale, buildings of pacca structures, with landlord's permission, the landlord having acquiesced in or having knowledge of the successive transfers, etc. — All these raise the presumption of permanency, although the origin of the tenancy may not be known—Their Lordships observed that this did not apply only to Bengal (the case was from the Punjab and it applied to it).)

NOTE.—The decisions of the Calcutta High Court in AIR 1925 Cal 309=52 Cal 43; A I R 1929 Cal 37=56 Cal 738 and A I R 1932 Cal 198 contain an exhaustive discussion of the question in different aspects and may be usefully referred to.

4. ('32) 19 AIR 1932 Cal 198 (199) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupathi*. (It should also be noted that the effect of a number of facts may be destroyed in some cases by a single fact.)
('40) 27 AIR 1940 Cal 393 (395) : 190 Ind Cas 622, *Sukumar* v. *Nagendrabala*.

5. ('30) 17 AIR 1930 P C 103 (104) : 57 Cal 1293 : 57 Ind App 125 : 123 Ind Cas 722 (PC), *Md. Mazaffaralmusavi* v. *Bibi Jabeda*. (Tenure described as istimrari mukarari in rent receipts and Court proceedings — Failure of proceedings for enhancement of rent—Circumstances such as these are ordinarily, and *prima facie* a sufficient proof of permanent tenancy.)
('22) 9 AIR 1922 P C 292 (303, 304) : 45 Mad 586 : 49 Ind App 286 : 68 Ind Cas 538 (PC), *Chidambara* v. *Veerama Reddi*. (*Held*, defendants had established their prescriptive rights of occupancy — They had been dealing with the property as their own for at least 100 years — They had received compensation from Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence was found to be mostly false and fabricated.)
('05) 1 Cal L Jour 572 (575, 577) (DB), *Robert Watson & Co. Ltd.* v. *Radha Nath*. (Lease for reclamation — Time of origin not known — *Held* permanent.)
('34) 21 AIR 1934 Cal 51 (52) : 150 Ind Cas 30 (DB), *Annanda Charan* v. *Manmatha Nath*. (Entry in record of rights in favour of tenant raises statutory presumption as to permanency of tenure and transferability.)

The question whether a permanent tenancy can be inferred from circumstances is a question of law.[6]

49. Circumstantial evidence as to permanent tenancy —Long and undisturbed possession at fixed rent.—Long and undisturbed possession at fixed rent is not by itself sufficient to establish a claim of permanent tenancy.[1] Even when the origin of the tenancy is not known, long and uninterrupted possession at unvarying rent is not

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('19) 6 AIR 1919 P C 84 (84, 85) : 50 Ind Cas 856 (PC), *Surendra Nath* v. *Dwarkanath Chakravarti.* (Tenancy described as at will in rent receipts—Description not shown as known by tenants or consented to by them—Other facts showing tenancy as permanent—Tenancy cannot be held as one at will.)

('29) 16 AIR 1929 P C 156 (158) : 52 Mad 549 : 56 Ind App 248 : 116 Ind Cas 601 (PC), *Subrahmanya* v. *Subrahmanya.* (Purchase of kudivaram rights in a portion of the lands by the tenants throws doubt on the theory of having permanent rights.)

('15) 2 AIR 1915 Mad 1070 (1070) : 28 Ind Cas 599 (DB), *Raghava* v. *Secy. of State.* (Assertion of mulgeni lease for long time—*Held* mulgeni lease proved.)

6. ('27) 14 AIR 1927 P C 102 (105) : 8 Lah 573 : 54 Ind App 178 : 101 Ind Cas 355 (PC), *Dhanna Mal* v. *Moti Sagar.*

('34) 21 AIR 1934 Cal 288 (289) : 61 Cal 32 : 150 Ind Cas 238 (DB), *Manmatha Nath* v. *Promatha Nath.*

('32) 19 AIR 1932 Cal 398 (400) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*

('98) 25 Cal 896 (898) : 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullik.*

('29) 16 AIR 1929 Cal 37 (39, 43) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.* (View doubted by Rankin, J., but followed.)

('28) 15 AIR 1928 Nag 153 (155) : 111 Ind Cas 488, *Deolia* v. *Raje Janardhan.*

('32) 19 AIR 1932 Cal 198 (199) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupathi.*

Note 49

1. ('24) 11 AIR 1924 P C 65 (66) : 47 Mad 337 : 51 Ind App 83 : 82 Ind Cas 226 (PC), *A. S. N. Naina Pillai* v. *T. A. R. A. Rm. Ramathan.*

('29) 16 AIR 1929 P C 156 (158) : 56 Ind App 248 : 52 Mad 549 : 116 Ind Cas 601 (PC), *Subrahmanya* v. *Subrahmanya.*

('29) 16 AIR 1929 Cal 37 (38, 40, 41) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nanda Lal.*

('31) 18 AIR 1931 Mad 577 (578, 579) : 133 Ind Cas 369, *Gopala* v. *Juvappa.*

('31) 18 AIR 1931 Bom 436 (443, 444) : 134 Ind Cas 721 (DB), *Hiralal* v. *Secretary of State.*

('73) 10 Bom H C R 324 (326), *Narayan Visaji* v. *Lakshuman.*

('91) 15 Bom 647 (649) (DB), *Narayanbhat* v. *Davlata.*

('37) 24 AIR 1937 Pat 391 (396) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.*

('23) 10 AIR 1923 Cal 682 (683) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*

('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prosad Burman* v. *Prasanno Kuniar Das.*

('11) 9 Ind Cas 141 (145) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao.*

('22) 9 AIR 1922 Bom 402 (402) : 47 Bom 4 : 76 Ind Cas 71 (DB), *Narayan* v. *Pandurang.*

('88) 11 Mad 77 (80) (DB), *Thiagaraja* v. *G. S. Pandara Sannadhi.*

('19) 6 AIR 1919 Mad 293 (296) : 52 Ind Cas 247 (DB), *Ponniah* v. *Deivanai Ammal.*

('04) 8 Cal W N 155 (157, 158) (DB), *J. Winterscale* v. *Sarat Chandra Banerjee.*

('32) 19 AIR 1932 Cal 398 (403) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*

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sufficient by itself to give rise to an inference of permanency.[2] In some decisions, however, the view has been taken that length of possession at an unvarying rent coupled with the unknown origin of the tenancy would be sufficient to prove the tenancy to be permanent.[3]

In *Secretary of State for India* v. *Luchmeswar Singh*,[4] the Privy Council observed as follows :

> "The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord, that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in that argument, but as the origin of them is known, the argument loses its force."

But in view of the general position of the case-law on this point, it does not seem as if the Privy Council intended in the last sentence of the above passage, to lay down that where the origin of a tenancy is unknown, long and undisturbed possession at an unvarying rent would be sufficient in every case to raise a presumption of permanence.

It must also be noted here that the presumption of lawful origin in cases of tenancies of unknown origin, referred to in Note 44 does *not* involve as a rule of law the proposition that, whenever in such cases the tenant is known to have been in possession for a long time at a fixed rent, it ought to be presumed that a permanent tenancy has been granted. As pointed out in that Note, such a presumption does not arise automatically and *de jure* in favour of a particular kind of possessor. It is a presumption that arises only when there is positive evidence to sustain it. There must be evidence from which a grant of permanent tenancy must at least be reasonably capable of being presumed, though the evidence need not be sufficient to make such grant *likely*.

Length of possession at a fixed rent when it co-exists with other factors may give rise to an inference of permanence of tenancy, especially

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2. ('29) 16 AIR 1929 Cal 37 (42) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nanda Lal.*
('25) 12 AIR 1925 Cal 309 (314) : 52 Cal 43 : 85 Ind Cas 103 (DB), *Abdul Hakim Khan* v. *Elahi Baksha Sha.*
('98) 25 Cal 896 (908) : 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullik.*
('01) 5 Cal W N 801 (803) (DB), *Durga Mohun Das* v. *Rakhal Chandra Roy Chowdhury.*
('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Sheikh Rutton.*
('21) 8 AIR 1921 Cal 453 (454) : 63 Ind Cas 109 (DB), *Jyoti Prosad Chatterjee* v. *Dasarath Ghose.*

3. ('89) 16 Cal 223 (231, 232) : 16 Ind App 6 (PC), *Secretary of State for India* v. *Luchmeswar Singh.*
('90) 17 Cal 144 (146, 147) (DB), *Dunne* v. *Nobo Krishna Mookerji.*
('07) 30 Mad 528 (530) : 17 Mad L Jour 252 (DB), *Kittu Hegadthi* v. *Channamma Shettathi.* (Not followed in A I R 1931 Mad 577.)
('07) 31 Bom 183 (202) : 9 Bom L R 50 (DB), *Nananchand* v. *Modi Kekhushru.*

4. ('89) 16 Cal 223 (231, 232) : 16 Ind App 6 (PC).

if the origin of the tenancy is not known.[5] For instance, if the value of the property in the locality has gone up very high and the rent fixed is comparatively low, the fact that it has not been raised *may* suggest that the tenancy is a permanent one.[6] See also cases under Notes 50 and 51.

The fact that the rent paid has not been uniform or that the possession of the tenant has been interrupted, is a factor which will weaken a claim of permanent tenancy.[7]

50. Circumstantial evidence as to permanent tenancy—Lease for dwelling or residential purpose. — The fact that the lease has been granted for building or residential purposes may, in combination with other circumstances, suggest a permanent right.[1] This would especially be so where the origin of the tenancy is not known and the tenant and his predecessors-in-title have been in undisturbed possession of the property for a long time at a uniform rent.[2] The

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5. ('95) 22 Cal 533 (542, 543) : 22 Ind App 60 (PC), *Ram Ranjan Chakerbatti* v. *Ram Naran Singh.*
('27) 14 AIR 1927 Nag 147 (149) : 23 Nag L R 16 : 100 Ind Cas 438, *Manya* v. *Sitaram.*
('35) 62 Cal L Jour 551 (559) (DB), *Prodyot Kumar* v. *Hirendra Nath.*

6. ('07) 34 Cal 902 (907, 908) : 34 Ind App 160 (PC), *Naba Kumari Debi* v. *Behari Lal Sen.*
('26) 96 Ind Cas 315 (315) (DB) (Cal), *Bireswar Mookherji* v. *Troilokhya Dasi.* (No written lease—Series of successions—Rent not charged for at least 65 years—Land let out for dwelling purposes and situated within the Howrah Municipality —Value of land increased abnormally.)
('32) 19 AIR 1932 Cal 198 (199): 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.*
('12) 15 Ind Cas 110 (113, 114, 115) (DB) (Cal), *Grey* v. *Ram Shashi Roy.*
('29) 16 AIR 1929 Cal 473 (474) : 56 Cal 275 : 118 Ind Cas 353 (DB), *Pramatha Nath* v. *Champa Dasi.*

7. ('27) 14 AIR 1927 P C 102 (105) : 8 Lah 573 : 54 Ind App 178 : 101 Ind Cas 355 (PC), *Dhanna Mal* v. *Moti Sagar.*
('14) 1 AIR 1914 Mad 564 (567) : 47 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Narsaya.*
('37) 24 AIR 1937 Pat 391 (396) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.*

Note 50

1. ('12) 15 Ind Cas 110 (113, 114, 115) (DB) (Cal), *Grey* v. *Ram Shashi Roy.*
('33) 20 AIR 1933 Bom 97 (98) : 57 Bom 194 : 142 Ind Cas 481 (DB), *Venkatesh* v. *Bhujballi.* (Land given for building purposes and the tenancy is an *ancient one*—Presumption of permanent lease.)
('05) 7 Bom L R 401 (404) (DB), *Navalram* v. *Javerilal.*
('82) 8 Cal 960 (962) (DB), *Gangadhur Shikdar* v. *Ayimuddin.*
('26) 96 Ind Cas 315 (315) (DB) (Cal), *Bireswar* v. *Troilokhya Dasi.*

2. ('32) 19 AIR 1932 Cal 198 (199 to 204) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.*
('40) 27 AIR 1940 Cal 393 (394) : 190 Ind Cas 622, *Sukumar Chandra* v. *Nagendrabala Dasi.* (In determining the nature of a tenancy it is necessary to bear in mind the habits and customs of the people.)
('27) 14 AIR 1927 All 342 (343) : 100 Ind Cas 479, *Shah Jahan Begam* v. *Munna.*
('24) 11 AIR 1924 Bom 454 (455) : 48 Bom 541 : 83 Ind Cas 45 (DB), *Rukmini* v. *Rayaji.*
('10) 7 Ind Cas 881 (883) : 37 Cal 662 (DB), *Janaki Nath* v. *Kali Narain.*

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Notes 50–51

existence of pucca structures will add to the strength of the inference. But the absence of such structures and the fact that there are only katcha structures on the land will not necessarily defeat an inference of permanence suggested by other circumstances in the case.[3] But the mere fact that the tenancy has been created for dwelling purposes will not by itself give rise to an inference of permanence. As seen in Note 48, it is the *combination* of several factors that generally gives rise to an inference of a permanent right. The Court may, in the peculiar circumstances of a case hold that the tenancy is not permanent though it may have been created for dwelling purposes and though there may be substantial structures on the land.[4]

51. Circumstantial evidence as to permanent tenancy — Successions and transfers. — The fact that a tenancy has been

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('07) 5 Cal L Jour 178 (179) (DB), *William M. Grant* v. *Mrs. Robinson.*
('27) 14 AIR 1927 Cal 234 (235, 236) : 99 Ind Cas 910 (DB), *Pramatha Nath* v. *Bejoy Singh.*
('24) 11 AIR 1924 Cal 465 (466) : 73 Ind Cas 2 (DB), *Makhanlal De* v. *Arun Bala Devi.*

3. ('27) 14 AIR 1927 All 342 (343) : 100 Ind Cas 479, *Shah Jahan Begam* v. *Munna.*
('29) 16 AIR 1929 Cal 37 (42) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.* (The absence of pucca masonry structures was explained by the fact that the tenant was only a labourer.)
('29) 16 AIR 1929 Cal 473 (474, 475) : 56 Cal 275 : 118 Ind Cas 353 (DB), *Pramatha Nath* v. *Champa Dasi.*
('20) 7 AIR 1920 Cal 552 (552) : 57 Ind Cas 877 (DB), *Sharoshi Charan* v. *Bhagloo Sah.*
('24) 11 AIR 1924 Cal 465(467): 73 I.C. 2 (DB), *Makhanlal De* v. *Arun Bala Devi.*
('12) 13 Ind Cas 606 (607, 609) (DB) (Cal), *Mahoram Sheikh* v. *Telamuddin Khan.*
('34) 21 AIR 1934 Cal 288 (290) : 61 Cal 32 : 150 Ind Cas 238 (DB), *Manmatha Nath* v. *Promatha Nath.* (But the residence cannot be confined to the case of tenant himself.)
[But see ('25) 12 AIR 1925 Cal 309 (315) : 52 Cal 43 : 85 Ind Cas 103 (DB), *Abdul Hakim* v. *Elahi Baksh.*]

4. ('81) 8 Cal L R 50 (51) (DB), *Tarukpodo Ghosal* v. *Shyama Churn.*
('02) 6 Cal W N 134 (140) (DB), *Ismail Khan* v. *Kali Krishna.*
('82) 10 Cal L R 25 (29) (DB), *Prosunno Coomar* v. *Jagun Nath.*
('78) 3 Cal 696 (699, 700) : 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Rutton Bepari.*
('22) 9 AIR 1922 Pat 258 (259, 260) : 1 Pat 717 : 67 Ind Cas 744 (DB), *L. E. Sir Ralli* v. *A. H. Forbes.* (Though the fact that a lease is for the purpose of building permanent structures raises a presumption that it is a permanent one, yet such presumption cannot outweigh the terms of the lease itself.)
('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prasad* v. *Prosanna Kumar.*
('24) 11 AIR 1924 Cal 156 (157) : 80 Ind Cas 580 (DB), *Kazemini Mutwali* v. *Manik Chandra.*
('37) 24 AIR 1937 Pat 391 (396) : 170 Ind Cas 316 (DB), *Secy. of State* v. *Rajendra Prasad.*
('89) 16 Cal 652 (656, 657) (DB), *Rakhal Das* v. *Dino Moyi.*
('32) 19 AIR 1932 Cal 398 (402) : 137 Ind Cas 658 (DB), *Narendra Nath* v. *V. Sannyasi Charan.*
('29) 16 AIR 1929 Cal 37 (38) : 56 Cal 738 : 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandlal Dube.*

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Note 51

held in the same family from generation to generation would be some indication that tenancy is permanent.[1] But this is not a strong indication. Because as pointed out by Rankin, J., in *Kamal Kumar* v. *Nandlal Dubey*,[2] no reasonable landlord would eject a family from a homestead merely because the father or grandfather has died. But at the same time, the fact that a tenancy is not shown to be hereditary would weaken the case for permanency.[3]

The fact that there have been transfers of the holding which have been recognised by the landlord is strong indication of the tenancy being permanent.[4] Where the other circumstances show that the landlord has recognised a transfer, the mere fact that in the rent receipts, the name of the old tenant is retained does not defeat such inference.[5]

Note 51

1. ('26) 96 Ind Cas 315 (315) (DB) (Cal), *Bireswar Mookherji* v. *Troilokhya Dasi*. (Series of successions along with other facts held to prove permanent tenancy.)
2. ('29) 16 AIR 1929 Cal 37 (42) : 56 Cal 738 : 116 Ind Cas 378 (DB).
3. ('37) 24 AIR 1937 Pat 391 (396) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad*.
4. ('07) 34 Cal 902 (907) : 34 Ind App 160 (PC), *Naba Kumari Debi* v. *Behari Lal Sen*. (Sale deed of the holding stated as follows: "You have become entitled to make gift, or sale of the said land . . . . on paying expenses, etc., to the Maharaja Bahadur and on causing expunction of my name you shall take a patta in your name"—*Held* the condition was not inconsistent with the permanent tenancy.)
('05) 32 Cal 51 (60, 61): 31 Ind App 149 (PC), *Nilratan Mondal* v. *Ismail Khan Mahomed*. (Reversing 6 Cal W N 352.)
('05) 32 Cal 41 (49, 50) : 31 Ind App 144 (PC), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed*.
('40) 27 AIR 1940 Cal 393 (394) : 190 Ind Cas 622, *Sukumar Chandra* v. *Nagendrabala Dasi*.
('34) 21 AIR 1934 Cal 288 (289, 290): 61 Cal 32: 150 Ind Cas 238 (DB), *Manmatha Nath* v. *Promatha Nath*.
('32) 19 AIR 1932 Cal 198 (199) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath*.
('29) 16 AIR 1929 Cal 37 (42) : 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandlal*.
('21) 8 AIR 1921 Cal 474 (475) : 60 Ind Cas 984 (DB), *Jogesh Chandra Roy* v. *Mokbul Ali Chowdhury*.
('12) 15 Ind Cas 110 (113) (DB) (Cal), *Gray* v. *Ram Shashi Roy*.
('11) 12 Ind Cas 482 (483) (DB) (Cal), *Jyoti Prosad* v. *Lachipur Coal Co*.
('10) 5 Ind Cas 783 (784) (DB) (Cal), *Latifar Rahaman* v. *Forbes*.
('04) 8 Cal W N 301 (305) (DB), *Ismail Khan Mahomed* v. *Srimutty Mrinmoyi*.
('04) 8 Cal W N 297 (300, 301) (DB), *Ismail Khan Mahomed* v. *Asmatulla Sareng*.
('74) 21 Suth W R 386 (387, 388) (DB), *Nidhee Kristo Bose* v. *Nistarinee Dossee*.
('12) 17 Ind Cas 208 (209, 210) : 1912 Pun Re No. 121 (DB), *Abdul Karim* v. *Allah Baksha*.
('09) 4 Ind Cas 173 (174) (DB) (Cal), *Nemai Chandra Bose* v. *Mahomad Basir*. (The fact mentioned in one of the sale deeds by which the tenure was sold that one-fourth of the purchase money should be paid to the landlord is not sufficient to outweigh the presumption.)
('01) 28 Cal 738 (741) : 5 Cal W N 858 (DB), *A. Caspersz* v. *Kedar Nath Sarbadhikari*.
[See however ('32) 19 AIR 1932 Cal 398 (402): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan*.]
5. ('12) 15 Ind Cas 110 (115) (DB) (Cal), *Gray* v. *Ram Shashi Roy*.

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Notes 51–53

Where, however, the transfers are recent and not such as to have come to the notice of the landlord they will not be evidence against him suggesting a permanent tenancy.[6]

52. **Subsequent arrangements between landlord and tenant—Effect on inference of permanence.** — On the principles discussed in Note 48, in the case of old tenancies which have gone on for a long time it may be inferred from the surrounding circumstances that a permanent lease was granted. But this rule will not hold good if there has been a subsequent arrangement between the parties, into which their original rights have merged. In such a case, their relations must be determined with reference to such arrangement.[1] But if the arrangement is only of a confirmatory character, the original rights will not be affected. So also, though annual kabuliyats are sometimes executed there may be no *intention* to act on them. In such cases, the original rights of the parties will not be affected.[2] Similarly, where the rent is not fixed and parties enter into periodic agreements as regards the rent payable, such agreements cannot affect the question of the *duration* of the lease.[3] It is a question of fact and construction in each case as to what is the effect of the arrangement in question. In the cases cited below,[4] it was held that a new tenancy had been created, while in the undermentioned cases[5] it was held that no new tenancy was created and that the original rights of the parties remained unaffected.

53. **Acquisition of permanent tenancy after commencement of tenancy.** — Possession for any length of time will not by itself be sufficient to convert a tenancy (which is not permanent) into a

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('21) 8 AIR 1921 Cal 474 (475) : 60 Ind Cas 984 (DB), *Jogesh Chandra Roy* v. *Mokbul Ali Chowdhury.*

6. ('29) 16 AIR 1929 P C 156 (158) : 116 Ind Cas 601 : 56 Ind App 248 : 52 Mad 549 (PC), *Subrahmanya* v. *Subrahmanya.*

Note 52

1. (1900) 27 Cal 570 (582) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*

2. ('28) 15 AIR 1928 Nag 153 (156): 111 Ind Cas 488, *Deolia* v. *Raje Janardhan.*

3. ('29) 16 AIR 1929 Pat 376 (382) : 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*

4. ('04) 27 Mad 291 (299) : 31 Ind App 83 (PC), *Mayandi Chettiyar* v. *Chokkalingam Pillay.*

('86) 9 Mad 307 (318) : 13 Ind App 32 (PC), *Vizianagaram Maharajah* v. *Suryanarayan.* (Original permanent lease—Fresh document construed as grant of lease of similar tenure but on terms more favourable to lessor.)

('88) 11 Mad 77 (84) (DB), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi.*

('26) 13 AIR 1926 Cal 634 (636) : 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu.* (Kabuliyat stating that it was being executed after the previous lease had expired.)

(1900) 27 Cal 570 (582) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.* (Origin of tenancy not known—Subsequently a kabuliyat executed by tenant —*Held* new tenancy created.)

5. ('04) 8 Cal W N 155 (157, 158) (DB), *J. Winter Scale* v. *Sarat Chandra Banerjee.*

('04) 8 Cal W N 297 (300, 301) (DB), *Ismail Khan Mahomed* v. *Asmatulla Sareng.*

('96) 19 Mad 485 (493, 494, 495, 496) : 6 Mad L Jour 247 (DB), *Chockalingam Pillai* v. *Mayandi Chettiar.*

permanent one[1] in the absence of statutory provision or custom under which such permanent right is acquired. In the absence of such statutory provision or custom, the tenant setting up a permanent right must show that by a subsequent arrangement with the landlord his original tenancy has been converted into a permanent one.[2] As to acquisition of permanent rights by adverse possession, see Notes 79 and 80. As to the estoppel of the landlord from denying the permanent rights of the tenant, see Note 55.

The mere fact that a tenant has carried out reclamation work will not entitle him to permanent rights.[3]

54. Permanent tenancy — Acquisition of, by prescription. — See Notes 79 to 84.

55. Permanency by estoppel. — A landlord may be precluded on the principle of estoppel from denying that the tenant is entitled to a permanent right in the property.[1] The conditions necessary for raising such an estoppel have been exhaustively discussed in Note 22 on S. 51.

See also Note 12.

56. Permanent lease of property belonging to religious and charitable endowments. — As seen in Note 7 on S. 7, managers of religious and charitable endowments in India have very limited powers of alienating endowed property and they cannot transfer such property except for unavoidable necessity. As to whether in the case of permanent leases granted long ago, where the circumstances under which they were granted are impossible to prove, the Courts will presume the existence of the conditions justifying the grant of such leases, see Note 45.

57. Consideration for lease. — One of the essentials of a lease under this section is the presence of *consideration* for the transaction. This consideration must be either premium or rent as defined by the section. In other words if the consideration for the transfer is not either premium or rent as defined by the section, the transaction will

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Note 53

1. ('74) 21 Suth W R 386 (386) (DB), *Nidhi Kristo* v. *Nistarinee Dossee.*
('30) 17 A I R 1930 Mad 434 (438) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.*
('24) 11 AIR 1924 Pat 560 (564) : 3 Pat 403 : 83 Ind Cas 741 (D B), *Tekait Harnarayan* v. *Darshan Deo.*
('88) 11 Mad 77 (79, 80) (D B), *Thiagaraja* v. *G. S. Pandara Sannadhi.*

2. *See* ('88) 11 Mad 77 (79, 84) (D B), *Thiagaraja* v. *G. S. Pandara Sannadhi.* (Lessor transferring property to another and the latter agreeing with the former not to disturb the existing tenants so long as they paid rent— This does not confer permanent rights on the tenants who were originally let in as year to year tenants.)

3. ('24) 11 A I R 1924 Pat 560 (561) : 3 Pat 403 : 83 Ind Cas 741 (D B), *Tekait Harnarayan* v. *Darshan Deo.*

Note 55

1. ('35) 62 Cal L Jour 551 (559) (DB), *Prodyot Kumar Tagor* v. *Hirendra Nath Dutt.*
('25) 12 A I R 1925 P C 146 (149) : 4 Pat 707 : 52 Ind App 178 : 87 Ind Cas 318 (PC), *A. H. Forbes* v. *L. E. Ralli.*

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not be a lease.[1] The section speaks of the consideration being premium *or* rent. But it is conceived it will cover cases, where the consideration is partly premium and partly rent.[2]

A sum of money payable under a lease but not as a consideration for the *grant of the lease* is not rent or premium within the meaning of this section (see Note 59). Thus, where a lease is granted in consideration of the lessee buying certain goods or accepting certain services from the lessor and paying for them at a certain rate, the *lease* is not granted in consideration of the money to be so paid and such money is not rent.[3]

Where under a building agreement a builder agrees with the owner of land to erect houses thereon and to expend in so doing not less than a specified amount, in consideration of a lease thereof being granted to him on completion of the houses, the sum so expended on their erection is not a payment made in consideration of the lease.[4] It is in the nature of a *collateral* agreement. (See Note 59.)

As to whether a grant for maintenance is to be treated as a grant for consideration of the kind defined in this section, see Notes 60 and 68.

It has been held that under the Central Provinces Tenancy Act, a tenancy can be created without consideration.[5]

58. Premium. — The section defines premium as the price paid or promised for the lease. A similar expression occurs in S. 54 also and the principles discussed in Note 12 on that section will apply here also. As seen in that Note "price" means money only.[1] But it will include not only actual cash but also money *due*.[2] But it must be price paid

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Note 57

1. ('37) 24 A I R 1937 Mad 882 (893) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Maintenance grant in the case was held to be not a lease as there was neither premium nor 'rent' as defined.)
('22) 9 AIR 1922 Oudh 201 (201) : 25 Oudh Cas 39 : 68 Ind Cas 333, *Sitaram* v. *Sarju Prasad*. (Agreement among co-owners for enjoyment of property by turns is not lease.)
2. ('34) 21 AIR 1934 Cal 803 (805) : 61 Cal 556 : 152 Ind Cas 601 (S B), *In re U. P. Electric Supply Co.*
3. ('34) 21 AIR 1934 Cal 803 (807) : 61 Cal 556 : 152 Ind Cas 601 (S B), *In re U. P. Electric Supply Co.* (Per Buckland, J.)
4. (1913) 3 K B 570 (578) : 82 L J K B 1300 : 109 L T 165, *Stepney and Bow Educational Foundation (Governors)* v. *Inland Revenue Commissioners.*
5. ('25) 12 AIR 1925 Nag 90 (92) : 82 Ind Cas 190, *Amarchand* v. *Sardar Singh.*

Note 58

1. ('37) 24 A I R 1937 Mad 882 (887) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Maintenance grant held not to be lease.)
[*See* ('22) 9 A I R 1922 Oudh 201 (201) : 25 Oudh Cas 39 : 68 Ind Cas 333, *Sita Ram* v. *Sarju Prasad*. (Agreement between co-owners for the enjoyment of the property by turns is not lease.)]
[See however ('98) 1898 Bom P J 49 (DB), *Jhumbra* v. *Raoji*. (Lease before T. P. Act—Possession of land made over for 10 years in consideration of a quantity of grain that was due was held to be lease. NOTE — This will not be good law now.)]
2. ('02) 25 All 115 (119) : 30 Ind App 54 (PC), *Nidha Sah* v. *Murli Dhar.*
('10) 6 Ind Cas 817 (817) : 6 Nag L R 65, *Beni Prosad* v. *Mulchand.*

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or promised for the *lease*, i. e., for the transfer of the right to *enjoy* the property. If it is a price for the *property* itself which is to vest in the lessee at the end of the period of the lease, though the agreement for such payment and purchase of the property may be *consideration* for the granting of the lease, it will not be *premium*.[3] (See Note 57.)

The amount due must be ascertained or capable of ascertainment at the time of the transfer. A grant in lieu of maintenance, where no definite sum of money is due as maintenance will not, therefore, be a lease.[4] (See Note 68.)

The distinction between rent and premium is that the latter is a *lump sum*, though it may not be paid in cash at once but only *promised* or may be payable in instalments,[5] while rent, if it is to be paid in money, is a *periodical* payment.[6] The other points of distinction are that rent may be in money or in kind or in the form of services, while premium can only be in the form of money. Where, looking at the substance of the transaction, the payment is premium and not rent, it will not cease to be such merely because it is styled as "advance rent."[7]

Unlike a *vendor* of immovable property who has a statutory lien for unpaid purchase-money, a lessor has no lien for unpaid premium.[8]

The consideration for a lease paid in the form of a premium is exhausted as soon as the lease is granted and the forfeiture of the lease does not entitle the lessee to a refund of the premium.[9] Similarly, where a part of the premium is paid and it is agreed that if the balance is not paid within a fixed time, the lessor is to be entitled to cancel the lease and recover possession and on the default of the lessee the lessor proceeds to do so, the lessee is not entitled to a refund of the part of the premium paid by him.[10]

('28) 15 AIR 1928 Bom 377 (378, 379) : 114 Ind Cas 266, *Gulabbhai* v. *Bhagvan*.
('23) 10 AIR 1923 Nag 60(61): 19 Nag L R 1: 69 I.C. 511, *Bhika* v. *Sheikh Amir*.
('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi*.

3. ('34) 21 A I R 1934 Cal 803 (805) : 61 Cal 556 : 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.* (Lease by Municipality in favour of electric company— Annual rent— Provision that a certain sum due from Municipality to Government must be paid by lessee by annual instalments and that on such payment it would become the owner of part of the premises — *Held* that the whole of this sum at any rate cannot be treated as premium.)

4. ('37) 24 AIR 1937 Mad 882 (892, 893) : ILR (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (NOTE — In this case, notwithstanding the provision for the payment of an annual sum of money by the grantee to the grantor it was held that the grant was not a lease—The annual payment was held not to be rent.)

5. *See* ('34) 21 AIR 1934 Cal 803 (805) : 61 Cal 556 : 152 Ind Cas 601 (S B), *In re U. P. Electric Supply Co.*

6. ('21) 8 A I R 1921 Nag 137 (138) : 59 Ind Cas 419, *Jagannath* v. *Behari*. ("Premium" should be regarded as the equivalent of the vernacular nazarana.)

7. ('29) 16 AIR 1929 Cal 433 (434) : 56 Cal 252 : 118 Ind Cas 561, *Nawab of Murshidabad* v. *Bilas Roy*.

8. ('26) 13 AIR 1926 Mad 55 (56) : 48 Mad 821 : 90 Ind Cas 725 (DB), *Venkatacharyulu* v. *Venkatasubba Rao*.

9. ('94) 18 Mad 32 (33) (DB), *Kammaran Nambiar* v. *Chindan Nambiar*.

10. ('34) 21 AIR 1934 All 293(294): 149 I.C. 621, *Hazari Kalwar* v. *Abdul Majid*.

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Note 59

59. Rent — General features. — As seen in Note 57, rent is one of the forms of consideration prescribed by the law as essential for a lease. The following are the elements of rent as defined by the section :

(1) It must be a consideration for the transfer of a right to enjoy immovable property for a certain time or in perpetuity.

(2) It must be money, share of crops, service or other thing of value. (See Note 61.)

(3) It must be rendered periodically or on specified occasions.

(4) The rendering must be to the lessor by the lessee. (See Note 60.)

The definition of rent in Woodfall's *Law of Landlord and Tenant* is also similar.[1] But as a further element it seems to be required that the rent should be a source of *profit* to the lessor. (See Note 60 for a further discussion of this point.)

The definition of rent in various local Tenancy Acts[2] corresponds in essential particulars with the definition under this section. But *service* is not included as rent in such local Acts.

Tenancy Acts essentially dealing, as they do, only with tenancy of *land*, the definition of rent in such Acts describes it as something rendered to the landlord by the tenant on account of occupation of *land*.

The first essential in the definition of rent is, as seen above, that it is a consideration for the transfer of a right to enjoy immovable property. It has been seen in Note 3 that such right is an *interest* in immovable property created in particular modes. Hence, before there can be any question of rent, there must be a transfer of this description. Otherwise the payment will not be rent. Thus, licence fee is not rent, because licence does not involve a transfer of any interest in immovable property.[3] Similarly, the amount payable under a collateral agreement in consideration of the grant of the lease is not rent, because such

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Note 59

1. Woodfall, *Law of Landlord and Tenant* (by A. J. Spencer) 21st Edition, page 481.
2. Bengal Tenancy Act, VIII of 1885, S. 3 (13); Bihar Tenancy Act, VIII of 1934; S. 3 (5), C. P. Tenancy Act, I of 1920, S. 2 (9); Madras Estates Land Act, I of 1908; S. 3 (11), U. P. Tenancy Act, XVII of 1939, S. 3 (18).
3. ('28) 15 AIR 1928 Oudh 99 (100, 101) : 3 Luck 282 : 106 Ind Cas 491, *Ram Lal* v. *Badal Khan*. (Tradesman selling goods on municipal land and paying license fee.)

(1863) 8 L T (NS) 429 (430) : 32 L J C P 252 : 135 R R 847 : 11 W R (Eng) 833, *Hancock* v. *Austin*. (Money due under a contract cannot be distrained for as rent. And if there really was no demise of the room, and the landlord only gave permission to the plaintiff to place his machines in it, with the use of the steam power, upon payment of a certain sum weekly, the sum payable for such permission could not be distrained for as rent.)

('14) 1 AIR 1914 Oudh 272 (273) : 25 Ind Cas 666, *Sadiq Hussain* v. *Secretary of State*. (A theka of a right to fish and to collect produce from nazul lands belonging to Government is not a lease but merely a licence, and the money that the thekadar is bound to pay is not rent but fee.)

[See however ('26) 13 AIR 1926 Nag 174 (174) : 92 Ind Cas 683, *Indal* v. *Debi*. (Right to take cattle or cart along a definite strip of land held in the circumstances of this case to amount to a lease and not a licence and the quantity of grain agreed to be supplied in return for this is rent.)]

agreement does not, by itself, create an interest in the property.[4] For other instances see the cases cited below.[5]

The next point is that the payment must be a consideration for the *transfer*. Every payment that is to be made under a lease is not necessarily *rent*. Thus, if the lessee has agreed to accept, in consideration of the lease, certain goods to be supplied by the lessor or certain services to be rendered by him and to pay for such goods or services, such payment is not consideration for the lease but for the goods or services, though it is made under the terms of the lease.[6]

Similarly, where a grant is made by the holder of an impartible estate for the maintenance of a junior member of the family, and as the income from the village set apart for maintenance is expected to exceed the proposed amount of maintenance, the grantee is required under the grant to pay to the grantor annually a certain sum of money, such sum cannot be said to be rent, as it is not the *consideration* for the transfer, such consideration being the giving up by the grantee of his claim for maintenance.[7]

Rent being one of the *essential* elements of a lease (unless there is a premium) there must be *certainty* about the rent in the lease.[8] Otherwise, the lease will be void.[9] But though the exact amount is not stated, if it is capable of ascertainment, it is enough.[10] Further, the

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4. ('02) 25 Mad 603 (611) : 29 Ind App 138 (PC), *Subramanian Chettiar* v. *Arunachalam Chettiar*.

5. ('05) 32 Cal 567 (570) : 3 Cal L Jour 141 (DB), *Girindra Chandra Pal* v. *Sree Nath Pal*. (One cosharer landlord occupying a separate portion of the common land is not liable for rent to the other cosharers but only to pay a share of the profits of the land, unless there is an agreement by him to pay rent. Merely because one cosharer landlord grants a putnee lease of certain portions to another person, he does not become liable to pay rent to the other cosharers.)

('83) 9 Cal 908 (912) : 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath Gir Sunnyassee*. (After expiry of lease landlord is not entitled to rent.)

('01) 25 Bom 556 (563) : 3 Bom L R 135 (DB), *Sadashiv* v. *Ramkrishna*. (Plaintiff an inamdar of certain village — Defendant holding certain land in the village but he was not placed in possession either by plaintiff or his predecessor in title under any agreement—Plaintiff sued to recover arrears of assessment—*Held*, the assessment was not rent.)

6. ('34) 21 AIR 1934 Cal 803 (807, 808) : 61 Cal 556 : 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.* (Per Buckland, J.)

See also cases under Note 60.

7. ('37) 24 AIR 1937 Mad 882 (891, 892) : ILR (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramanian*.

8. (1882) 21 Ch D 442 (458) : 52 L J Ch 121 : 47 L T 362 : 31 W R (Eng) 19, *Re Knight*; *Ex parte Voisey*. (Otherwise it is not rent.)

('82) 8 Cal 730 (731, 732) (DB), *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*.

9. ('24) 11 AIR 1924 Cal 346 (347) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das*.

('88) 11 Mad 200 (201) (DB), *Ramasami* v. *Rajagopala*.

10. (1882) 21 Ch D 442 (458) : 52 L J Ch 121 : 47 L T 362 : 31 W R (Eng) 19, *Re Knight*; *Ex parte Voisey*. (Per Brett, L. J.—Rent is certain if by calculation and happening of certain events it becomes certain.)

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mere fact of rent being fluctuating does not make it uncertain. Thus, if a lease for a term certain provides that the rent should be increased at a certain rate at certain intervals, the rent is not uncertain.[11]

Rent under the Act being purely a matter of *contract* the Court has no power to go behind the contract between the parties and pass a decree for what it considers to be a fair and equitable rent.[12]

So long as the contract of tenancy subsists, the liability of the tenant to pay rent continues. If he has any right to repudiate the tenancy on the ground of fraud, etc., he must do so in regard to the entire property and not with regard to only a portion of it. Though he may give up possession of any portion of the property and profess to repudiate the tenancy in respect of such portion, he will be liable for the whole of the stipulated rent.[13]

A covenant to pay rent is one running with the land. (See S. 40, Note 25.) Hence, the *assignee* of a lease is liable to pay rent to the lessor.[14]

In a suit for rent, the landlord has to prove the existence of the relationship of landlord and tenant between him and the defendant. That means that he has to show that he has demised the property to the defendant on the terms alleged by him. It is not necessary for him to set out his *title* to the property because the tenant is estopped under S. 116 of the Evidence Act from denying such title.[15]

A decree for rent necessarily implies a decision that the relationship of landlord and tenant exists between the parties and will be *res judicata* in a future suit for rent.[16]

60. Rent—Illustrative cases. — One essential feature of rent, as has been seen in Note 59 is that it is something paid or given in consideration of the grant of the lease. In other words, the alleged rent must be consideration for the right of occupation which is transferred to the lessee. There may be an item payable by the lessee to the lessor under the terms of the lease but it may not be rent in the above sense. Thus, if the payment is in return of services to be rendered or goods

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('24) 11 AIR 1924 Cal 346 (347, 348) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das.* (If a mode is specified for ascertaining rent, it will not be uncertain.)

11. (1882) 21 Ch D 442 (458) : 52 L J Ch 121 : 47 L T 362 : 31 W R (Eng) 19, *Re Knight; Ex parte Voisey.* (Per Brett, L. J.)

12. ('37) 24 AIR 1937 Pat 391 (392) : 170 Ind Cas 316 (DB), *Secy. of State* v. *Rajendra Prasad.*

13. ('82) 8 Cal 118 (120) (DB), *Anarullah Shaikh* v. *Koylash Chunder Bose.*

14. NOTE—But the assignment must be of the entire interest of the lessee under the lease. A mortgage of a leasehold interest not being ordinarily such an assignment, the mortgagee cannot be sued for rent by the lessor. *See* ('27) 14 AIR 1927 Cal 725 (729) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

15. ('35) 22 AIR 1935 Cal 368 (382) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Kumar Raj Krishna* v. *Barabani Coal Concern Ltd.*

16. ('12) 16 Ind Cas 911 (912, 913) (DB) (Cal), *Raj Kumar Roy Chowdhury* v. *Alimaddi.*

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Note 60

supplied by the grantor of the right, such payment will not be rent, although the acceptance and payment for such services or goods may be part of the arrangement embodied in the lease.[1] It is a question depending on the facts and circumstances of each case whether a particular item is rent or not. If the item satisfies the above test, it is rent irrespective of its description by the parties. Thus, where a cash rent was fixed and besides, it was provided that certain fixed quantities of named commodities must also be supplied by the tenant to the landlord every year, it was held on construction of the leases in question that such commodities formed part of the *rent*, although they were not described as such.[2]

But, in the undermentioned cases,[3] such an item was held on the construction of the particular lease, not to be rent. In the cases cited below,[4] "collection charges" were held to be rent on the application of the test stated above.

In the undermentioned cases[5] it was held that a certain annual payment called "Muhatarifa" to be made by certain non-agricultural raiyats in occupation of house sites in the village abadi was rent.

The section says that the rent is something to be paid or rendered to the transferor, i. e., the *lessor*. This question is involved in cases in which the item is of the nature of a tax or other public charge in respect of the property or (in the case of an underlease) relates to the rent payable to the superior landlord. It seems to be clear that an item does

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Note 60

1. (1895) 1 Q B 484 (492) : 64 L J Q B 84, *Jones* v. *Commrs. of Inland Revenue.* (Agreement by *A* with a telephone company for the erection and maintenance in working order telephonic lines and instruments—Covenant to pay certain sum for the use of the lines and instruments — The agreement was not a lease as no exclusive right of occupation was intended to be given and further because the payment was not in the nature of rent — It was a payment not merely for the occupation of the wires but also for services to be rendered by the company and expenses to be paid for by them in laying down the lines, etc.)
('34) 21 AIR 1934 Cal 803 (807, 808) : 61 Cal 556 : 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.* (Per Buckland, J.)

2. ('17) 4 AIR 1917 All 483 (484) : 38 All 286 : 35 Ind Cas 208 (FB), *Rangilal* v. *Jassa.* (35 All 19=16 Ind Cas 422 distinguished on the ground that in that ruling the plaintiff sued in the civil Court to recover the rasum zamindari as something over and above the rent.)
('11) 12 Ind Cas 37 (38) (DB) (Cal), *Sarada Kripa* v. *Mostfizar Rahman.*

3. ('14) 1 AIR 1914 Cal 781 (781) : 25 Ind Cas 547 (DB), *Kalar Singh* v. *Mathura Prosad.*
('12) 16 Ind Cas 422 (423, 424) : 35 All 19 (DB), *Sis Ram* v. *Ashgar Ali.*

4. ('04) 31 Cal 834 (837) : 8 Cal W N 529 (DB), *Radha Charan* v. *Golak Chandra.*
('82) 8 Cal 730 (731, 732) (DB), *Mohomed Fayez* v. *Jamoo Gazee.*
('17) 4 AIR 1917 Cal 737 (738) : 36 Ind Cas 404 (DB), *Upendra Lal* v. *Ataulla.*

5. ('04) 1 All L Jour 537 (540), *Abdul Hai* v. *Nathua.* (It is not "cess" — The primary notion of a cess is a payment not for the benefit of the landlord but a payment for some purpose of public convenience, such as sanitation, police and the like — The words rent cess, and the like, must be interpreted with reference to the meaning attached to them at the time for which the payments are claimed, and the period during which a wajibularz is the authority for village customs.)
('04) 27 All 183 (185) : 1904 All W N 204, *Muhammad Abdul* v. *Nathu.*

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not cease to be payable to the lessor merely because it is paid on his behalf (under his authority or under the terms of the lease) to a third person or body. This view finds support from a decision of the Privy Council in which it was held that the remuneration payable to village officers by a tenant in a zamindari was paid by him only as *agent* of the zamindar and when the Government relieved the zamindar of the burden of paying the village officers, the tenant was not entitled to any deduction from his dues to the zamindar.[6] On this principle, there seems to be no difficulty in holding that an amount payable to the Government or other public authority on behalf of the landlord is rent, provided that the payment is on the construction of the lease in question a part of the consideration for the lease. This view was taken in the cases mentioned below[7] in which such amounts were held to be rent. A similar principle will apply also to a sum payable by an under-lessee to the superior landlord.[8]

But there are certain decisions which are inconsistent with the above view. Some of these decisions proceed on the particular facts of the case and hold that the sum in question does not form part of the consideration for the lease.[9] But they also advert to the aspect that the payment is not made to the landlord. As stated already, this ground does not seem to be a sound one.

Some of the decisions proceed on the ground that the payment is not a *profit* in the landlord's hand.[10] They are based upon the conception

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6. ('27) 14 AIR 1927 P C 206 (207, 208) : 51 Mad 449 : 104 Ind Cas 337 (PC), *Satyapati Rajeshwara* v. *Muthanan.*

7. ('85) 1885 Bom P J 160 (Reprint p. 150), *Harcharan Das* v. *Sadashiv.* (Government assessment.)
('11) 9 Ind Cas 394 (396) : 38 Cal 278 (DB), *Dwaraka Nath* v. *Dumburudhur.* (Government revenue.)
('12) 15 Ind Cas 301 (302, 303) (DB) (Cal), *Janaki Ballav* v. *Gopal Lal.* (Government demand reduced—Lessor held entitled to that amount.)
('95) 22 Cal 680 (688) (DB), *Assanulla* v. *Tirthabashini.* (Chaukidari tax.)
('74) 22 Suth W R 12 (13), *Jeeatoolla* v. *Jugodindro.* (Cesses.)
('98) 2 Cal W N 455 (456, 457) (DB), *Mohebut Ali* v. *Mohomed Faizullah.* (Cess and expenses of musjid on the land.)
('79) 4 Cal 576 (581) (DB), *Surnomoyee* v. *Koomar Purresh.* (Road cess.)
('94) 21 Cal 132 (133) (DB), *Watson* v. *Sree Kristo.* (Dak cess.)
('07) 6 Cal L Jour 212 (214) (DB), *Bholanath* v. *Chunder Madhub.* (Public works cess.)
[*See* ('35) 22 AIR 1935 Oudh 209 (212) : 10 Luck 307 : 152 Ind Cas 786 (DB), *Jwala Sahay & Sons* v. *Mathura Dutt.* (In this case, it was held on construction that the tenant was not liable to pay municipal taxes.)]

8. (1900) 27 Cal 67 (73) : 4 Cal W N 3 (FB), *Basanta Kumari* v. *Ashutosh Chuckerbutti.* (Rent payable under assignment.)
('11) 10 Ind Cas 382 (383) (DB) (Cal), *Kali Kumar* v. *Bindhu Bhusan.*

9. ('05) 32 Cal 169 (172, 173, 174) : 9 Cal W N 96, *Hemendra Nath* v. *Kumar Nath.*
('85) 11 Cal 221 (225, 226) (DB), *Rutnessur* v. *Hurish Chunder.*

10. ('15) 2 AIR 1915 Bom 49 (50) : 39 Bom 434 : 28 Ind Cas 584 (FB), *In re Gangaram Narayandas Teli.* (Quoting Woodfall on "Landlord and Tenant.")
('26) 13 AIR 1926 Pat 80 (80) : 90 Ind Cas 352 (DB), *Prasanna Kumar* v. *Kaleyan Charan.* (Amount payable to superior landlord.)

of rent as given by Woodfall in his *Law of Landlord and Tenant*. But there does not seem to be any reason for reading this idea into the definition of rent under this section. Some decisions have even gone to the length of holding that a letting on payment of the *bare* assessment on the land would be a lease.[11] This view seems to be quite justified by the wording of the section.[12] Nor does there seem to be any difference in this respect between the definition under this section and the definition of rent contained in some of the Provincial Tenancy Acts.

Tagore v. *Bibi Jarao*[13] is a decision of the Privy Council in which it was held that the Government assessment payable by the tenant under the lease was not part of the *rent*. This decision is based purely on the construction of the lease in question. It no doubt refers to the consideration that the relevant section, namely, S. 3 of the Bengal Tenancy Act requires the payment to be made to the *landlord* in order to constitute rent. But it must only be taken to mean that the payment in question was not intended to be made to the Government by the tenant as the landlord's agent, i. e., out of a fund due to the landlord.

Where, on an adjustment of accounts between the plaintiff and defendant, the defendant is found liable for a certain amount on account of rent out of which a certain sum is left with him in deposit for payment to the superior landlord on account of rent payable by the plaintiff, such sum will not be rent where the facts show that there is a *discharge* of the lessee's obligation so far as that portion of the sum is concerned, by the adjustment of accounts.[14]

The question whether a certain item payable under a lease is rent or not is material under some of the local laws which prohibit or restrain the levy of any sum other than rent by the landlord. Their object is to prevent oppression of tenants by landlords.[15]

If an amount payable under a lease to a third party, e. g., Government assessment or rent due to the superior landlord is found on construction of the particular lease in question not to be *rent*, then the lessor's remedy against the lessee on the latter's default is by means of a suit for damages for breach of contract. It has been held that in such cases not merely nominal damages but the full amount payable to the third party is recoverable as damages.[16]

As to whether a maintenance grant under which the grantee is to pay an annual sum to the grantor is a lease and as to whether such sum is rent, see Note 68.

61. Forms of rent. — Rent need not be *money*.[1] The section expressly provides that rent may be in the form of money, a share of

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11. ('11) 9 Ind Cas 394 (396) : 38 Cal 278 (DB), *Dwarka Nath* v. *Damburudhur*.
('85) 1885 Bom P J 16Q (Reprint p. 150), *Harcharandas* v. *Sadashiv*.

12. See also the decisions referred to above which hold that "collection charges" constitute rent.

13. ('06) 33 Cal 140 (149, 150) : 33 Ind App 30 (P C).

14. ('15) 2 AIR 1915 Cal 370 (371) : 19 Ind Cas 759 (DB), *Lachmi Missir* v. *Deoki Kuar*.

15. ('95) 22 Cal 680 (686) (DB), *Assanulla* v. *Tirthabashini*.

16. ('85) 11 Cal 221 (226) (DB), *Rutnessur* v. *Hurish Chunder*.

Note 61

1. ('34) 21 AIR 1934 Cal 747(748): 152 I.C. 484, *Tofazzal Ahmed* v. *Masalat Khan*.

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Notes 61-62

crops, service or any other thing of value. Premium, however, can only be in money. (See Note 58.) This also seems to be the conception of rent under the English law. The definitions of rent under the various Provincial Tenancy Acts also include rent in money as well as in kind but not in the form of service. The rent may be partly in one of these forms and partly in another.[2] But unless the consideration takes one of these forms, it will not be rent.[3] In the case of "share of crops" it is clear, it should be a share of the crops of the demised field. But in the case of other things, there is no restriction that it must come out of the property leased. But, in a case under the United Provinces Land Revenue Act of 1901, one of the reasons for holding that the articles agreed to be delivered by the tenant to the landlord in that case constituted "cesses" and not "rent" was that such articles were not the produce of the field leased.[4] But it cannot be said to have been intended to be laid down that this is a *conclusive* test of rent. Even the definitions of rent in the various Provincial Tenancy Acts do not restrict rent in kind to things produced on the land demised. But the question if the article is a product of the demised field or not may be *one* of the matters to be considered in determining if it was a part of the *consideration* for the lease.

62. Rent in kind — Payment of money value. — Where a lease deed fixes a money rent but provides that a certain quantity of grain or other commodity may be delivered in lieu of it, the lessor is entitled on default by the lessee, to recover only the stipulated sum of money and not the market value of the article.[1]

Where a lease-deed fixes rent in kind or partly in kind and partly otherwise, but states also the money value of the thing to be delivered, the question arises whether on default by the lessee, the lessor is entitled to the sum mentioned in the lease as the value or is entitled to the *market* value of the thing at the date on which its delivery was due. This is entirely a matter of construction of the particular lease, the question in each case being whether the value of the article is mentioned in the lease-deed merely by way of *description* or is *fixed* as an alternative form, in which the rent is to be recovered. In the former case, the market value, and in the latter case the sum fixed in the lease-deed would be recoverable. The decisions on the subject have been classified on the above lines in the foot-notes below.[2]

('26) 13 AIR 1926 Nag 174 (174) : 92 Ind Cas 683, *Indal* v. *Debi.*

2. ('86) 12 Cal 37 (38) (DB), *Gopal Singh* v. *Jhakri Rai.*
For further cases see under Note 60.

3. ('22) 9 AIR 1922 Oudh 201 (201) : 25 Oudh Cas 39 : 68 Ind Cas 333, *Sita Ram* v. *Sarju Prasad.* (Agreement among co-owners to enjoy the property by turns is not a lease as there is no provision for rent.)

4. ('12) 16 Ind Cas 422 (423) : 35 All 19 (DB), *Sis Ram* v. *Ashgar Ali.*

Note 62

1. ('10) 8 Ind Cas 945 (945) (DB) (Cal), *Bipro Charan* v. *Suchand Roy.*
('27) 14 AIR 1927 Cal 243 (244) : 98 Ind Cas 977 (DB), *Kailash Chandra* v. *Hamid Ali.*

2. ***Market value recoverable :***
('22) 9 AIR 1922 Pat 4 (5) : 66 Ind Cas 780, *Jitendranath* v. *Jaku.* (Approximate value of article stated in the deed.)

Unless the rent is fixed in the form of two *equal* alternatives, the lessor is entitled to a decree in the first instance, for the particular thing and not for its value.[3]

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63. Rent — Service as rent.

The section expressly recognises the rendering of service as a form of rent and so a lease in consideration of service to be rendered is valid.[1] But service *can* also be the consideration for the grant of a *licence* to occupy property. As to when occupation in lieu of service will be a lease and when it will be a licence, see Note 16.

64. Variation of rent. — Rent under this section is a matter of contract and once fixed it cannot be altered, so long as the lease continues, except by agreement.[1] Hence, the Court has no power to pass a decree for a fair and equitable rent by going behind the terms of the agreement between the parties. (See Note 59.)

The proof of an agreement varying the rent payable under a lease is subject to the provisions of S. 92 of the Evidence Act. For instance, in the case of a registered lease, a subsequent oral agreement to raise or

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('94) 4 Mad L Jour 201 (203) (DB), *Soodamani Patter* v. *Somansundara Mudaliar*.
('10) 7 Ind Cas 875 (876) : 37 Cal 626 (DB), *Baneshwar* v. *Umesh Chandra*. (The fact that the lease deed mentions the value of the paddy rent does not mean that the amount is fixed as cash rent. It may be mentioned only for purposes of stamp.)
Only the amount fixed in lease-deed can be recovered :
('31) 18 AIR 1931 Cal 468 (469) : 58 Cal 72 : 133 Ind Cas 210, *Mohit Krishna* v. *Mahendra Nath*.
('25) 12 AIR 1925 Cal 114 (115) : 51 Cal 943 : 84 Ind Cas 147 (DB), *Official Trustee of Bengal* v. *Benode Behari*.
('28) 15 AIR 1928 Cal 112 (112) : 105 Ind Cas 756 (DB), *Saroj Bandhu* v. *Mati Lal*.
('28) 15 AIR 1928 Cal 166 (167) : 55 Cal 574 : 106 Ind Cas 25 (DB), *Bangshiram* v. *Prasannamoyi Debi*. (Even treated as a claim for damages, it can only be awarded at the rate mentioned in the lease deed.)
3. ('31) 18 AIR 1931 Cal 468 (469) : 58 Cal 72 : 133 Ind Cas 210, *Mohit Krishna* v. *Mahendra Nath*.

Note 63

1. ('05) 32 Cal 243 (246) : 8 Cal W N 904 (DB), *Jyotish Chandra* v. *Ramanath Bhadra*. (Lease in lieu of medical service.)
('99) 23 Bom 602 (607) : 1 Bom L R 61 (DB), *Komar Gowda* v. *Bhimaji Keshav*.
('29) 16 AIR 1929 Cal 224 (224) : 56 Cal 862 : 115 Ind Cas 34, *Radhu Hari* v. *Narendra Nath*. (Lease in consideration of service being rendered for 12 days in the year in lieu of rent is legal—It does not offend against S. 3 of Regulation V of 1812 or S. 14 of the Bengal Tenancy Act.)
('12) 13 Ind Cas 32 (33) (DB) (Lah), *Muhammad Badar* v. *Chiragh Shah*. (Sanjidar was a person who performed certain services in connection with the takyas in question in the suit and in consideration therefor was given a certain land to hold as tenant under the owners.)

Note 64

1. ('12) 17 Ind Cas 208 (210): 1912 Pun Re No. 121 (DB), *Abdul Karim* v. *Allah Baksh*.
('08) 7 Cal L Jour 284 (286) (DB), *Satis Chunder* v. *Rai Jotindranath*.
('10) 8 Ind Cas 790 (791) (DB) (Cal), *Radha Raman* v. *Bhabani Prosad*. (Mere acceptance of reduced rent may be full acquittance for the particular year or years but does not amount to a contract to reduce rent.)

Section 105 Notes 64-66

lower the rent is not admissible in evidence.[2] As to whether an agreement varying the terms of a lease as to rent is itself a lease, see Note 11.

Where the original lease itself provides for a varying or fluctuating rent, there is no objection to such variation provided that there is no uncertainty about the matter. See Note 59.

In the case of agricultural tenancies not governed by this Act, the Court has power under some of the local laws to award a fair and equitable rent in variation of the agreement between the parties. In Bengal a zamindar under the Permanent Settlement is presumed to be entitled to vary the rent from time to time upto the limit allowed by the current rates prevailing in the purgana. But the parties can agree to have a fixed rent not liable to variation.[3]

65. Rent-free grants. — A right to a rent-free grant may be acquired by grant or prescription. As will be seen in Note 79 a tenant, although originally liable to pay rent, may, by refusing to the landlord his enjoyment of the right to rent within Art. 131 of the Limitation Act, prescribe for the right to hold the property rent-free.[1] A rent-free grant may also be proved on the principle of lost grant[2] discussed in Note 44.

66. Interest on rent. — The statutory definition of mesne profits in S. 2 (12) of the Civil Procedure Code includes interest on mesne profits within the meaning of the expression. But this section does not specifically refer to interest on arrears of rent as part of rent. The question whether interest is *payable* on rent is one of *contract*.

Is interest agreed to be paid on arrears of rent a *part* of the rent? It has been held by the Calcutta High Court that such interest is not rent.[1] The decision follows two earlier decisions of the same Court, in which it was held that interest on rent is not an "amount of rent

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2. ('10) 8 Ind Cas 790 (791) (DB) (Cal), *Radha Raman* v. *Bhabani Prosad.*
('99) 22 Mad 261 (264) : 8 Mad L Jour 196 (DB), *Mayandi Chetti* v. *Oliver.*

3. ('69-70) 13 Moo Ind App 248 (262) : 13 Suth W R P C 11 (PC), *Bama Soondery* v. *Radhika.*
('27) 14 AIR 1927 Cal 168 (171) : 99 Ind Cas 258 (DB), *Saroda Prosad* v. *Uma Sankar.*
('20) 7 AIR 1920 Cal 594 (595) : 58 Ind Cas 867 (DB), *Nirodchandra* v. *Harihar.*
('18) 5 AIR 1918 Cal 799 (800) : 38 Ind Cas 56 (DB), *Upendralal* v. *Jogesh Chandra.*
('32) 19 AIR 1932 Cal 436 (437) : 138 Ind Cas 139 (DB), *Satya Charan* v. *Rai Mohan.*

Note 65

1. ('29) 16 AIR 1929 Nag 123 (123, 124) : 117 Ind Cas 287, *Kampta Prasad* v. *Ramsaran Singh.* (Mere non-payment for a number of years is not enough.)
('33) 20 AIR 1933 Pat 685 (687) : 149 Ind Cas 976, *Kameshwar Singh* v. *Ramji Misser.*

2. ('33) 20 AIR 1933 Pat 685 (687) : 149 Ind Cas 976, *Kameshwar Singh* v. *Ramji Misser.*

Note 66

1. ('07) 5 Cal L Jour 69 (70) (DB), *Bhagabati Debya* v. *Basanta Kumari.* (Money paid by tenant to landlord as rent and accepted as rent cannot be appropriated by landlord towards interest on arrears of rent.)

annually payable" within the meaning of section 153 of the Bengal Tenancy Act.[2]

67. Lease for a premium and usufructuary mortgage — Distinction. — The points of distinction between a lease for a premium and a usufructuary mortgage are as follows:

(1) A lease for a premium is a transfer of the right to *enjoy* the property. Under such a lease, the usufruct of the property will belong to the lessee till the lease is determined. But under a usufructuary mortgage only the right to *possession* is transferred to the mortgagee. The usufruct of the property will not *belong* to the mortgagee. He will have only the right to receive it. He must adjust it towards the mortgage-debt. This is the principle even in cases in which the mortgagee's remaining in possession and appropriating the profits of the property for a certain period is to *ipso facto* wipe out the mortgage-debt without his being liable to account for such profits during that period. (See Note 5.)

(2) A usufructuary mortgage connotes a transfer of an interest in the *fee simple* in the property, though not the entire fee simple or ownership of the property. The interest in immovable property which, according to the definition of a mortgage in S. 58, is transferred to the mortgagee is an interest in the *fee simple*. But the interest transferred under a lease for a premium is not an interest in the fee simple. It is merely *a right to the enjoyment* of the property. (See Note 6.)

(3) The premium for a lease is a *price* paid or promised for the lease. But the consideration for a usufructuary mortgage is the advancement of a *loan*.

(4) The transfer of an interest under a usufructuary mortgage is for the purpose of securing repayment of the loan. There is no such object in a lease. It is this difference that is at the root of the difference mentioned in item (1) above.

The above points of difference are involved in the very definition of the two kinds of transactions. The following points of difference in regard to their *incidents* may also be noted:

(1) A provision entitling the transferee to continue in possession of the property after the term fixed for the mortgage, even if the mortgage-debt should be repaid to the mortgagee within such term, would be void as being a clog on the equity of redemption. But a provision, enabling the lessee to hold the property even after the term fixed for the lease would not be invalid.[1]

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2. ('98) 25 Cal 571*n*(572*n*): 1 CalWN 63*n* (DB), *Koylash Chandra* v. *Tarak Nath*.
('98) 25 Cal 571 (575) : 2 Cal W N 297 (DB), *Rai Charan* v. *Kumud Mohun*.

Note 67

1. ('23) 10 AIR 1923 Nag 60 (61) : 19 Nag L R 1 : 69 Ind Cas 511, *Bhika* v. *Sheikh Amir*.

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(2) A usufructuary mortgagee is entitled to remain in possession as long as the debt is not repaid, though the term of the mortgage may have expired. But a lessee is not entitled to remain in possession after the expiry of the term of the lease.[2]

(3) A clause prohibiting a transfer of the lease, when it is inserted for the benefit of the lessor, is valid. But a clause prohibiting a mortgagee from transferring his interest under the mortgage would be invalid.[3]

The question, whether a particular transaction is a lease for a premium or a usufructuary mortgage, is one of construction in each case. It must be seen whether the money paid is a loan advanced or price paid and whether possession of property is transferred for the purpose of securing the repayment of a loan.[4] If the money paid is a loan advanced and the transfer of possession is for the purpose of securing the repayment of such loan, the transaction would be a usufructuary mortgage.[5] But if the money is paid as a price and not as a

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2. ('70) 13 Suth W R 445 (446), *Kewal Sahoo* v. *Rash Narain Singh.*

3. ('41) 28 AIR 1941 Oudh 198 (200) : 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur.*

4. ('41) 28 AIR 1941 Pat 296 (298) : 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*
('41) 28 AIR 1941 All 56 (59, 60) : 194 Ind Cas 347 (DB), *Ramman Lal* v. *Raghunath Shankar.*
('41) 28 AIR 1941 Oudh 198 (200) : 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur.*
('38) 25 AIR 1938 Pat 35 (36, 37) : 172 Ind Cas 935 (DB), *Dildar Hussain* v. *Sheikh Saddip.*
('39) 26 AIR 1939 Pat 265 (266, 267) : 180 Ind Cas 95, *Jageshar Singh* v. *Alakh Narain.*
('37) 24 AIR 1937 Oudh 146 (148) : 162 Ind Cas 225 : 12 Luck 161, *Tulshi Ram* v. *Munna Kuar.*
('35) 22 AIR 1935 Pat 360 (364) : 158 Ind Cas 162 (DB), *Parameshwar* v. *Ramrudra Prasad.*
('19) 6 AIR 1919 Mad 322 (330) : 41 Mad 959 : 49 Ind Cas 291 (DB), *Meenakshisundara* v. *Rathnasami.*
('10) 6 Ind Cas 817 (818) : 6 Nag L R 65, *Beni Prasad* v. *Mulchand.*
('22) 9 AIR 1922 Nag 156 (157) : 65 Ind Cas 241, *Ram Prasad* v. *Chandulal.*
('25) 12 AIR 1925 Pat 319 (320) : 83 Ind Cas 192 (DB), *Mathura Pandey* v. *Chandrika Rai.*
('33) 20 AIR 1933 Lah 786 (788) : 149 I. C. 509 (DB), *Husain Ali* v. *Sardar Ali.*
(1869) 4 Q B 293 (305) : 38 L J Q B 81 : 17 W R (Eng) 414, *Morton* v. *Woods.*
('82) 6 Bom 674 (679, 680) : 1882 Bom P J 263, *Gopal Sitaram* v. *Desai.*
('99) 12 C P L R 96 (100), *Manickchand* v. *Vishnu.*

5. ('39) 26 AIR 1939 Nag 166 (167) : 182 Ind Cas 239 (DB), *Jabbarshah* v. *Kanchhedi Lal.*
('34) 21 AIR 1934 Pat 217 (219) (DB), *Rameshwar Narain* v. *Pani Ram.*
('30) 17 AIR 1930 Mad 160 (162, 167) : 124 Ind Cas 282 (DB), *Seshayya* v. *Lakshminarsimha Rao.*
('25) 12 AIR 1925 Mad 881 (882) : 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
('02) 26 Bom 252 (258) : 3 Bom L R 778 (FB), *Tukaram* v. *Ramchand.*
('24) 11 AIR 1924 Pat 580 (581) : 3 Pat 465 : 78 Ind Cas 588 (DB), *Kharag Narayan* v. *Dwarka Prasad.*
('28) 15 AIR 1928 Pat 410 (411, 412) : 7 Pat 690 : 110 Ind Cas 469 (DB), *Umeshwardhari Singh* v. *Neman Singh.*

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loan and there is no intention to provide any security for the repayment of a loan, the transaction would be a lease.[6]

The intention of the parties is to be gathered mainly from the document embodying the transaction, with such extrinsic evidence of surrounding circumstances as may be admissible for the purpose of showing in what manner the language of the document is related to existing facts.[7] The nomenclature used by the parties is immaterial for this purpose.[8] When the terms of a deed are not ambiguous, extrinsic evidence is not admissible for the purpose of determining the intention of the parties.[9]

A provision for the payment of interest or for redemption by repayment will show the transaction to be a mortgage and not a lease.[10]

('21) S AIR 1921 Pat 43 (43, 44) : 6 Pat L Jour 37 : 61 Ind Cas 67 (DB), *Hitendra Singh* v. *Rameshwar Singh.*
('08) 32 Bom 569 (571) : 10 Bom L R 742 (DB), *Mahmad Muse* v. *Bagas Amanji.*
('25) 12 AIR 1925 Pat 118 (119) : 3 Pat 266 : 78 Ind Cas 923 (DB), *Tilakdhari Singh* v. *Chaturgun Bind.*
('26) 13 AIR 1926 Pat 77 (79) : 90 Ind Cas 785 (DB), *Nathan Prasad* v. *Kali Prasad.*
[*See also* ('05) 7 Bom L R 772 (785), *Mahomed Cassum* v. *Joseph Ezekiel.*]

6. ('35) 22 AIR 1935 Mad 320 (321, 322) : 156 Ind Cas 873 (DB), *Peda Yerranna* v. *Somanna.*
('34) 21 AIR 1934 All 950 (951) : 153 Ind Cas 607, *Jessa* v. *Dhaniram.*
('84) 7 Mad 203 (206) (FB), *Reference under Indian Stamp Act (1879), S. 46.*
('18) 5 AIR 1918 Oudh 279 (280) : 48 Ind Cas 151, *Inder Bahadur Singh* v. *Bechan Singh.* (The use of the expression 'birt rahni' does not *prima facie* indicate the creation of some relation of mortgagor and mortgagee.)
[*See also* ('16) 3 AIR 1916 Pat 161 (164) : 1 Pat L Jour 1 : 33 Ind Cas 408 (DB), *Sital Prasad* v. *Dildar Ali Khan.*]

7. ('40) 1940 Oudh W N 1233 (1236), *Makka Lal* v. *Ganga Singh.*
('34) 21 AIR 1934 Pat 217 (219, 221) (DB), *Rameshwar Narain* v. *Pani Ram.*
('19) 6 AIR 1919 Mad 322 (330) : 41 Mad 959 : 49 Ind Cas 291 (DB), *Meenakshisundara* v. *Rathnasami.*
('10) 6 Ind Cas 817 (818) : 6 Nag L R 65, *Beni Prasad* v. *Mul Chand.*
('99) 9 Mad L Jour 290 (294) (DB), *Valla Nayar* v. *Subramanian Pattar.*
('78) 1 Cal L R 256 (258) (DB), *Lala Doul Narain* v. *Runjit Singh.*

8. ('02) 26 Bom 252 (258) : 3 Bom L R 778 (FB), *Tukaram* v. *Ram Chand.*
('40) 1940 Oudh W N 1233 (1234), *Makka Lal* v. *Ganga Singh.* (A document cannot be a lease or mortgage according to the interpretation put upon it by any of the parties to it.)
('35) 22 AIR 1935 Mad 320 (321) : 156 Ind Cas 873 (DB), *Peda Veeranna* v. *Sommanna.* ("Cowle" ordinarily denoted a lease and not a mortgage.)
('30) 17 AIR 1930 Mad 160 (166, 167) : 124 Ind Cas 282 (DB), *Seshayya* v. *Lakshminarsimha Rao.*
('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi.* (Document called 'karja rokha' held a lease.)
('28) 15 AIR 1928 Bom 377 (377, 379) : 114 Ind Cas 266, *Gulabbhai Ranchhodbhai* v. *Bhagwan Kesur.* (*Held* that the deeds in question though called 'valatdan' deeds were really lease deeds.)
[*See also* ('21) 8 AIR 1921 Pat 43 (43, 44) : 6 Pat L Jour 37 : 61 Ind Cas 67 (DB), *Hitendra Singh* v. *Rameshwar Singh.* (Document described as 'sudbharana lease' held a mortgage.)

9. ('25) 12 AIR 1925 Mad 881 (881) : 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
10. ('97) 24 Cal 272 (279, 280) : 23 Ind App 158 (PC), *Bengal Indigo Co.* v. *Roghobur Das.* (Provision for payment of interest.)

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The absence of such provisions may *prima facie* indicate the transaction to be a lease.[11] Thus, where the stipulation is that the transferee is to remain in possession for a fixed term of years and then vacate the property irrespective of the question whether the amount paid by him has been recouped by him from the profits of the property or not, the transaction may *prima facie* be held to be a lease.[12] But the test is not a conclusive one. Thus, where it was provided that the transferee was to be in possession for a certain period in lieu of the money paid by him but that if he was dispossessed in the meanwhile, he was to be entitled to recover the amount with interest, it was held that the transaction was a mortgage.[13]

In the undermentioned case,[14] where the transferee was placed in possession of the property for a term of years in discharge of the amount paid by him and there was no provision either for interest or redemption or rent and the document was described as a mortgage, it was held that the transaction was a mortgage and not a lease.

('41) 28 AIR 1941 Oudh 198 (200) : 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur.*

('19) 6 AIR 1919 Mad 322 (330) : 41 Mad 959 : 49 Ind Cas 291 (DB), *Meenakshisundara* v. *Rathnasami.*

('23) 10 AIR 1923 Mad 454 (454) : 73 Ind Cas 733 (DB), *Kuppu Reddi* v. *Mandaluka.*

('41) 28 AIR 1941 Pat 296 (298) : 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*

('35) 22 AIR 1935 Pat 360 (364) : 158 Ind Cas 162 (DB), *Parmeshwar Rai* v. *Ramrudra Prasad.* (Provision for interest.)

('25) 12 AIR 1925 Pat 118 (119) : 3 Pat 266 : 78 Ind Cas 923 (DB), *Tilakdhari Singh* v. *Chaturgun Bind.*

('15) 2 AIR 1915 Cal 769 (770) : 28 Ind Cas 383 (DB), *Chulhan Singh* v. *Madho Singh.*

11. ('03) 25 All 115 (119) : 30 Ind App 54 (PC), *Nidhasah* v. *Murli Dhar.*

('84) 7 Mad 203 (206) (FB), *Reference under Indian Stamp Act (1879), S. 46.*

('41) 28 AIR 1941 Pat 296 (298) : 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*

('33) 20 AIR 1933 Lah 786 (788) : 149 Ind Cas 509 (DB), *Hussain Ali* v. *Sardar Ali.*

('35) 22 AIR 1935 Mad 320 (321) : 156 Ind Cas 873 (DB), *Peda Yerranna* v. *Somanna.*

('28) 15 AIR 1928 Mad 35 (36, 37) : 106 Ind Cas 426 (DB), *Sundra Raju* v. *Seshadri.*

('23) 10 AIR 1923 Mad 454 (454) : 73 Ind Cas 733 (DB), *Kuppu Reddi* v. *Mondaluka.*

('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi.*

('10) 6 Ind Cas 817 (818) : 6 Nag L R 65, *Beni Prasad* v. *Mulchand.*

('98) 1898 Bom P J 49 (DB), *Jhumbra* v. *Raoji.*

('23) 10 AIR 1923 Nag 60 (61) : 19 Nag L R 1 : 69 Ind Cas 511, *Bhika* v. *Sheikh Amir.*

12. ('33) 17 R D 526 (528), *Kishan* v. *Pitam Prasad.*

('28) 12 R D 600 (602), *Bhagwan Das* v. *Ram Sarup.*

13. ('22) 9 AIR 1922 Nag 156 (157) : 65 Ind Cas 241, *Ramprasad* v. *Chandulal.* [*See also* ('06) 3 Cal L Jour 222 (223, 224) (DB), *Krishna Chandra* v. *Miran Bajania.*]

14. ('71) 15 Suth W R 331 (332) (DB), *Ishan Chunder* v. *Sooja Bebee.* (Document was termed as banduknamah.)

Where the transferee is to remain in possession till the amount paid by him is fully recovered from the usufruct of the property, the transaction may be taken to be a mortgage.[15]

Where rent is payable by the transferee, the transaction is indicated to be a *lease*.[16] Where otherwise a transaction is shown to be a lease, the fact that the lessor is a debtor of the lessee and that the rent payable by the latter is to be adjusted to the interest payable by the lessor[17] or that the principal itself is to be deemed as repaid by the adjustment of such rent for a certain number of years[18] will not alter the character of the transaction.

68. Maintenance grants. — Where land is granted for the purpose of providing maintenance to the grantee, the question arises as to whether such a grant is to be treated as a *lease*. There can be no general rule in such cases and the nature of the grant must be determined with reference to the facts and circumstances of each case. Because, though the purpose of the grant may be similar, the facts material for the determination of the question whether the grant fulfils the requirements of a *lease* are bound to differ. For instance, in the case of *Sonet Kooer* v. *Himmut Bahadur*[1] the Privy Council held a maintenance grant to be a grant of an *absolute* interest. But in the undermentioned cases[2] such a grant was assumed to be a *lease*. No doubt, these cases relate to grants made before the passing of the Act. But they show that though the purpose of a grant may be similar the nature of the grant may differ.

The decision of the Privy Council in *Sonet Kooer's case* brings home the point that if a grant for maintenance is of an *absolute* character, i.e., if it creates an interest in the *fee simple* or *ownership* of property, it would not be a *lease*, not even a permanent lease. Similarly, it was doubted by Varadachariar, J., in the undermentioned

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15. ('35) 22 AIR 1935 Pat 360 (364) : 158 Ind Cas 162 (DB), *Parmeshwar Rai* v. *Ramrudra Prasad*.

16. ('41) 28 AIR 1941 Pat 296 (298) : 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar*.

17. ('34) 21 AIR 1934 All 950 (951) : 153 Ind Cas 607, *Jassa* v. *Dhaniram*.
('30) 14 R D 83 (84), *Jodonandan Lal* v. *Jagnandan Tewari*.

18. ('43) 30 AIR 1943 Pesh 15 (17) (DB), *Akbar Khan* v. *Fateh Mohd*.
('23) 10 AIR 1923 Nag 60 (61) : 19 Nag L R 1 : 69 Ind Cas 511, *Bhika* v. *Sheikh Amir*.
('16) 3 AIR 1916 Mad 642 (643) : 28 Ind Cas 842 (DB), *Kamara Peda Subbayya* v. *Kakerla Chennapa*.
('10) 6 Ind Cas 817 (818) : 6 Nag L R 65, *Beni Prasad* v. *Mulchand*.

Note 68

1. ('75) 1 Cal 391 (398) : 3 Ind App 92 (PC).

2. (1900) 27 Cal 156 (163, 164) : 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy*. (Principles of holding over, etc., discussed.)
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra*. (Registration held necessary.)
('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ram Chandra Singh* v. *Bhikambar Singh*. (Principle of S. 116 applied.)

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decision[3] whether there is any intention of creating the relationship of landlord and tenant between a zamindar and the junior member of his family in whose favour he makes a grant for the purpose of his maintenance.

It seems fairly clear that ordinarily such grants would not be mere *licences*. The intention may generally be presumed to be to create an *interest* in the property.

One important question which arises in regard to such cases is whether a grant for maintenance is one made for a *consideration* and if so, if the consideration can be said to be of the particular kind which this section requires in order to make the transfer a lease. A grant in lieu of maintenance cannot be said to be *without* consideration when it is made in favour of a person who is entitled to a legal right of maintenance.[4] But the consideration cannot be said to be either *premium* or *rent* as required by this section and unless there are special factors which make the grant a lease, a giving up of the claim for maintenance will not, by itself, make the transaction a *lease*.[5]

Even if an annual sum is made payable by the grantee to the grantor under the terms of the grant, the grant cannot be considered to be a lease, unless it appears in the peculiar circumstances of a case that such payment forms the consideration for the grant. Normally, it will not be such consideration, the consideration in such cases being the giving up of the claim of maintenance.[6]

A maintenance grant made before the coming into force of this Act *could* be a lease even though there was no other consideration than the provision of maintenance for a person entitled to demand it, as there was no statutory definition of a lease at that time.[7]

Under the Central Provinces Tenancy Act, it has been held that no consideration is necessary for the creation of a tenancy. Hence, the grantee under a maintenance grant can be a tenant under that Act.[8]

It would seem that ordinarily a grant for the maintenance of a person would be tenable for the lifetime of the grantee, though it *can*

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3. ('37) 24 AIR 1937 Mad 882 (891) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Judgment of reference.)

4. ('37) 24 AIR 1937 Mad 882 (891) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Per Varadachariar, J.—Judgment of reference to Full Bench.)

5. ('37) 24 AIR 1937 Mad 882 (893) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*.
[But see ('11) 9 Ind Cas 394 (396) : 38 Cal 278 (DB), *Dwarka Nath* v. *Dumburudhur Mohapatra*.]

6. ('37) 24 AIR 1937 Mad 882 (892) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*.

7. *See* ('10) 6 Ind Cas 339 (340): 37 Cal 674, *Ram Chandra Singh* v. *Bhikambar Singh*.
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra*.
(1900) 27 Cal 156 (163, (164) : 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy*.

8. ('25) 12 AIR 1925 Nag 90 (92) : 82 Ind Cas 190, *Amarchand* v. *Sardar Singh*.

be made hereditary by express or implied provision.[9] In *Sonet Kooer's case*, above referred to, the grant was held to be an *absolute hereditary* grant, i.e., not a lease at all.

69. Resumption of service grants. — Where a grant of land is made in consideration of service to be rendered by the grantee, the grant may fall under either of the two following classes :

(a) It may be a grant in lieu of wages for the services to be rendered. The grant of an office, the performance of whose duties is to be remunerated by the enjoyment of certain lands, will fall under this class.

(b) It may be a grant burdened with the performance of service.

In class (a) it is an implied condition of the grant that if the services are not performed or are not required the grant can be resumed.

In class (b) *prima facie* the grant is not resumable even though the services may not be required. But an intention that the grant is to be resumable when the services are not required may appear from the provisions of the grant. Such intention may be express or implied. For instance, if the whole motive and consideration for a grant is the performance of the service, it may be presumed that the intention was that the services ceasing, the grant should be resumable. But where the grant is made partly as a reward for past services and partly in consideration of future services to be rendered, the grant will be presumed as not resumable even though the services may not be required. In such a case if owing to a change in circumstances the services are no longer required, the grant will continue practically freed from the liability of rendering the service.

One test to see if a grant is one in lieu of wages or one burdened with service is whether the service to be rendered is public or private. In the former case, the grant will *prima facie* be treated as being one burdened with service and not one in lieu of wages. In the latter case, the grant will be *prima facie* treated as one in lieu of wages and therefore resumable.

The above principles have been laid down in a series of decisions of the Privy Council,[1] beginning from *Forbes* v. *Mir Mahomed*

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9. ('13) 21 Ind Cas 93 (94) (DB) (Cal), *Secretary of State* v. *Rashidul Huq*.
(If property is vested in the grantee and his descendants by appropriate words creating a hereditary estate, it is not cut down to a life-estate and made inalienable merely by a direction that certain persons were to be maintained.)
[*See* (1900) 27 Cal 156 (161, 162) : 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy*. (Grant by zamindar of village, to member of his family in lieu of maintenance—*Held*, *prima facie* resumable on death of grantor, when there are no words purporting to grant a perpetual interest—At the latest, the interest came to an end at grantee's death.)]

Note 69

1. ('70) 13 Moo Ind App 438 (464, 465) : 14 Suth W R P C 28 (PC), *Forbes* v. *Mir Mahomed Taki*.
('70) 14 Moo Ind App 247 (257): 11 Beng L R 71 (PC), *Kooldeep Narain Singh* v. *Government of India*.

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Taki[2] which is also the leading decision on the subject, and have been followed by various decisions of the High Courts.[3] It may be that the grants in some of the decisions were not leases in the strict sense of the term and included a grant of an interest in the fee simple of the property.[4] In such cases, the grants might come under the category of revocable grants. But the above principles are equally applicable whether the grant is a lease or a revocable gift.[5]

Hence, where a lease is granted *in consideration* of services to be rendered by the lessee, i.e., in lieu of wages for such services, the lease will be presumed to be subject to the condition that on failure of the lessee to render the service the lease can be determined by the lessor. The cases cited below fall under this principle.[6] See also the undermentioned decision.[7]

('73) 1873 Ind App Sup Vol 181 (185) : 13 Beng L R 124 (132) (PC), *Leelanund Singh* v. *Munorunjun Singh.*

('06) 29 Mad 52 (57) : 33 Ind App 46 (PC), *Vencata Narasimha* v. *Sobhanadri.*

('31) 18 AIR 1931 PC 157(157): 132 I.C. 736 (PC), *Lakhamgouda* v. *Baswantrao.*

[*See* (1857-59) 7 Moo Ind App 128 (132, 133, 142) : 4 Suth W R P C 121 (PC), *U. R. R. Bommarauze* v. *P. Venkatadry Naidoo.* (Amaram grants, in the absence of all evidence to the contrary are resumable grants.)]

2. ('70) 13 Moo Ind App 438 (464, 465) : 14 Suth W R P C 28 (PC).

3. ('04) 28 Bom 305 (309) : 6 Bom L R 364 (DB), *Lakham Gauda* v. *Keshav Annaji.*

('27) 14 AIR 1927 Cal 561(562):103 I.C. 542(DB), *Sati Prasad* v. *Mahesh Bhunia.*

('29) 117 Ind Cas 848 (849) (DB) (Cal), *Official Receiver, Calcutta* v. *Kamdar Ali.* (*Held*, it was a grant burdened with services and not one in lieu of wages.)

('95) 22 Cal 938 (941) (DB), *Radha Pershad Singh* v. *Budhu Dashad.*

('15) 2 AIR 1915 Mad 606 (607, 608) : 26 Ind Cas 78 (DB), *K. Mrutyunjayudu* v. *Suryarao.*

('14) 1 AIR 1914 Mad 564 (567) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya.*

4. As seen in Note 6 an interest in the fee simple is inconsistent with a lease.

5. ('99) 23 Bom 602 (607) : 1 Bom L R 61 (DB), *Komargowda* v. *Bhimaji.*

[*See also* ('23) 10 AIR 1923 Nag 163 (163) : 67 Ind Cas 305, *Bed Prasad* v. *Kangalu.* (A muafi khairati tenant may be exempt from paying rent for services to be rendered to the malguzar or for services to be rendered to the village. The distinction between the two classes is clear. A man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. This is one class. In the other, persons are entitled to hold land as tenants with an added condition that they shall pay no rent so long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them.)]

6. ('19) 6 AIR 1919 Cal 1057(1058):45 I.C. 611(DB), *Sanchiram De Behari* v. *Hara Priya.* (Services to be performed at the time of marriages in the landlord's house.)

('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.* (Barber.)

[*See* ('93) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.* (Licensee allowed to occupy certain house site in a village on the condition of his doing certain work (blacksmith's work) is liable to be evicted on his ceasing to do that work, without notice to quit.)]

7. ('08) 7 Cal L Jour 90 (93) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain.* (A document purported to convey certain village to a person 'subject to faithful service'. There were no other words in the document making the grant descendible to the heirs or other descendants of the grantee — *Held*, the words 'subject to faithful service' clearly conveyed the idea of a grant for the life of the grantee only. Such a grant was therefore resumable on the death of the grantee.)

It may be noted that a lease in lieu of service will be a valid lease though a definite period is not fixed in advance for the duration of the lease. As seen in Note 25, the fixing of such period is not necessary for a lease. It will also be noted that service is a valid form of rent under the section.

70. Damages for use and occupation. —A claim for damages for use and occupation arises under the following circumstances —

(1) the defendant must be in possession of the plaintiff's immovable property;[1]

(2) the possession of the defendant must be with the *permission* of the plaintiff; and

(3) there must be *no* relationship of landlord and tenant between the parties.[2]

In such cases the *law* implies[3] a contract for the payment of compensation for use and occupation, although there may be no actual contract. But the circumstances must not be inconsistent with the raising of such a contract by implication. For instance, if there is an *express* contract providing for a certain amount of consideration to be paid in return for the use of one's immovable property, the implied contract under the law cannot arise, although the relationship between the parties may not amount to that of landlord and tenant. Similarly, if the permission is intended to be *gratis*, there can be no right to any damages for use and occupation.

Where A has granted a lease of his immovable property to B, A cannot sue C, a *third* person who may be actually in possession for damages for use and occupation.[4] The reason is that his occupation

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Note 70

1. A claim for rent may be tenable notwithstanding that the tenant has not been in actual possession of the land. The reason is that a claim for rent is based on the contract of tenancy. See 8 Cal 118 which shows this. In that case, the tenant was held to be liable for rent for the whole of the demised land, although he was not in possession of a substantial portion of it. This shows that want of actual possession is not necessarily and always a ground for refusing to pass a decree for rent. But a claim for use and occupation will necessarily fail if there is no possession.

2. ('15) 2 AIR 1915 Low Bur 47 (49): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi*.

('99) 26 Cal 739 (744) (DB), *Assanullah* v. *Mohini Mohan*. (Tenant occupying excess land—Liability for rent or for use and occupation — In absence of contract, no liability for rent—No liability for use and occupation also where under the law, the excess area forms part of the original tenure.)

[But see ('11) 12 Ind Cas 428 (429) (Mad), *Chinna Jogaya* v. *Verupati*. (A suit for damages for use and occupation will lie only where there is real or implied tenancy under the plaintiff—Submitted that the observation is not correct — The same criticism applies to observations in 27 Cal 239 (242) also.)]

3. ('10) 6 Ind Cas 766 (769) (DB) (Mad), *Chengiah* v. *Thimma Nayanim* (Art. 115 applies to suit for use and occupation.)

4. ('92) 16 Bom 568 (576), *Ragoonathdas* v. *Morarji Jutha*. (Lease to one partner —Suit against other partners not maintainable.)

('13) 21 Ind Cas 3 (4) : 7 Low Bur Rul 42, *J. D. Pappademetrion* v. *Rose Halliday*. (Do.)

('10) 7 Ind Cas 492 (493) (DB) (Cal), *Kanai Lal* v. *Nitai Chand*. (Person inducted on land by sub-lessee continuing in possession after termination of lease and sub-lease—No consent of lessor—Lessor cannot sue for use and occupation.)

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cannot be with the *permission* of A. A mere demand of rent from the person in possession will not make his possession permissive so as to make him liable for damages for use and occupation.[5]

A lessee holding over after the expiry of his lease without the assent of the landlord will not be liable for damages for use and occupation because his continuing in possession is not with the *permission* of the landlord. (See Note 40.)

Where a person enters into possession under an agreement for the grant of a lease and the lease is not actually granted, he will be liable for damages for use and occupation.[6] (See Note 4.) So also a person in possession under a void lease will be liable for damages for use and occupation.[7] (See Note 19.)

A *trespasser*, i.e., one who occupies land without the owner's permission and without any right cannot be sued for damages for *use and occupation*. He will be liable for *mesne profits*. But the owner can *waive* the trespass and claim compensation for use and occupation.[8] The position in such cases is this. The cause of action against a trespasser is based on *tort* and not on *contract*. An action for compensation for use and occupation is treated as based on *contract*, as the *law* implies such a contract, where the possession of the defendant is with the permission of the plaintiff. Even where such possession is not with the plaintiff's permission, it is open to him under the law to waive the tort or the wrong committed against him and sue, as if there was a permission, so that the action would be based on an implied contract as above explained. But the fact that he does so will not create a *tenancy* between the parties, and a suit for possession against the occupant will not be barred by his having adopted the above procedure.[9]

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5. ('82) 6 Bom 79 (82) (DB), *Kalidas* v. *Vallabhdas*.

6. ('12) 15 Ind Cas 432 (432) (Mad), *In re Kaya Ramkrishnamma*.

7. ('69) 12 Suth W R 289 (290) (DB), *Puroma Soonduree* v. *Prollad Chunder*.
('38) 25 AIR 1938 Mad 746 (748) : 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipality*.
('30) 17 AIR 1930 Lah 915 (916) : 129 Ind Cas 30, *Jawari Mal* v. *Jagan Nath*. (Lease deed inadmissible in evidence — Rent fixed in deed can be recovered as damages for use and occupation.)
('12) 15 Ind Cas 830 (831) : 36 Bom 500 (DB), *Ramchandra* v. *Tamo Ragho*.
('06) 9 Oudh Cas 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh*.
('09) 2 Ind Cas 211 (212): 31 All 276 (FB), *Sheo Karan Singh* v. *Parbhu Narain*.
[*See also* ('92) 14 All 176 (178) : 1892 All W N 25 (DB), *Gaya Prasad* v. *Baij Nath*. (Assignee of lease—Assignment invalid for want of registration—Assignee liable for damages for use and occupation.)]

8. ('83) 9 Cal 908 (913, 914) : 13 Cal L R 69 (DB), *Surnomoyee* v. *Deno Nath*.

9. ('15) 2 AIR 1915 Cal 494 (496) : 21 Ind Cas 197 (DB), *Raj Krishna Rudra* v. *Fakir Dome*.
[But see ('83) 9 Cal 908 (913, 914) : 13 Cal L R 69 (DB), *Surnomoyee* v. *Deonath*. (In this case, it was remarked that as the plaintiff had elected to waive the trespass and treat the defendants as tenants a decree for ejectment cannot be passed in plaintiff's favour, as the tenancy could be determined only by a proper notice to quit—It is submitted that this view is not correct — The election of the plaintiff in such cases cannot create a tenancy—It can only change the suit from being one based on tort into one based on contract.)]

The above discussion shows that it is only a *licensee* that may be liable for damages for use and occupation, and neither a tenant nor a trespasser.

Suppose, a suit for *rent* is brought against a person in possession of one's property, but the alleged tenancy is not established. In such a case, can the suit be converted into one for damages for *use and occupation* ? On this question the decisions are not uniform.[10] It is clear that the causes of action for a suit for rent and a suit for damages for use and occupation are different. The former is based on the *existence* of a tenancy, while the latter is based on the *absence* of a tenancy. The question, whether amendment of the suit should be allowed in such cases, falls within the province of the Civil Procedure Code. For a consideration of the principles applying to such matters, reference may be made to the Notes on O. 6, R. 17 of the Authors' Commentaries on the Code of Civil Procedure, 3rd (1940) Edn.

71. Determination of lease. — Section 111 provides for the modes in which a lease can be determined. Mere non-payment of rent for however long a time will not put an end to the relationship of landlord and tenant between the parties.[1] (See also Note 79.) Under S. 109 of the Evidence Act, where it is established that the relationship of landlord and tenant existed between the parties at a certain time, the burden of proving that the relationship has since ceased is on the party affirming the same.[2]

A clause in a lease entitling the lessor to re-enter on breach of certain conditions will not entitle him to re-enter *by force*.[3] Even a licence by the lessee to the lessor to eject him without process of law would be void and would be no answer to a charge of forcible entry.

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10. ('83) 9 Cal 908 (913, 914) : 13 Cal L R 69 (DB), *Surnomoyee* v. *Deonath*. (Amendment allowed.)
('09) 2 Ind Cas 920 (921): 12 Oudh Cas 140 (DB), *Udit Narayan Singh* v. *Rampal Singh*. (Do.)
('28) 15 AIR 1928 Nag 27 (29) : 23 Nag L R 152 : 105 Ind Cas 43, *Tribeniprasad* v. *Ramdas*. (Do.)
('15) 2 AIR 1915 Low Bur 47 (49) : 8 Low Bur Rul 270 : 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi*. (Do.)
(1900) 27 Cal 239 (242) (DB), *Rachhea* v. *Upendra Chandra*. (Amendment refused.)
('95) 22 Cal 752 (755) (DB), *Surendra Narain* v. *Bhai Lal Thakur*. (Do.)
('12) 17 Ind Cas 646 (646) (DB) (Cal), *Bhukhi Koeri* v. *Ram Khelawan*. (Do.)
('27) 14 AIR 1927 Mad 182 (183) : 99 Ind Cas 977, *Veerabhadra* v. *Vythinathaswami*. (Do.)

Note 71

1. ('81) 3 Mad 118 (120) (DB), *Tiruchurna Perumal Nadan* v. *Sanguvien*.
('79) 4 Cal 314 (317, 318) : 3 Cal L R 119 (DB), *Rungo Lall* v. *Abdool Guffoor*.
('12) 16 Ind Cas 911 (913, 914) (DB) (Cal), *Raj Kumar Roy* v. *Alimaddi*.
('04) 14 Mad L Jour 477 (478, 479) (DB), *Jagannatha* v. *Muthia Pillai*.
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj*.
('07) 6 Cal L Jour 72 (73, 74) (DB), *Bama Charan* v. *Administrator General of Bengal*.
('08) 7 Cal L Jour 202 (214) (DB), *Mohammad Amir* v. *Kedar Nath*.
2. ('81) 3 Mad 118 (120) (DB), *Tiruchurna* v. *Sanguvien*.
('79) 4 Cal 314 (317, 318) (DB), *Rango Lall* v. *Abdool Guffoor*.
3. ('12) 15 Ind Cas 857 (859) : 15 Oudh Cas 295, *Habibullah* v. *Surji*.

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Such a licence would be contrary to public policy as being likely to lead to a breach of the public peace.[4]

72. **Heritability of lease.**—A lease is *prima facie* a heritable right.[1] Section 111 shows that the death of the lessee will not necessarily terminate a lease. This is in keeping with the nature of a lease as an *interest* in immovable property and not merely a *personal* right of the grantee. Hence, on the death of a tenant for a term of years, his interest will survive to his legal representatives.[2] Even where a lease is not for a *fixed* term of years, it is a heritable right.[3] Thus, a lease from month to month is a heritable interest.[4]

But the above does not mean that a lease must *always* be heritable.[5] Thus, a lease for the life of the grantee is a valid lease under the law and such a lease will obviously terminate on the death of the lessee. Similarly, a tenancy-at-will is regarded as not being a heritable interest.[6] (See Note 32.) In such cases the intention of the

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4. ('12) 15 Ind Cas 857 (859) : 15 Oudh Cas 295, *Habibullah* v. *Surji*.

Note 72

1. (1846) 3 Moo Ind App 261 (275, 276) : 6 Suth W R P C 48 (PC), *Maharaja Tej Chand* v. *Sri Kanth Ghose*. (A lease for a term (or in perpetuity) confers a heritable right.)
(1851) 4 Moo Ind App 321 (333) : 7 Sudh W R P C 15 (PC), *Raja Burdakanth Roy* v. *Aluk Munjoore*. (Suit for damages for ouster of representatives of lessees before expiry of term is maintainable.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj*.
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir*.
('29) 16 AIR 1929 Nag 23 (26) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal*.
('22) 9 AIR 1922 Bom 45 (46) : 46 Bom 816 : 67 Ind Cas 230 (DB), *Chandmal* v. *Vishvanath*.
('21) 8 AIR 1921 Cal 453 (454) : 63 Ind Cas 109 (DB), *Jyoti Prosad* v. *Dasarath*. (The fact of a son inheriting a tenancy from his father and paying rent to the landlord held had not the effect of creating a new tenancy in favour of the son, even though the son inherited after the passing of the Transfer of Property Act.)
('27) 14 AIR 1927 Lah 423 (423) : 101 Ind Cas 166, *Bhola Nath* v. *Mahomed*. (Heirs and legal representatives are liable for the rent.)

2. ('90) 17 Cal 686 (687, 688) : 5 Sar 497 (PC), *Gobind Lal* v. *Hemendra*.
(1846) 3 Moo Ind App 261 (275, 276) : 6 Suth W R P C 48 (PC), *Maharaja Tej Chand* v. *Sri Kanth Ghose*.
('15) 2 AIR 1915 Cal 154 (154) : 25 Ind Cas 530 (DB), *Khitish Chunder* v. *Bhikan*.
('29) 16 AIR 1929 Nag 23 (26) : 110 Ind Cas 487, *Biju Bapu* v. *Munna Lal*.
('71) 16 Suth W R 147 (147) (DB), *Shaikh Dannoollah* v. *Amanutoolah*.

3. ('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj*.

4. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jaminilal*.
('37) 24 AIR 1937 Nag 321 (322) : I L R (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan*.
('28) 112 Ind Cas 651 (652, 653) (Lah), *Mohomed Budha* v. *Ghulam Qadir*.

5. ('10) 5 Ind Cas 500 (501, 502) : 37 Cal 377 (DB), *Kishori Lal Roy* v. *Krishna Kamini*.

6. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jaminilal*.
(1900) 10 Mad L Jour 201 (202) (DB), *Chemminian* v. *Udaya Varma*. (*James* v. *Dean*, 8 R R 185, followed.)

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parties may be presumed to be that the interest is to last only till the lessee's death.

The question whether there is sufficient reason to hold that a lease confers only an interest to last during the lifetime of the grantee depends on the facts and circumstances of each case.[7] Thus, where a village was conveyed "subject to faithful service", it was held that, in the absence of words showing an intention to make the grant hereditary, it must be held to be one ceasing on the death of the grantee.[8] The fact that the lease has been granted for a residential or building purpose is generally regarded as indicating an intention to confer a hereditary interest.[9] The term "mokarari" by itself does not show that a lease is a hereditary one.[10] (For further information see Note 47.)

There is one general rule of construction of grants which has to be referred to here. This rule was enunciated by the Privy Council in *Lakhraj Roy* v. *Kunhya Singh*[11] as follows:

> "If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant a hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained."

On the above rule of construction, if a lease is granted for an indefinite period, i. e., where the intention of the lessor is that the lease is to go on for an indefinite period, the lease will generally be regarded as conferring only a life-interest on the lessee, unless there is sufficient reason to suppose that a hereditary interest was granted.[12]

But as the Privy Council themselves have pointed out in the

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7. ('16) 3 AIR 1916 Cal 358 (358) : 44 Cal 403 : 33 Ind Cas 899 (DB), *Aklu* v. *Emman.* (The fact that the area occupied by the brother of the original lessee after original lessee's death is different from that included in the original lease and the fact that the rent was different from that which was specified in the lease, held led to the conclusion that the holding was not a heritable one.)

8. ('08) 7 Cal L Jour 90 (93) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain.*

9. ('12) 15 Ind Cas 137 (138) (DB) (Cal), *Hari Lal* v. *Rup Munjori.*
('32) 19 AIR 1932 Cal 215 (216) : 136 I.C. 607, *Digambar Das* v. *Bepin Behari.*
('10) 5 Ind Cas 500(501, 502): 37 Cal 377(382)(DB), *Kishori Lal* v. *Krishna Kamini.*
See also cases under Note 48.

10. ('88) 15 Cal 342 (344) : 5 Sar 128 (PC), *Permeswar Pertab* v. *Padmanand.*
[See however ('26) 13 AIR 1926 Cal 993 (994) : 53 Cal 816 : 98 Ind Cas 173 (DB), *Panchubala* v. *Jotindra.* (The words in a mokurari tenure that the lessee will continue to enjoy and possess by residing through sons, grandsons, etc. (putra poutradi krame) create a hereditary tenure.)

11. ('77) 3 Cal 210 (212) : 4 Ind App 223 (PC).

12. ('82) 8 Cal 664 (674) : 9 Ind App 33 (PC), *Bilasmoni Dasi* v. *Raja.*
('12) 15 Ind Cas 137 (137, 138) (DB) (Cal), *Hari Lal* v. *Rup Manjori.*
('18) 5 AIR 1918 Cal 823 (824) : 41 Ind Cas 227 (DB), *Jagadish Chandra* v. *Bisweswari Debya.*
('30) 17 AIR 1930 Mad 434 (436, 437) : 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.*
('36) 164 Ind Cas 837 (839, 840) (Cal), *Chandi Charan* v. *Ashutosh Lahiri.*

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passage quoted above, the rule of construction referred to by them will not apply, where the term, for which the lease has been granted, is fixed or can be definitely ascertained. On this principle, it was held in the above case by the Privy Council that, where the intention of the grantor is to create an interest which is to last as long as his own interest in the property, the period of the lease is capable of ascertainment by reference to such interest and hence, in such a case, the above-mentioned rule, making the grant only a *life-estate*, does not apply.[13]

The decision of the Privy Council in the above case shows that the period, for which a grant has been made, may be regarded as capable of being definitely ascertained, even though on the date of the grant the exact duration for which the grant will continue is not certain, provided that it will *become* certain at a future date on the happening of a certain event. Thus, in the above decision the grant was intended to continue so long as the grantor's own interest in the property lasted. But the grantor's interest in the property was of such a nature that on the date of the grant, it could not be definitely foretold how long it would continue. Because, the grantor's interest was a lease from the Government, which, (though hereditary and allowed to go on indefinitely) was liable to be terminated at any time by the Government. Nevertheless, it was held by the Privy Council that the term, for which the grant (by the lessee from the Government) was made, was capable of being definitely ascertained by reference to the interest, which the grantor himself had in the property. Evidently, their Lordships intended to lay down that the rule as to the construction of grants for an indefinite period will not apply where the parties have shown their intention that the grant is to continue in force up to a certain limit of time, although such limit is not fixed absolutely but is made to depend on the happening of some *collateral* event in the future.

It may be noted that, though the lease in favour of the *grantor*, in the above decision of the Privy Council, was liable to be terminated by the *lessor* (the Government) at any time, it was regarded as a heritable and transferable interest. This shows that even a lease, which is to go on *indefinitely* subject to the liability of being terminated at any time by the parties, is to be regarded as a lease under which a *term is fixed*, so as to make such interest a heritable one and not merely a life-interest.

Even where a lease is not heritable, if the tenant's heir continues in possession after the tenant's death and the landlord acknowledges the heir as his tenant, a new tenancy may arise by implication.[14] (See Note 38.)

Incidentally, it may be noted that the view of the Privy Council in the decision referred to above as to the question when the term of a lease can be said to be definitely ascertainable is exactly similar to the meaning of the words "certain time" in this section as explained in Note 25.

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13. *See also* ('29) 16 AIR 1929 Nag 23 (25) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal.* (This case was decided on the same principle.)

14. ('27) 14 AIR 1927 Cal 234 (235) : 99 Ind Cas 910 (DB), *Pramatha Nath* v. *Rajah Bejoy Singh.*

73. Construction of leases. — See Section 8 Note 20.

74. Escheat and reversion—Distinction. — See Note 6.

75. Zamindari and ryotwari lands — Tenants of. — The relationship between a *zamindar* and his ryot is not that of a landlord and tenant in the strict sense of the term, though in common practice the terminology of the law of landlord and tenant is loosely applied to such relationship.[1] The reason is that the ryot's right to *possession* of the land is ordinarily not one *derived* from the zamindar, so that there is no *transfer* of the right of possession in such cases.[2] Hence, if such a ryot sets up permanent occupancy rights, the ordinary presumption applicable to cases of landlord and tenant that a tenancy of agricultural land is presumed to be one from year to year, until the contrary is established (so that the burden of proof is on the tenant to establish his claim to a permanent right) does not apply.[3] But *ryotwari* pattadars are entitled to the actual possession of the land and the right of a tenant holding under them is only a *derivative* right, i.e., there is a *transfer* of such right by the ryotwari pattadar in such cases. The relationship of landlord and tenant exists in such cases, and the above-mentioned presumption will apply to them.[4]

It would also seem that a ryot holding under a zamindar has an interest in the *fee simple* or ownership of the land, though he may not be the full owner or proprietor. It seems he would be a sort of an "under-proprietor" referred to in Note 42.

Note 75

1. ('37) 24 AIR 1937 Mad 882 (891) : ILR (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Per Varadachariar, J., in his judgment of reference to the Full Bench.)

('03) 26 Mad 252 (254) : 12 Mad L Jour 449 (DB), *Narayan Ayyangar* v. *R. G. Orr*.

('04) 27 Mad 401 (404) (DB), *Ekambara Aiyar* v. *Meenatchi Ammal*. (Ryot with right of occupancy (under-shrotriemdar) is not a mere lessee.)

2. ('03) 26 Mad 252 (255) : 12 Mad L Jour 449 (DB), *Narayan Ayyangar* v. *R. G. Orr*. (It originates in effective occupation and beneficial use of the soil.)

('97) 20 Mad 299 (301, 302) : 7 Mad L Jour 251 (DB), *Venkata Narasimha* v. *Dandamudi*.

[*See* ('04) 27 Mad 401 (404) (DB), *Ekambara Aiyar* v. *Meenatchi Ammal*. ("'Tenant'' is a word which standing by itself denotes in law "one who holds lands by any kind of title whether for years or for life or in fee" and does not necessarily mean a lessee, unless it is used in opposition to landlord.)]

[See however ('07) 30 Mad 155 (157) : 17 Mad L Jour 64 (DB), *Bodda Goddeppa* v. *The Maharaja of Vizianagaram*. (In this case it was held that zamindar has a reversionary interest in the land.)]

3. ('97) 20 Mad 299 (301, 302) : 7 Mad L Jour 251 (DB), *Venkata Narsimha* v. *Dandamudi*.

[See however ('11) 9 Ind Cas 141 (146) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao*. (In this case the tenure set up was not that of a cultivating ryot. It was that of what was claimed to be a mokhasa right, an intermediate tenure between the zamindar and the ryot and a permanent right was claimed in respect of such right. It was held that the relationship of landlord and tenant existed and the burden of proof was on the tenant.)]

4. ('19) 6 AIR 1919 Mad 293 (300) : 52 Ind Cas 247 (DB), *Ponniah* v. *Deivanai Ammal*.

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76. Zuripeshgi lease. — See Section 58 Note 36.

77. Kanom leases. — See Section 58 Note 37.

78. Landlord and tenant—Adverse possession. — See Notes 79 to 84.

79. Nature of tenant's possession during tenancy — Adverse possession. — It is a fundamental principle that a person who is in possession of immovable property by virtue of a lawful title cannot deny such title and assert that his possession is hostile to the title of another person.[1] Hence, during the continuance of a tenancy the tenant's possession cannot be adverse to the landlord.[2] Mere denial of the landlord's title or assertion of a superior interest[3] by the tenant or non-payment of rent by the tenant will not determine the tenancy and make his possession adverse to the landlord.[4] So long as the tenancy

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Note 79

1. See the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edition, Arts. 142 & 144, Note 18.

2. ('16) 3 AIR 1916 Mad 642 (643) : 28 Ind Cas 842 (DB), *Peda Subbayya* v. *Kakerla Chennappa*. (Under Madras Hereditary Village Offices Act (III of 1895), S. 13, an alienation of service tenures by way of leases is not prohibited — Hence a lessee of the holder of such tenure cannot set up an adverse title by alleging that leases are prohibited under the Act.)
('02) 25 Mad 507 (511): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*.
('81) 3 Mad 118 (120) (DB), *Tiruchurna Perumal* v. *Sanguviem*.
('76) 25 Suth W R 66 (66, 67) (DB), *Rajkishore Surma Chuckerbutty* v. *Grija Kant Lahiree*.

3. ('23) 10 AIR 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC), *Mumtaz Ali* v. *Mohan Singh*. (Claim of under-proprietary title by a tenant in a judicial proceeding.)

NOTE — A denial of the lessor's title is, no doubt, a ground of forfeiture of the lease, (see S. 111 (g).) — But such denial by itself does not terminate the lease— The lease is determined only if the lessor takes action on such forfeiture being incurred. Under S. 111, as it has been amended by Act XX of 1929, the lessor must give written notice determining the lease.

4. ('78-80) 2 All 517 (520, 521) : 4 Ind Jur 650 (FB), *Premsukh Das* v. *Bhupia*. (Term in lease that on default in payment of rent lessee should vacate — His possession does not become adverse on default.)
('99) 23 Bom 602 (607) : 1 Bom L R 61 (DB), *Komar Gowda* v. *Bhimaji*. (Lands held for service — Mere non-rendering of service does not make possession of tenant adverse — Same principle applies as in case of rent.)
('14) 1 AIR 1914 Bom 294 (296) : 27 Ind Cas 523 (DB), *Yeshwant* v. *Keshavrao*.
('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari*.
('83) 7 Bom 34 (39) (DB), *Dadoba* v. *Krishna*. (Possession referable to lawful title is not adverse.)
('12) 16 Ind Cas 365 (366) : 40 Cal 173 (DB), *Prasanna Kumar* v. *Sri Kantha Raut*.
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bushan*.
('07) 6 Cal L Jour 72 (73, 74) (DB), *Bama Charan* v. *Administrator General of Bengal*. (Further the fact that rent was never paid does not necessarily show that the instrument evidencing tenancy was not intended to be acted upon.)
('05) 9 Cal W N 122 (122) (DB), *Apurba Krishna Roy* v. *Ashutosh Dutt*.
('32) 19 AIR 1932 Lah 586 (587) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh*. (Tenancy-at-will.)
('30) 17 AIR 1930 Lah 437 (437) : 129 Ind Cas 889, *Allah Ditta* v. *Budha*. (Do.)

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has not ended, the tenant cannot, by adverse possession, acquire a title either to the ownership of the property or to any higher interest in the property than that created by the lease.[5] Thus, where the lease is not a permanent one, the tenant cannot convert it into a permanent lease by adverse possession for the statutory period.[6]

The rule that a tenant's possession cannot be adverse to the landlord during the continuance of the tenancy can also be traced to other principles. These are :

(1) A tenant is estopped from denying the ownership of the lessor. This principle is embodied in S. 116 of the Evidence Act.

('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj*. (The fact that the landlord had a right to eject the tenant in case of non-payment of rent does not cause a forfeiture of the tenancy, unless the landlord chose to exercise it.)

('20) 7 AIR 1920 Lah 217 (217) : 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh*. (Tenancy-at-will.)

NOTE — As some of the above cases, (see AIR 1920 Lah 217 and AIR 1930 Lah 437) will show the above proposition is true even in the case of a tenancy at will— As seen in Note 32, such a tenancy can only be determined by the tenant by notice and surrender of possession — Mere notice of a claim to a higher right is not enough.

5. ('23) 10 AIR 1923 P C 118 (121) : 26 Oudh Cas 231 : 50 Ind App 202 : 45 All 419 : 74 Ind Cas 476 (PC), *Mumtaz Ali* v. *Mohan Singh*. (Under-proprietary right.)

('32) 19 AIR 1932 Lah 586 (589) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh*. (Ownership.)

('08) 4 Nag L R 104 (108), *Hiria* v. *Mohd. Siraj-ud-din* (Do).

('26) 13 AIR 1926 Sind 71 (74) : 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Md. Faruq*. (Per Aston, A. J. C.)

6. (1900) 27 Cal 156 (165, 166) : 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy*. (Tenant for life cannot prescribe for permanent tenancy by giving notice to the landlord that he claims such right. NOTE — Attention is drawn by the Privy Council to the fact that the landlord could not have sued for possession before the determination of the lease.)

('24) 11 AIR 1924 P C 65 (73): 51 Ind App 83: 47 Mad 337 : 82 Ind Cas 226 (PC), *Nainapillai* v. *Ramanathan*. (Following A I R 1923 P C 205 = 47 Bom 798 = 50 Ind App 255 (PC).)

('35) 22 AIR 1935 Bom 247 (250) : 156 Ind Cas 1020 (DB), *Vaman* v. *Khanderao*.

('34) 21 AIR 1934 Bom 194 (197) : 58 Bom 419 : 150 Ind Cas 555 (DB), *Datto* v. *Babasaheb*.

('73) 10 Bom H C R (AC) 324 (326), *Narayan Visaji* v. *Lakshuman*. ("Mirasi rights" in Bombay Presidency.)

('26) 13 AIR 1926 Cal 634 (636, 637) : 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*. (Mokarrari mourashi right.)

('02) 25 Mad 507 (511) : 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*.

('14) 1 AIR 1914 Mad 564 (568, 569) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Raja of Venkatagiri* v. *Narsaya*. (*Semble*.—Where the landlord, on the tenant's assertion of hostile title, has unequivocally shown his intention to determine the lease, time would run in favour of the tenant.)

('32) 19 AIR 1932 Mad 328 (332) : 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda*.

('31) 18 AIR 1931 Mad 577 (580) : 133 Ind Cas 369, *Gopala* v. *Juvappa*.

('30) 17 AIR 1930 Mad 434 (438) : 125 Ind Cas 242, *Saldanha* v. *Roman Catholic Church, Mermajal*.

[*See also* ('14) 1 AIR 1914 Cal 382 (384) : 21 Ind Cas 920 (DB), *Bengal Coal Co.* v. *Rejendra Lal*. (Permanent lease granted by lessee under a lease for a term of years —Sub-lessee's possession is not adverse to lessor till main lease ends.)]

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Note 79

It will be noted that this principle only precludes the tenant from denying the *ownership* of the landlord. It does not preclude the tenant from asserting a lesser right although such right may be higher than the one conferred by the lease. But the principle above referred to, namely, that possession referable to a lawful title cannot be adverse comes in the way of the tenant doing so.

2. The possession of the tenant is *permissive* i. e., not in denial of the title of the lessor, but in consonance with it.

3. So long as the tenancy is outstanding the lessor cannot sue the tenant for possession. If it is held that his possession can become adverse even before the tenancy ends, the result will be that limitation will begin to run against the landlord at a time when he has no right of suit at all—a result which is repugnant to the law. This aspect of the matter is pointed out by the Privy Council in *Beni Pershad* v. *Dudhnath Roy*.[7]

4. Adverse possession implies a present right to possession in another person. (See Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Note 78.) But so long as tenancy continues, the right to possession is vested in the tenant and not in the landlord.

But where the tenant refuses to the landlord the "enjoyment of his right" to the rent reserved by the lease, such right will, under Art. 131 read with S. 28 of the Limitation Act, be extinguished at the end of twelve years from such refusal.[8] To constitute "refusal of enjoyment" of the right within the meaning of the Article, mere non-payment of rent is not enough. There must be a demand and refusal[9] and a denial of the landlord's title to the rent.[10] It must be noted that the effect of Art. 131 is *not* to make the tenant's possession of the *leased property* adverse to the landlord from the date of the refusal by the tenant. The subject-matter of adverse possession in such cases is the right to the *rent* of the leased property. Such right is itself a kind of property,[11] (apart from the leased property) which is capable of adverse possession by the lessee or a stranger.

It is sometimes held or assumed that there can be adverse possession by a tenant in respect of the land covered by the lease even during the continuance of the lease.

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7. (1900) 27 Cal 156 (166) : 26 Ind App 216 (PC).

8. See the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edition, Art. 131, Notes 2 and 3.
[*See also* ('97) 21 Bom 394 (396) (DB), *Gopalrao Krishna* v. *Mahadevrao*. (*Held*, in this case that the landlord's right to enhanced rent was extinguished by adverse possession.)]

9. See the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 131, Note 9.

10. ('06) 29 Mad 42 (44) : 16 Mad L Jour 35 (DB), *Lakshminarayan* v. *Venkata Narasimha*.
('13) 18 Ind Cas 243 (243) (Mad), *Adivi Sreenivasa Pantulu Garu* v. *Palatala Jogiraju*.
('19) 6 AIR 1919 Mad 758(763): 48 I.C. 615(DB), *Kamulammal* v. *Sangali Subba*.
('12) 15 Ind Cas 338 (339) (All), *Anroop Miser* v. *Kedar Pande*. (Non-payment of customary dues to zamindar.)
[*See also* ('68) 5 Bom H C R A C 85 (86) (DB), *Hari* v. *Mahadaji*. (Non-payment of rent for 12 years is no bar to recovery of rent for 3 years before suit.)]

11. See the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., S. 28, Note 5.

Section 105
Note 79

It is said or implied that an open assertion of a hostile title or open repudiation of the landlord's title may make the possession of the tenant adverse to the landlord.[12] In *Fatesingji* v. *Bamanji*[13] it was held that although a tenant cannot prescribe by adverse possession for title as *full owner*, a tenant who is not a permanent tenant can, by adverse possession for twelve years, convert his tenancy into a permanent tenancy. The judgment proceeds on the ground that S. 116 of the Evidence Act precludes the tenant only from asserting a right to the *ownership* of the property. It is submitted that such decisions are contrary to sound principle. They fail to take note of the principle (above referred to) under which the tenant is *precluded* during the continuance of the tenancy from claiming adversely to the landlord. This principle is wider than S. 116 of the Evidence Act.

In *Mumtaz Ali* v. *Mohan Singh*[14] the Privy Council observed that the mere assertion in a judicial proceeding of an underproprietary title by a tenant would not deprive the landlord of his proprietary rights and continued as follows : "The case might have been different if, in addition to the judicial assertion by the plaintiff, there had been any change in the money payment which he thereafter made to his landlord." It is submitted that the above observations of the Privy Council do not mean that the possession of the *leased property* by a tenant would become adverse to the landlord, if the assertion of a higher title had been accompanied by a change in the money payment. There is no reason why a change in the money payment should make a difference in the character of the possession of the *leased property*. As seen already, it is well established that mere non-payment of rent does not make such possession adverse to the

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12. ('21) 8 AIR 1921 Bom 227 (227, 228) : 45 Bom 508 : 59 Ind Cas 718 (DB), *Babusingh Ramachandra* v. *Pandu*. (Where a tenant wishes to acquire a larger claim (permanent right of tenancy) by adverse possession, he must give the landlord specific notice of the claim.)
('99) 23 Bom 602 (606) : 1 Bom L R 61 (DB), *Komargowda* v. *Bhimaji*. (To make possession by service tenant adverse to lessor there must be, over and above the non-rendering of service, an active assertion of an adverse right.)
('12) 17 Ind Cas 943 (944): 37 Bom 284, *Vinayak* v. *Sitaram*. (Mere non-payment of rent by a tenant does not make him owner of the land by adverse possession, unless the tenant does some act which is inconsistent with the owner's title and thereby turns his possession as tenant into possession adverse to that of the owner.)
('97) 21 Bom 509 (516) (DB), *Budesab* v. *Hanmanta*. (Assertion of permanent tenancy in judicial proceeding and continuing to hold under that assertion—There is adverse possession. NOTE — This decision is clearly against the decision of the Privy Council in AIR 1923 P. C., 118 and is submitted to be wrong.)
('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari*. (Unless made to the knowledge of landlord mere assertion of the permanent tenancy by tenant does not start adverse possession.)
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bushan*.
('32) 19 AIR 1932 Lah 586 (589) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh*. (Per Bhide, J.—Assertion of adverse title would terminate tenancy at end of agricultural year and must be looked upon as a notice to the landlord that the tenant no longer intends to hold the land under him.)
('26) 13 AIR 1926 Sind 71 (72) : 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Md. Faruq*. (Per Kennedy, J. C.)

13. ('03) 27 Bom 515 (540): 5 Bom L R 274 (DB). (But bare assertion of permanent tenancy to landlord's knowledge is not enough—If tenant proceeds to enjoy benefits claimable only by a permanent tenant, his possession becomes adverse.)

14. ('23) 10 AIR 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC).

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Notes 79–80

landlord. All that the Privy Council says is that the landlord's "proprietary rights" might be affected in such a case. It is quite possible that their Lordships had in mind the landlord's right to the *rent* reserved by the lease and meant to say that *this* right might be affected in the circumstances stated. Such a view is quite understandable in the light of Art. 131 of the Limitation Act which has already been referred to.

It must also be mentioned that the decisions of the Privy Council in *Ram Chunder* v. *Madho Kumari*[15] and *Chidambara Sivaprakasa* v. *Veerama Reddi*[16] do not affect the position that a tenant cannot during the *continuance* of the tenancy prescribe by adverse possession for any higher title than that conferred by the lease. *Ram Chunder* v. *Madho Kumari* was the case of a tenant at sufferance continuing in possession *after* the determination of the tenancy. There is nothing to show that in *Chidambara Sivaprakasa* v. *Veerama Reddi*, the permanent tenancy was acquired by prescription by persons who had *entered* as *tenants*.

80. Nature of tenant's possession after determination of tenancy — Adverse possession. — Where a lessee continues in possession after the determination of the lease without the assent of the landlord, time begins to run in his favour under Art. 139 of the Limitation Act. Under that Article read with S. 28 of that Act the ex-lessee will acquire at the end of twelve years from the determination of the tenancy, such right to the property as he has been claiming while in possession. If the ex-lessee has been in possession in the assertion of a right to the full ownership, he can acquire such right at the end of the statutory period. If he has been asserting any lesser right, he can acquire such lesser right.[1] *But this is apart from any question of adverse possession*. It is purely as the effect of the above two provisions that such a result occurs.

But *can* a tenant's possession after the determination of the tenancy be adverse to the landlord and if so, to what extent ? As seen in Note 37 the tenant's possession in such cases is *wrongful*. But it is not *ipso facto adverse* to the landlord. Nor *can* it be adverse to the *full* extent. In other words, such possession can be adverse to the landlord to a limited extent but not to the full extent so as to enable

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15. ('85) 12 Cal 484 (492, 493) : 12 Ind App 188 (PC).
16. ('22) 9 AIR 1922 P C 292 (302, 303):45 Mad 586:49 Ind App 286:68 Ind Cas 538 (PC).

Note 80

1. ('26) 13 AIR 1926 Cal 952 (953) : 95 Ind Cas 101 (DB), *Sadananda Mandal* v. *Jotish Kantha Roy*.
('02) 25 Mad 507 (511) : 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*.
('24) 11 AIR 1924 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *Kamakhya Narain Singh*. (Tenant at sufferance.)
[*See* ('09) 4 Ind Cas 1080 (1080, 1081) : 33 Mad 260 (DB), *Subravti Ramiah* v. *Gundala Ramanni*. (Even under English law tenancy at sufferance does not interrupt the running of time.)]
[*See also* ('25) 12 AIR 1925 Pat 216 (228) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhy* v. *Kamakhya Narain*. (Transferee from life tenant continuing in possession after life-tenant's death—Possession under claim of permanent tenancy.)]
See also the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 139, Note 11.

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Note 80

the ex-tenant to prescribe for *full ownership* by adverse possession. Hence, *but for Art. 139 read with S. 28*, a tenant continuing in possession after the determination of the tenancy for any length of time would not be able to acquire by prescription a title to the *full ownership* of the property. But he can, *independently of Art. 139*, acquire by adverse possession a title to a *lesser* interest in the property although such interest may be higher than that under the expired tenancy.

This position results like this : After the determination of the tenancy, the principle referred to in Note 79, that possession referable to a lawful title cannot be adverse, does not apply for the simple reason that the tenant's possession is no longer referable to a lawful title. But, though the above principle does not apply to such a case, the *principle* of S. 116 of the Evidence Act applies. (The principle applies even after the tenancy has ceased, so long as the tenant has not surrendered possession.[2]) This principle precludes the ex-tenant from asserting a claim for the full *ownership* of the property. But it does not preclude him from asserting a claim for a lesser title, say a title to permanent tenancy, although such title may be higher than that conferred by the expired lease.[3]

Even as to a limited extent, the tenant's possession does not *ipso facto* become adverse to the landlord from the moment of the termination of the tenancy. The possession will not become adverse, till an adverse claim is actually put forward by the tenant against the landlord.[4]

A lessee who, after the determination of the tenancy, discontinues possession or is dispossessed but afterwards again enters into possession of the same property is in the position of a mere stranger and on the

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2. See Woodroffe and Ameer Ali, *Evidence Act*, 6th Edn., 1915, p. 800.
[*See also* ('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi* v. *Venkatalakshminarasayya*. (15 Mad L Jour 368 followed.)]

3. ('86) 12 Cal 484 (494) : 12 Ind App 188 (PC), *Ramchunder Singh* v. *Madho Kumari*. (Maintenance grant by ghatwal — Grant not valid after grantor's death —Grantee continuing in possession thereafter is tenant at sufferance—He can set up adverse possession as a permanent tenant. NOTE —In this case, however, the full period of limitation had not run from the setting up of adverse possession.)
('26) 13 AIR 1926 Cal 634 (635) : 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*.
('22) 9 AIR 1922 Cal 193 (194) : 69 Ind Cas 7 (DB), *Satyendra Nath* v. *Krishnasakha*. (Chaukidari chakran lands resumed by Government and settled with zamindar—Zamindar taking no steps to eject lessee, claiming under a lease granted before resumption — Lessee continuing in possession for more than 12 years after resumption, held acquired the status of a tenant.)
('03) 26 Mad 535 (536, 537) (DB), *Parameswaram* v. *Krishnan*. (Yearly tenancy—Tenant continuing in possession after termination of tenancy—Tenant so continuing in possession under claim of permanent tenancy—His possession is adverse and he acquires permanent tenancy by prescription.)
('32) 19 AIR 1932 Mad 328 (332) : 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda*.

4. ('86) 12 Cal 484 (494) : 12 Ind App 188 (PC), *Ramchunder Singh* v. *Madho Kumari*.
[*See also* ('84) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan*.]

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principles discussed in Note 84, he can prescribe by adverse possession for *any* title which he may assert.[5]

Where a lessor assents to the continuation in possession of a tenant after the determination of the original tenancy, the tenancy is renewed under S. 116. In such cases, the principle which precludes a tenant from asserting a claim by adverse possession against his landlord during the continuance of the tenancy will come into play again, and there will be no adverse possession till the tenancy is determined.[6]

81. **Tenant encroaching on other land of the landlord — Adverse possession.** — Where a tenant encroaches on other land of the lessor he does not thereby *ipso facto* become a tenant of such land also. So, such land is not covered by the tenancy. The principles referred to in Note 79 which preclude a tenant from setting up adverse possession against the landlord during tenancy, therefore, do not apply to the tenant's possession of other land of the lessor on which the tenant encroaches. So, a tenant can set up adverse possession against the landlord in respect of such lands.[1] But there is a presumption that he claims to hold such land under the same terms as those under which he holds the lands covered by the lease. Hence, *prima facie*, in regard to lands encroached upon by a tenant, he can acquire by adverse possession only such rights as he has in respect of the lands covered by the original tenancy.[2] But he *can* prescribe for a higher title also by openly asserting such title to the *knowledge* of the landlord.

(See also the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 139, Note 19.)

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5. *See* ('14) 1 AIR 1914 Mad 564 (569) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Narsaya*. (Determination of lease by lessor and resumption of possession by him—Lessee getting back into possession and paying rent at the old rate which is accepted by the lessor—Nothing to show that the tenant asserted a right to permanent tenancy—Tenant does not acquire right to permanent tenancy by prescription.)

6. ('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ramchandra Singh* v. *Bhikambar Singh*.

('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi* v. *Venkatalakshminarasayya*. (Per Sadasiva Ayyar, J.—While the clear words of Art. 139, Limitation Act, should be given effect to there is no reason why Courts should not, having regard to the usual course of events and probabilities, view with favour evidence adduced to show that though the original tenancy for a fixed period had expired, the relationship as between a landlord and tenant from year to year had been afterwards created by conduct between the parties to the original contract of letting.)

Note 81

1. ('26) 13 AIR 1926 Cal 634 (635) : 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*.

2. ('30) 17 AIR 1930 Lah 437 (437) : 129 Ind Cas 889, *Allah Ditta* v. *Budha*. (He cannot get, by mere efflux of time, a title to full ownership. 10 Ind Cas 575 : 35 Mad 618, followed.)

('18) 5 AIR 1918 Cal 639 (641) : 41 Ind Cas 530 (DB), *Sarada Kripahalala* v. *Akhil Chandra*. (If the original tenancy is of a permanent character, the tenancy with regard to the new land also will be a permanent one.)

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Note 82

82. Possession under invalid lease, how far adverse. — Where a person enters under a void lease, his possession is not referable to any lawful title and so, he is not precluded, on the principle discussed in Note 79 from setting up adverse possession against the grantor of the lease. But he can set up such adverse possession only in regard to the interest attempted to be created by the void lease.[1] The reason is that having entered into possession under colour of a particular transaction he cannot afterwards set up another title to the property against such transaction, although it did not operate to pass title to him. (See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Note 60.)

Reference may also be made in this connexion to S. 116 of the Evidence Act. As seen in Note 19, the person entering under a void lease is in the position of a licensee. Under S. 116 of the Evidence Act he cannot set up a right to the *ownership* of the property. But that section does not prevent him from asserting a lesser right to the property. But the principle above referred to precludes him even from doing so, except to the extent of the interest purported to be created by the void lease.

Under the above principles, a person entering under a void lease can acquire by adverse possession the interest purported to be granted by such lease.[2] Thus, if the interest attempted to be created is a

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Note 82

1. ('10) 5 Ind Cas 350 (351) (All), *Bhagwan Das* v. *Hari Ram.*
('17) 4 AIR 1917 All 102 (103) : 37 Ind Cas 395, *Bijai Narain Singh* v. *Parbhu Narain Singh.* (Even where lessee continues in possession after the period of the invalid lease.)

2. ('28) 15 AIR 1928 Bom 377 (378, 379) : 114 Ind Cas 266, *Gulabbhai Ranchhodbhai* v. *Bhagvan Kesur.* (Lease void as being against Bhagdari Act.)
('23) 10 AIR 1923 Bom 146 (147) : 77 Ind Cas 952 (DB), *Chaturbhai* v. *Motibhai.* (Lease for 500 years void under Bhagdari Act—Prescription.)
('03) 27 Bom 515 (534) : 5 Bom L R 274 (DB), *Fatesingji* v. *Bamanji.* (Possession may be adverse to a limited extent though rent is paid and accepted.)
('97) 21 Bom 509 (516) (DB), *Budesab* v. *Hanmanta.*
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra.* ("Jibka" grant can be acquired by adverse possession. NOTE — The dicta in this case that possession under a void grant can be adverse even to the full extent i. e., so as to enable ownership to be acquired by adverse possession are, it is submitted, not correct.)
('32) 19 AIR 1932 Mad 328 (332) : 137 Ind Cas 487 (DB), *Periyanan Chetty* v. *Govindarao.*
('02) 25 Mad 507 (512) : 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade.*
[But see ('07) 5 Cal L Jour 62 (63) (DB), *Chaitan Singh* v. *Sadhari Monim.* (NOTE — In this case the grantee under a void lease remained in possession for more than the statutory period. During this period he paid rent which was accepted by the landlord—He was then dispossessed by the owner. He afterwards brought a suit for possession based on the ground that he had acquired a title by prescription—It was held that there was no adverse possession as there was no hostile claim between the grantor and grantee—Both believed that the lease was valid and rent was paid and accepted—12 Cal 484 was relied on for the proposition that unless there is an assertion of a hostile claim possession cannot be adverse—At the same time it was held that the payment and acceptance of rent created a tenancy by implication and that the tenant could not be dispossessed without determining that tenancy.)]

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Notes 82–84

permanent tenancy, the person entering into possession under such transfer can prescribe for a permanent tenancy.[3] The same principle will apply *mutatis mutandis*, where a transfer is valid for a time and becomes invalid subsequently. Thus, where a lease is valid only for the lifetime of the grantor or during the time that he holds a certain office or occupies a certain position, the lessee's possession after the death of the grantor or after he ceases to hold the office or occupy the position will be adverse to his successors from the moment of his death or ceasing to hold the office or occupy the position in question. Such a person would also be in the position of a person who continues in possession without the lessor's assent after the determination of the tenancy.

83. Dispossession of lessee by third person — Adverse possession.—Where a stranger dispossesses a lessee from the property and enters into possession of the property, the possession of such stranger is not adverse to the lessor so long as the tenancy is in force. The reason is that till the lease is determined the lessor is not entitled to possession.[1] (See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Notes 78 and 86.)

84. Acquisition of tenancy by prescription by trespasser.—A *limited* interest in immovable property can be acquired by adverse possession in the same way in which a right of *ownership* can be acquired. Thus, a trespasser in possession under a claim of tenancy in respect of the land can acquire a right of *tenancy* in the land by prescription.[1] If he has been in possession claiming a *permanent*

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3. ('94) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan*. (Grantee of mirasi right from manager of math.)

('23) 10 AIR 1923 Cal 130 (134) : 69 Ind Cas 707 (DB), *Gajendra Nath* v. *Ashraf Hossain*. (Permanent lease by manager of religious endowment.)

('06) 33 Cal 511 (525, 526, 527) : 3 Cal L Jour 306 (DB), *Shamacharan* v. *Abhiram*. (Permanent lease of debutter property.)

('32) 19 AIR 1932 Mad 328 (332) : 137 Ind Cas 487 (DB), *Periyanan Chetty* v. *Govindarao*. (Cowl granted by a dharmakaratha of temple lands.)

Note 83

1. ('37) 24 AIR 1937 Mad 882 (883) : ILR (1937) Mad 633 : 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*.

[*See* ('22) 9 AIR 1922 Cal 348 (352) : 49 Cal 257 : 69 Ind Cas 117 (DB), *Katyani Debi* v. *Udaykumar*. (Per Woodroffe, J.—Where the lease is permanent the landlord can sue the trespasser in order to give land, of which the latter is wrongfully in possession, to his tenant.)]

Note 84

1. ('83) 7 Bom 96 (99) (DB), *Maidin Saiba* v. *Nagapa*.

('08) 35 Cal 470 (476) : 7 Cal L Jour 499 (DB), *Icharam Singh* v. *Nilmoney Balidar*. (Purchaser from occupancy tenant transferring without landlord's consent.)

[But see ('12) 17 Ind Cas 606 (609) : 8 Nag L R 163, *Kanhayalal* v. *Dular Singh*. (Under Central Provinces Tenancy Act tenancy cannot be acquired by adverse possession.)

('29) 16 AIR 1929 Nag 13 (13) : 114 Ind Cas 622, *Gulab Singh* v. *Nanaji*. (Dr.)]

tenancy, he will be entitled, at the end of the statutory period to a permanent tenancy by prescription.[2] Section 105 Note 84.

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106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. Section 106

Duration of certain leases in absence of written contract or local usage.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and [a](either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party), or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

a. These words were substituted by s. 54 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929), for the words : "tendered or delivered either personally to the party who is intended to be bound by it."

Synopsis

1. Amendment of section. See Note 45.
2. Contract to the contrary.
3. Lease for a term certain — Notice.
4. Lease for life.
5. Perpetual lease.
6. Tenancy-at-will.
7. Lease for indefinite period.
8. Possession under agreement to grant lease for a term certain.
9. Law to the contrary.
10. Usage to the contrary.
11. Immovable property.
12. Presumption of yearly or monthly tenancy under this section.
13. Lease for agricultural or manufacturing purposes.
14. Lease for building purpose — Presumption as to. See Note 12.
15. Reservation of yearly or monthly rent—Effect.
16. Lease from year to year.
17. Lease from month to month.
18. Possession under invalid lease—Presumption under this section.

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2. ('22) 9 AIR 1922 PC 292 (304) : 45 Mad 586 : 49 Ind App 286 : 68 Ind Cas 530 (PC), *Chidambara Sivaprakasa* v. *Veerama Reddi*. (Permanent tenancy of temple lands.)

('83) 7 Bom 96 (99) (DB), *Maidin Saiba* v. *Nagapa*.

('22) 9 AIR 1922 Cal 185 (186) : 68 Ind Cas 1003 (DB), *Ujir Ali* v. *Shadhai*. (Possession under a transfer purporting to be a transfer of a permanent tenure.)

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19. Notice to quit — General principles.
20. Notice to quit with an option to continue on different terms.
21. Notice required under other sections for determining lease.
22. Notice by lessee — Duty to give up possession.
23. Waiver of notice.
24. Suit for ejectment — Notice to quit.
25. Denial of lessor's title by lessee and notice to quit.
26. Other modes of determination of lease.
27. Effect of giving notice where it is not necessary.
28. Notice by lessor undertaking to pay compensation for improvements—Effect.
29. Determination of main lease by notice—Effect on sublease.
30. Resumption of possession by landlord without giving notice—Effect.
31. Lessee giving up possession before termination of lease —Liability for damages or rent.
32. Lessee holding over after expiry of notice to quit—Effect.
33. Notice to quit—Who can give.
34. Who can give notice to quit —Co-lessors.
35. Who can give notice to quit — Assignment by lessor.
36. Who can give notice—Miscellaneous.
37. Notice to quit to whom to be given.
38. Notice to or by agent.
39. Period of notice.
40. Expiring with end of year or month of tenancy.
41. Year or month of tenancy.
42. Calendar for calculation of time.
43. Form of notice.
44. Mode of service.
45. Service by post.
46. Service of notice on party's pleader or solicitor.
47. Leases by Government.
48. Lease by Municipality.
49. Notice in cases not governed by this section.

1. Amendment of section. — See Note 45.

2. Contract to the contrary. — This section only applies in the absence of *(inter alia)* a "contract to the contrary".[1] A lease for a term certain, a perpetual lease, a lease for the life of the lessee, a tenancy-at-will, etc., are all leases in which there is a contract to the contrary within the meaning of the section. So also, where a lease is expressly made determinable by the lessor *without* any previous notice there is clearly a contract to the contrary under this section and no notice will be necessary to determine such a lease.[2] Similarly, where a

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1. ('28) 15 AIR 1928 Mad 687 (689) : 110 Ind Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.*
('24) 11 AIR 1924 Nag 220 (220) : 78 Ind Cas 445, *Saik Kasam* v. *Haji Yusuf.*
('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.*

2. ('28) 15 AIR 1928 Mad 687 (689) : 110 Ind Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.* (Provision that tenant should surrender the property when demanded.)
('10) 8 Ind Cas 362 (363) (DB) (Mad), *Kelu* v. *Ammad Kully.* (Do.)
('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.* (Do.)
('18) 5 AIR 1918 Cal 665 (665) : 47 Ind Cas 19 (DB), *Monindra Nath* v. *Radha Prosonno.* (Provision for resumption of possession by landlord at any time on payment of compensation.)

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lease is expressed to be determinable by notice but the notice is not of the kind required by this section there is a contract to the contrary within this section.[3] Thus, the parties may provide for a longer[4] or shorter[5] notice than that required under the section for the determination of a lease. Similarly, a notice may be according to the contract between the parties although such notice does not expire with the end of a year or month of the tenancy.[6]

Where a contract of tenancy simply provides for a notice of a certain period which is different from the period of notice under this section there will be deemed to be a contract to the contrary within the meaning of this section not only with reference to the *length* of the notice required to determine the lease but also with reference to the time when the notice is to expire, although there is no specification in the contract as to such time. Hence in such a case the notice need not expire with a year or month of the tenancy.[7]

('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.* (Notwithstanding mention of term and also fixation of rent by reference to year option reserved to lessor to eject at any time—No notice necessary.)

3. ('07) 12 Cal W N 724 (725) (DB), *Bhola Nath Das* v. *Raja Durga Prosad Singh.*

4. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmed Moola Dawood.* (One month's notice in lease of house property.)

('19) 6 AIR 1919 Cal 54 (55) : 52 Ind Cas 180 (DB), *Manmatha Nath* v. *Peary Mohan.* (Three months' notice in lease of homestead land.)

5. ('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.* (Lease for agricultural or manufacturing purpose—Parties may contract that lease is to be from month to month determinable at fifteen days' notice.)

('23) 10 AIR 1923 Lah 281 (282) : 75 Ind Cas 490, *Sahib Dayal* v. *Dhanpat Rai.* (Monthly tenancy determinable at a week's notice.)

('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Mohammad.* (Lease for eleven months determinable at a week's notice.)

[See however ('38) 25 AIR 1938 Cal 656 (658) : I L R (1938) 2 Cal 261 : 180 Ind Cas 93, *Baidyanath Basak* v. *Onkermull Manicklal.* (In this case a lease of vacant land provided that when it is necessary to give khas possession the lessee will give khas possession to the lessor within seven days—*Held* that this was not a contract making the lease determinable on seven days' notice by the landlord — The provision only meant that if the tenancy was determined in any of the ways mentioned in S. 111, the tenants would give khas possession within seven days of such determination : (1904) 1 K B 444 followed.)]

6. ('28) 15 AIR 1928 Lah 348 (348, 349) : 106 Ind Cas 537, *Ram Nath* v. *Badri Nath.*

(1902) 1 K B 157 (158) : 71 L J K B 24 : 85 L T 614 : 50 W R (Eng) 169, *Soames* v. *Nicholson.*

('20) 7 AIR 1920 Lah 96 (97) : 56 Ind Cas 7, *Radha Kishen* v. *Rattan Lal.* (Lessee undertaking to vacate within one month of *receipt* of notice.)

7. ('24) 11 AIR 1924 Nag 220 (220) : 78 Ind Cas 445, *Saik Kasam* v. *Haji Yusuf.*

('19) 6 AIR 1919 Cal 54 (55) : 52 Ind Cas 180 (DB), *Manmatha Nath* v. *Peary Mohan.*

('28) 15 AIR 1928 Lah 348 (348, 349) : 106 I. C. 537, *Ram Nath* v. *Badri Nath.*

('24) 11 AIR 1924 Oudh 309 (311) : 84 Ind Cas 532, *Shamsuddin Khan* v. *Agha Sayid Fateh Shah.*

[But see ('23) 10 AIR 1923 Lah 659 (659, 660) : 79 Ind Cas 957, *Chuni Lal* v. *Chuni Lal.*]

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Note 2

It has been held that where after the termination of a lease, the lessee holds over with the assent of the landlord and the lease is renewed from year to year or from month to month, a covenant in the original lease making it determinable without notice will also hold good in the case of the lease formed by holding over.[8] The reason given is that except as to the period of the lease, the lease by holding over will be governed by the same terms as the original lease.

The questions as to the nature of a tenancy and as to whether it involves a contract to the contrary within the meaning of this section are purely questions of construction depending on the facts and circumstances of each case. The undermentioned are some illustrative cases.[9]

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8. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa.*
('19) 6 AIR 1919 Cal 54(55) : 52 I.C. 180(DB), *Manmotha Nath* v. *Peary Mohan.*
('20) 7 AIR 1920 Lah 96 (97) : 56 Ind Cas 7, *Radha Kishen* v. *Rattan Lal.*
('25) 12 AIR 1925 Oudh 173 (173) : 27 Oudh Cas 224 : 81 Ind Cas 592, *Lalman* v. *Mt. Mullo.*

('09) 3 Ind Cas 873 (875) : 12 Oudh Cas 279, *Khuda Baksh* v. *Abid Husain.*

9. ('05) 28 Mad 391 (392, 393) (DB), *Narasimha Charri* v. *Gopala Ayyangar.* (A patta given at the end of the fasli indicating the change in the conditions of the tenure even for the existing fasli is not a sufficient notice.)
('37) 24 AIR 1937 Oudh 165 (167) : 12 Luck 516 : 164 Ind Cas 1003 (DB), *Gur Din Sah* v. *Badri.* (Lease for building purpose—Long possession at same rent—*Held* on construction lease was permanent.)
('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.* (Unless there is some indication to the contrary, the term 'ordinary tenant' would in Calcutta mean monthly tenant, even though there was no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy.)
('15) 2 AIR 1915 All 251 (252) : 29 Ind Cas 437 (DB), *F. S. Old* v. *J. A. Shail.* (In the absence of evidence to the contrary a lease of a house at Mussoorie for the 'season' continues to the end of the year.)
('29) 117 Ind Cas 842 (846) (DB) (Cal), *Bejoychand Mahtab* v. *Gurupada Haldar.* (The fact that a tenant for an agricultural holding has been in long possession but failed to prove permanent tenancy may give rise to an inference that he was a tenant from year to year.)
('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath Mahto.* (Fresh settlement made every year—Therefore the lease was not one from year to year.)
('17) 4 AIR 1917 Pat 46 (47) : 2 Pat L Jour 180 : 39 Ind Cas 658 (DB), *Mt. Parshan Kuer* v. *Mt. Tulsi Kuer.* (*Held* that the bemiadi patta was a lease without a term, or one not for any definite period, and the mere mention of the heirs, and successors of the lessee or of the mineral rights, etc., did not make the lease a permanent one and that it was only a lease from year to year.)
('33) 20 AIR 1933 Cal 609 (609, 610) : 60 Cal 681 : 146 Ind Cas 55, *Surendra Nath* v. *Poornachandra.* (In the case of utbandi holdings, unless there is a special custom to that effect the right to occupy the land does not enure beyond a particular season or a particular year and the tenancy not being a lease from year to year S. 106 does not apply.)
('18) 5 AIR 1918 Mad 453 (454) : 42 Ind Cas 268 (DB), *Gangadharan Pattar* v. *Manavikraman.* (Verumpattam is a lease which runs only for a single year unless otherwise specified—At the end of the year the landlord is at liberty either to renew the lease or let the land to another tenant — The period of twelve years presumed in the case of a kanom has no application to Verumpattam.)

The contract to the contrary must be a *valid* contract, see Notes 15 and 18. Further, it must form part of the transaction of lease in question. See Notes 8 and 18.

In a suit for ejectment by a landlord against a tenant on the allegation of the tenancy having been determined by a notice to quit the onus of proving that the tenancy is not determinable by notice is on the tenant.[10] See also Note 43 on section 105.

3. Lease for a term certain — Notice. — Where a definite period is fixed as the term of a lease, there would be a "contract to the contrary" within the meaning of this section. The section will not, therefore, apply to such cases.[1] In such cases, the lease will automatically come to an end by efflux of the time limited thereby. (See S. 111, cl. (a).) A notice will not be necessary to determine the lease.[2] Similarly, such a lease cannot be determined before the end of the term fixed, by a notice to quit.[2a] After the expiration of the term fixed by the lease, the lessee

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('15) 2 AIR 1915 Mad 1135 (1136) : 28 Ind Cas 915 (DB), *Ramasami Chettiar* v. *Ambalagaran*. (A refusal or neglect to perform purakudi service renders the purakudi tenant liable to be evicted without notice—S. 111 of the T. P. Act has no application to the case.)

('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath*. (Lease for residential purpose — *Held* on construction that the land was to be enjoyed by the defendants from generation to generation so long as the landlord did not require it for his own purposes, but that if he so required it, he had the right to re-enter after giving notice and paying compensation in accordance with the terms of the lease.)

('24) 11 AIR 1924 Mad 771 (772) : 80 Ind Cas 139 (DB), *Kannan Kutty* v. *E. V. Velu*. (A condition in the lease that the landlord must give the value of the kuzhijurs and chamayams to the tenant on his eviction does not dispense with the necessity of notice to quit.)

10. ('17) 4 AIR 1917 Cal 37 (38) : 42 Ind Cas 262 (DB), *Paran Chandra* v. *Khazez Mandal*.

Note 3

1. ('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand*.

2. ('25) 12 AIR 1925 Nag 48 (48) : 78 Ind Cas 446, *Dina Singh* v. *Jamal Singh*. (Where a tenant agrees to give up possession at a particular time, he is not entitled to a notice to quit under S. 106.)

('18) 5 AIR 1918 Nag 148 (148) : 14 Nag L R 129 : 44 Ind Cas 212, *Keshao* v. *Mansha*.

('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath*.

('05) 2 Cal L Jour 343 (351) (DB), *Bibi Jawahir Kumari* v. *Chatterput Singh*.

('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzzaman* v. *Anwar Husain*. (Notice must be presumed as given when lease was executed.)

('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand*. (If notice is actually given, it cannot be treated as defective merely because it is not according to the requirements of a notice under this section.)

2a. ('19) 6 AIR 1919 Oudh 124 (125) : 53 Ind Cas 109, *Bisheshwar* v. *Chhedi Lal*. (Lease for one year providing that the lessor might determine the lease before the end of one year if he wanted the house himself or if the rent was not regularly paid—Lessee cannot determine the lease by notice.)

('14) 1 AIR 1914 Mad 301 (303) : 23 Ind Cas 572, *Ramasami* v. *Venkataramanjulu*. (Lease for 15 years with provision for six months' notice thereafter before the lessee could be asked to vacate is not determinable by notice given before expiry of 15 years.)

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Notes 3–5

continuing in possession, will, in the absence of an assent by the lessor or his representative in interest, only be a *tenant at sufferance*. He can be sued in ejectment at any time without any previous notice or demand of possession.[3] (See S. 105, Note 37.)

Where a lease for a term certain is granted in favour of *A* and then another lease is granted in favour of *B* to commence on the expiration of *A's* lease, *B* can sue *A* for possession after the period of *A's* lease has expired. *B* need not give any notice to quit to *A* before bringing such suit.[4]

Where, however, the tenancy is renewed from year to year or month to month under S. 116 read with this section, a notice will be necessary to determine such tenancy and the tenant cannot be sued in ejectment without such notice being given.[5] (See Notes on S. 116.)

4. Lease for life. — A lease for the life-time of the tenant is obviously one in which there is a "contract to the contrary" within the meaning of this section. Such a lease cannot be determined by a mere notice to quit under this section. Nor will such a notice be *necessary* for bringing a suit for ejectment against the tenant's representatives, where the lease has terminated on the death of the tenant.[1] See also Note 34 on section 105.

5. Perpetual lease. — A perpetual lease necessarily involves a contract to the contrary within the meaning of this section and is not determinable by notice under this section.[1]

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3. ('25) 12 AIR 1925 Nag 48 (48) : 78 Ind Cas 446, *Dina Singh* v. *Jamal Singh.*
('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath.* (The annual tenancy of private land (manjhihas) of landlord ceases on the termination of the year.)
('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*
('19) 6 AIR 1919 Pat 254 (256): 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh.*
('10) 7 Ind Cas 8 (9) (DB) (Mad), *Nandikolla Gopalan* v. *Manyam Mahalakshmi.*
('27) 14 AIR 1927 Bom 192 (193, 194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Magan Lal* v. *Bhudar.*
('30) 17 AIR 1930 Lah 386(388): 120 I.C. 166 (DB), *Asa Ram* v. *Kishan Chand.*
('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini.*
[*See also* ('40) 27 AIR 1940 Oudh 401 (402) : 189 Ind Cas 488 : 16 Luck 44 (DB), *Bansidhar* v. *Ramcharan.* (Tenant continuing in possession after expiry of period fixed in invalid lease without landlord's consent — Notice to quit not necessary prior to ejectment.)]

4. ('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzzaman* v. *Anwar Husain.*
('31) 18 AIR 1931 All 649 (650, 651) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*

5. *See* ('17) 4 AIR 1917 Mad 141 (142) : 32 Ind Cas 709 (DB), *Mt. Bevi Umma* v. *Shamu Menon.* (In this case the lease stipulated for a year certain and provided for yearly payments in case the lessee continued to hold on — *Held* on the expiry of the first year of tenancy the defendant was continuing as a tenant from year to year under the provision to hold on — Notice to quit was necessary for ejectment.)

Note 4

1. ('94) 18 Bom 256 (259) (DB), *Krishnaji Ramchandra* v. *Antaji Pandurang.*
('08) 7 Cal L Jour 90 (95) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain Singh Bahadur.*

Note 5

1. ('86) 9 Mad 307 (319) : 13 Ind App 32 (PC), *Visianagaram Maharajah* v. *Suryanarayana.*

Where a tenancy is established, the onus of proving that it is a perpetual tenancy is on the tenant. See S. 105, Note 43.

6. Tenancy-at-will.—Where the agreement between the parties is to the effect that the tenancy should be determinable by either party *at any time*, there is clearly a "contract to the contrary" within the meaning of this section. Hence, the provisions of this section will not apply to such leases. The tenancy in such cases will be what is known as a tenancy-at-will under the law. (See S. 105, Note 32.)

But a tenancy-at-will must be established by *positive* proof of a contract. Such a tenancy cannot be implied merely because the intention of the parties as to the duration of a lease cannot be definitely ascertained.[1] In such cases, there would be no contract to the contrary within the meaning of this section and the presumption of yearly or monthly tenancy under the section will apply.

But the agreement making a lease one at the will of the parties may be express or implied. Such agreement may be implied from words used as well as from the conduct of the parties and other circumstances. So the question, whether a lease is a tenancy-at-will, depends on the facts and circumstances of each case.

Where it was provided in a lease that the tenant would pay the monthly rent regularly and that in case of default for three months he would vacate the property, it was held that as soon as rent for three months fell into arrears the tenancy was reduced to one at will and that from that date the tenant could be ejected without any notice to quit.[1a]

Though, ordinarily, a tenancy-at-will is not a transferable interest, it may be transferable by special custom in any particular place. Hence, notwithstanding such transferability, a lease may be only a tenancy-at-will.[2]

Where a lessee enters into possession under a lease which requires registration but is not registered, the circumstances of a case may give rise, by implication, to a tenancy-at-will.[3] But it would be wrong to suppose that wherever a tenant enters under an invalid lease, there would *ipso facto* arise a tenancy-at-will. If a tenancy is implied from the circumstances in such cases, the *prima facie* presumption under this section would be in favour of its being a yearly or monthly tenancy

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Note 6

1. But see ('40) 27 AIR 1940 Oudh 401 (403): 16 Luck 44: 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan*. (A tenancy-at-will arises by implication of law in cases of permissive occupation when a person is in possession of premises with the consent of the owner; or it may arise expressly by agreement to let for an indefinite period for a compensation accruing day to day so long as both parties please. NOTE—It is submitted that the view that a tenancy-at-will can arise by implication of law is against the provisions of this section.)

1a. ('38) 25 AIR 1938 Nag 506 (509): ILR (1940) Nag 269: 182 Ind Cas 581 (DB). *Abdul Razak* v. *Nandlal Sheolal*.

2. ('80) 6 Cal L R 117 (118) (DB), *Shama Sunduri* v. *Nobin Chunder*.

3. ('36) 23 AIR 1936 Oudh 102 (105): 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal*.

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and not a tenancy-at-will. Such a tenancy can arise only by positive proof of a contract and not by mere *presumption of law.*

A tenancy-at-will may go on for any length of time indefinitely. Hence, the mere fact that a tenancy has continued for a very long time is not a conclusive proof that it is not a tenancy-at-will.[4]

A tenancy-at-will can be determined by a notice to quit.[4a] But such a notice will not be *necessary* for the purpose.[5] A mere demand for possession will be sufficient to put an end to the tenancy.[6] Even where a notice is given, it need not comply with the requirements of this section. Such a notice need not be for the period prescribed by this section nor need it expire at the end of a year or month of the tenancy. A reasonable notice will be quite sufficient to determine the tenancy.[7]

But unless the lease is determined in some way, the lessee cannot be sued in ejectment.[8]

A tenancy-at-will is ordinarily determined by the death of the lessor,[9] or lessee.[10]

7. Lease for indefinite period. — Reference has been made in Note 26 on S. 105 to the rule of construction according to which a lease for an indefinite period would be construed as a lease for the life-time of the lessee. Hence, where this rule applies, there would be a "contract to the contrary" within the meaning of this section, although the lease is not for any definite period and the parties have not fixed any limit of time absolutely or relatively in regard to the lease.[1]

See also Note 72 on section 105.

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4. ('68) 10 Suth W R 477 (478) (DB), *Sheo Dayal* v. *Mohabeer Pershad.*

4a. ('75) 24 Suth W R 461 (461) (DB), *Abdool Kureem* v. *Omer Chand.*

('28) 15 AIR 1928 Cal 279 (280) (DB), *Bishun Chandra* v. *Behari Lal.*

5. ('25) 12 AIR 1925 Pat 256(258):85 I.C. 77(DB), *Ramdhani Gope* v. *C. V. Scott.*

('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkrishun Pande* v. *Bibi Sohila.*

('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan.*

6. ('36) 23 A I R 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal.*

('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Saodagar* v. *Hazi Mal Gani.*

('78) 2 Mad 346 (351) (DB), *Abdulla Rawutan* v. *Subbarayyar.*

7. ('05) 2 Cal L Jour 343 (349) (DB), *Jawahir Kumari* v. *Chatterput Singh.*

('18) 5 AIR 1918 Cal 355 (356) : 39 Ind Cas 795 (DB), *Dhuki Ram* v. *Matabi.*

8. But see ('26) 13 AIR 1926 Lah 129 (130) : 89 Ind Cas 869, *Kaka* v. *Ram Saran.* (Defendant retaining possession of the property for a considerable period after the institution of the suit—Suit cannot be dismissed on the ground that there was no previous notice to quit. NOTE — Submitted that the view is not correct.)

9. (1900) 10 Mad L Jour 201 (202) (DB), *Chemminian Pockan* v. *Udayavarma Valia Rajah.*

10. ('38) 25 AIR 1938 Nag 506 (509) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal.*

Note 7

1. ('39) 26 AIR 1939 Cal 423 (424, 425) : 184 Ind Cas 216 (DB), *Mahomed Azizal* v. *Raziuddin Mohd. Idris.*

8. Possession under agreement to grant lease for a term certain. — In the undermentioned case,[1] A agreed to take a lease of lands for a term of ten years and entered into possession of the lands. He paid rent as arranged but no lease was executed in his favour. It was held that this section did not apply to such a case as the agreement to grant a lease for ten years amounted to a "contract to the contrary" within the meaning of this section. It is submitted with respect that this view is not correct. The "contract to the contrary" referred to in the section is a contract forming *part* of the transaction of lease. In the above case, the tenancy formed by implication from payment and acceptance of rent is independent of the agreement to grant a lease for ten years and is not affected by such agreement.

9. Law to the contrary. — Where the right of a landlord to eject his tenant after determining the tenancy under the general law is interrupted by a temporary enactment, the right is revived on such enactment ceasing to be in force.[1]

10. Usage to the contrary.—The presumption as to the duration of a tenancy and its mode of determinability under this section will not apply to cases, where there is a usage to the contrary.[1] Thus, it has been held that according to local custom a month's notice to quit instead of 15 days' notice as required by this section will probably be necessary to determine a tenancy of buildings in the city of Bombay.[2] But in the city of Calcutta there would seem to be no special custom extending the fifteen days' notice provided for by this section for monthly tenancies of buildings.[3] It has been held by the Sind Judicial Commissioner's Court that, where local custom requires a monthly tenancy to be determined by a month's notice, it need not be served in the manner prescribed by this section.[4] There being a "usage" to the contrary in such a case, the provisions of the section do not apply.

11. Immovable property. — A jalkar or right of fishery is "immovable property" within the meaning of this section.[1]

See also Notes on section 3.

Note 8

1. ('05) 2 Cal L Jour 343 (346) (DB), *Jawahir Kumari* v. *Chatterput Singh.*

Note 9

1. ('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.* (Calcutta Rent Act, III of 1920—Case relating to—Act expiring during pendency of appeal.)

Note 10

1. ('78) 3 Cal 696 (699) : 1 Cal L Rep 577 (DB), *Prosunno Comaree Debea* v. *Sheikh Rutton Behary.*
2. ('25) 12 AIR 1925 Bom 167 (167): 94 I.C. 631, *Mahomedally* v. *Haji Abdulla.*
3. ('74) 12 Beng L R 263 (265), *Nocoordass Mullick* v. *Jewraj Baboo.* (Tenancy in Calcutta is presumed to be monthly terminable by a month's notice.)
('35) 39 Cal W N 1069 (1071), *Profulla Chandra Mullick* v. *Nanda Lal Jhamor.*
4. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon Haji Hamid* v. *Meherali Din Mahomed.*

Note 11

1. ('93) 20 Cal 446 (448) (DB), *Ram Gopal Bysack* v. *Nurumuddin.*

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Note 12

12. Presumption of yearly or monthly tenancy under this section. — Under this section, in the absence of a contract, local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes should be deemed to be one from year to year and a lease for any other purpose should be deemed to be one from month to month. Hence, where there is no satisfactory evidence as to the period for which a lease has been granted, it will be deemed to be one from year to year[1] or one from month to month[2] according to the purpose of the lease, unless there is any local law or usage to the contrary.

In thus creating a presumption of yearly tenancy in regard to agricultural leases the section only gives effect to a principle generally recognised in India.[3]

In the cases cited below,[4] a lease of shops in the Punjab, where

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Note 12

1. ('43) 1943-1 Mad L Jour 43 (44), *Thirumalareddi Inna Reddi* v. *Gade Gopi Reddi.*
('20) 7 AIR 1920 Nag 62 (62) : 57 Ind Cas 311, *Manalal* v. *Sukhlal.*
('21) 8 AIR 1921 Bom 224 (224) : 45 Bom 350 : 59 Ind Cas 751 (DB), *Maneklal* v. *Bai Amba.*
('22) 9 AIR 1922 Bom 402 (403) : 47 Bom 4 : 76 Ind Cas 71 (DB), *Narayan Ramchandra* v. *Pandurang Balakrishna.*

2. ('05) 32 Cal 243 (246) : 8 Cal W N 904 (DB), *Jyotish Chandra* v. *Ramanath.* (Where it was agreed that instead of paying rent a lessee was to give his services as a family doctor to the lessor, the lease was a lease from month to month terminable by fifteen days' notice, expiring with the end of month of the tenancy.)
('26) 13 AIR 1926 Nag 147 (148) : 89 Ind Cas 1019, *Baliram* v. *Sadaram.*
('37) 24 AIR 1937 Nag 321 (321) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.*
('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra Tewary* v. *Secretary of State for India.*
('39) 43 Cal W N 797 (799), *Anwarali Bepari* v. *Jamini Lal.*
[*See also* ('97) 24 Cal 440 (446) : 1 Cal W N 321, *Kally Das Ahiri* v. *Monmohini Dassee.* (Ordinary inference as to a lease of buildings in Calcutta at a monthly rent would appear to be that the tenancy is from month to month.)]

3. ('23) 10 AIR 1923 Lah 659 (659, 660) : 79 Ind Cas 957, *Chuni Lal* v. *Chuni Lal.*
('90) 13 Mad 60 (62, 64, 65) (DB), *Appa Rau* v. *Subbanna.*
('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepari.*
('91) 4 C P L R 47 (47), *Jadoonath Jamadar* v. *Palhadi.*
('91) 4 C P L R 55 (55), *Kasiba* v. *Vitoba.*
('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govindan Nambudri.*
('10) 6 Ind Cas 701 (701) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkatratnam.*
('96) 20 Bom 78 (82) : 1894 Bom P J 399 (DB), *Sonshet Antushet* v. *Vishnu Babaji.*
('70) 7 Bom H C R (A C) 111 (113, 114) (DB), *Endar Lala* v. *Lallu Hari.*
('68-69) 5 Bom H C R (A C) 179 (179, 180) (DB), *Bai Ganga* v. *Dullabh Parag.*
('77) 1877 Bom P J 182 (DB), *Govind* v. *Narayan.*
[See however (1900) 23 Mad 318 (327, 328) (DB), *Cheekati Zamindar* v. *Ranasooru Dhora.* (The general presumption does not apply to agricultural leases in zamindari areas.)]

4. ('13) 19 Ind Cas 493 (495) (DB) (Lah), *Jamasjee Boga* v. *Duni Chand.*
('98) 1898 Pun Re No. 33, *Ganga Singh* v. *Mt. Shib Devi.*

this Act is not in force, was held to be one from month to month on the analogy of this section.

Under this section, a lease which is not for agricultural or manufacturing purposes must be presumed to be one from month to month. This presumption will apply even to a *building* lease.[5] See also S. 105, Note 26.

13. Lease for agricultural or manufacturing purposes.— This section provides that in the absence of a contract, local law or usage to the contrary, a lease for agricultural or manufacturing purposes shall be deemed to be one from year to year. This provision has to be read with S. 117, under which the provisions of this chapter will not apply to leases for agricultural purposes, except in so far as they may be made specially applicable by a notification of the Provincial Government. The result is that in the case of agricultural leases, the presumption of yearly tenancy under this section will apply only if the section has been made applicable to such leases by special notification as above mentioned.[1] As to when a lease can be regarded as being for agricultural purposes, see S. 105, Note 1 and Notes on S. 117, and the undermentioned cases.[2]

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5. ('09) 1 Ind Cas 66 (69) (DB) (Cal), *Mohan Chandra* v. *Anil Bandhu.*
('38) 25 AIR 1938 All 42 (43) : ILR (1938) All 53 : 173 Ind Cas 153 (DB), *Nand Ram* v. *Saraj Hussain.*
('19) 6 AIR 1919 Cal 400 (400): 51 Ind Cas 44, *Biseshwar Roy* v. *Pitambar Nath.* (Mere fact that rent is payable annually does not make lease a yearly one. See Note 15.)
('39) 26 AIR 1939 Pat 296 (303) : 182 Ind Cas 618, *Ram Lal Sahu* v. *Bibi Zohra.*
('39) 26 AIR 1939 Mad 247 (249): 183 Ind Cas 609, *Pandarasannadhi* v. *Anantha-krishnaswami.*
NOTE — See cases under Note 47 in which a building lease by the Government for building purposes was presumed to be one from year to year on the analogy of English Common law.

Note 13

1. ('19) 6 AIR 1919 Pat 254 (256) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh.*
2. ('18) 5 AIR 1918 Nag 210 (211) : 48 Ind Cas 354, *Bannali* v. *Nihal Singh.* (A lease of a village or of a share in a village for the purpose of bringing it under cultivation is a lease for agricultural purposes.)
('09) 2 Ind Cas 993 (993) (Cal), *Sheikh Abdul* v. *Chabil Jan.* (Lease of homestead land not agricultural.)
('35) 22 AIR 1935 Oudh 90 (92) : 10 Luck 490 : 153 Ind Cas 609, *Narain Singh* v. *Jagat Jit.* (A lease was given for cutting down timber in forest land and subsequently the same land was given to another for cultivation at an annual rent but no period was fixed—*Held*, it was lease for agricultural purposes.)
('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra* v. *Harimohan.* (Though the cultivation of indigo is certainly an agricultural purpose, the manufacture of indigo cannot be said to be agricultural purpose.)
('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (The fact that a portion of a holding used for residential purposes is planted with fruit bearing trees does not alter the character of the holding.)
('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal* v. *Bhutnath.* (Mere fact that there is a right to plant fruit trees or pluck the fruits of trees would not by itself convert lease for residential purpose into horticultural lease.)

Section 106
Notes 13–15

It was held in the case cited below[3] that the question, whether a lease was for a manufacturing purpose, was one of *fact*.

Where a lease is for a manufacturing purpose but the landlord gives only a notice of *one* month to terminate the lease and the tenant in his reply to that notice admits that he is a *monthly* tenant, this does not estop him from contending in a subsequent suit for ejectment against him, that the notice is not sufficient and that he is entitled to six months' notice.[4]

14. **Lease for building purpose — Presumption as to.** — See Note 12.

15. **Reservation of yearly or monthly rent — Effect.** — The reservation of a yearly rent would *prima facie* imply that a lease is not one from month to month but one from year to year.[1] Hence, where a lease is not for an agricultural or manufacturing purpose but a yearly rent is reserved under the lease, there would *prima facie* be a contract to the contrary within the meaning of this section, preventing the application of the presumption of monthly tenancy to such a lease. But a lease from year to year would require registration under S. 107. Hence, in such a case, if the lease is made by an oral agreement and delivery of possession and not by a registered deed, there would be no lease from *year to year* notwithstanding the above implication. In other words, there would be no *valid* "contract to the contrary" in such a case within the meaning of this section. Hence, in such a case, the lease can be presumed to be one from month to month under this section notwithstanding the reservation of a yearly rent.[2]

('26) 13 AIR 1926 Cal 373 (374): 90 Ind Cas 805 (DB), *Purusottam* v. *Panchanan* (Where the land was admittedly taken by defendants not for the purpose of a homestead from which the defendants were to cultivate their jotes but was taken for the purpose of a shop and continued to be used for that purpose, *held*, the case was governed by the provisions of this Act.)

('36) 164 Ind Cas 446 (447) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.* (When the letting of the land is for non-agricultural purposes, a subsequent user for agricultural purposes would not affect the incidents of the tenancy.)

('33) 20 AIR 1933 Cal 643 (644): 146 Ind Cas 540, *Banowari Lal* v. *Gopal Chandra.* (Parent holding may be agricultural and sub-lease may be residential.)

('22) 9 AIR 1922 Cal 201 (202) : 70 Ind Cas 166 (DB), *Herendra Kumar* v. *Hara Kishore.* (Transfer of agricultural lease—Fresh settlement in favour of transferee for non-agricultural purpose—T. P. Act applies.)

3. ('23) 10 AIR 1923 Rang 13 (15) : 70 Ind Cas 834 (DB), *The Punjab Motor Company* v. *Sheikh Juman.* (Failure by tenant defendant to plead manufacturing purpose will amount to admission that lease is not for such a purpose.)

4. ('24) 11 AIR 1924 Bom 115 (116) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks & Co.* v. *Joosab Md.*

Note 15

1. ('13) 19 Ind Cas 721 (722, 724) (DB) (Mad), *Sevathamuthu Asari* v. *Reverend J.N. K. Masquite.* (Pre-T. P. Act lease.)

('32) 19 AIR 1932 Cal 198 (201, 202) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.* (Pre-T. P. Act lease — A monthly tenancy at a yearly rent is an anomaly and difficult to infer unless there is some special reason for doing so.)

('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.*

('26) 13 AIR 1926 Cal 558 (558) : 94 Ind Cas 684 : 53 Cal 95 (DB), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*

2. ('06) 11 Cal W N 1124 (1126) (DB), *Debendra Nath Bhowmik* v. *Syama Prosanna Bhowmik.*

But apart from the above, the reservation of a yearly rent will not *conclusively* show in every case that the lease is one from year to year and a lease may be held not to be such a lease notwithstanding the reservation of such rent.[3]

The expression "ordinary tenant" used in a lease-deed with reference to house property in Calcutta *prima facie* indicates a monthly tenancy although there is no reference to payment of *monthly* rent.[4]

16. Lease from year to year. — The characteristics of such a lease have been discussed in Note 31 on S. 105. As pointed out in that Note, such a lease is intended to go on indefinitely, till it is determined by either party by a proper notice at the end of any year of the tenancy.[1] There is no other limit of time for such a lease and it may go on even for a century or more.[2] The lease is a single lease for the whole period till it is terminated. Although liable to be determined at the end of any year by a valid notice, it does not *ipso facto* come to an end at the end of every year.[3]

('16) 3 AIR 1916 Cal 358 (359) : 33 Ind Cas 899 (DB), *Shekh Akloo* v. *Sheikh Emanon.*
('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*
('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.*
('19) 6 AIR 1919 Cal 65 (66) : 50 Ind Cas 918 (DB), *Mohendra Nath Mozumdar* v. *Narendra Narain Roy.*
('19) 6 AIR 1919 Cal 212 (213) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*
('18) 5 AIR 1918 Cal 906 (906): 44 Cal 214: 37 Ind Cas 956 (DB), *Sarat Chandra* v. *Jadab Chandra.*
('21) 8 AIR 1921 Pat 307 (308) : 61 Ind Cas 976 (DB), *Sankar Ram* v. *Tulsi Bhagat.*
[*See also* ('32) 19 AIR 1932 Cal 198 (201, 202): 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.*]

3. ('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Saila Bala Dasi.*
('20) 7 AIR 1920 Cal 361 (361): 58 Ind Cas 835 (DB), *Gaya Nath Ojha* v. *Anukul Chandra Ojha.*
('19) 6 AIR 1919 Cal 400 (400) : 51 Ind Cas 44, *Biseswar* v. *Pitamber.*
('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.* (Lease in this case held to be a tenancy-at-will.)

4. ('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai Chooreewalla* v. *Commissioners for the Port of Calcutta.*

Note 16

1. ('70-71) 6 Mad H C R 164 (171) (DB), *Chockalinga Pillai* v. *Vythealinga Pandara.*
('04) 8 Cal W N 139 (140) (DB), *Idulgazi Doctor* v. *Chandra Kali.*
('14) 1 AIR 1914 Bom 152 (153) : 38 Bom 240 : 23 Ind Cas 786 (DB), *Sitaram* v. *Sadhu.*

2. ('89) 1889 Bom P J 321 (DB), *Gangadhar* v. *Mahadu.*
('85) 9 Bom 419 (422) (DB), *Gangabai* v. *Kalapa Dari Mukrya.*

3. ('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Sadagar* v. *Haji Mal Gani.*
[*See* ('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath.* (Fresh settlement made annually — This shows that lease terminates each year—No year to year lease.)]

Section 106
Notes 16–19

A periodic lease like a yearly tenancy is not determined by the death of the tenant. His legal representatives cannot be evicted from the land without a proper notice to quit.[4]

17. Lease from month to month. — A joint monthly lease is liable to partition among the co-lessees.[1] A monthly tenancy under this section is a heritable interest and is not determined by the death of the tenant.[2]

For a fuller discussion of the features of such leases, see section 105, Note 31.

18. Possession under invalid lease—Presumption under this section. — Where a lease for a term of years or in perpetuity is granted but is invalid and the lessee enters into possession under such a lease, a tenancy may arise by implication from the payment of rent by the tenant and its acceptance by the landlord. The presumption of a yearly or monthly tenancy under this section may apply to such leases.[1] The invalid lease would not constitute a "contract to the contrary" in such cases,[1a] for two reasons: (1) The section contemplates a *valid* contract to the contrary. (See Note 15.) (2) The contract would not form part of the lease in question. (See Note 8.) But the invalid lease *itself* cannot be treated as a yearly or monthly tenancy under this section.[2] The reason is that the section cannot convert an invalid lease into a valid one.

See also S. 105, Notes 8 and 19 and S. 107, Note 8.

19. Notice to quit — General principles. — The section provides that in cases coming under it the lease can be determined by either the lessor or the lessee by notice. The principles laid down in English decisions as to what would be a valid notice to quit are, it has been authoritatively held, equally applicable to cases arising in

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4. ('89) 1889 Bom P J 79 (DB), *Tavnapa* v. *Kalapa*.

Note 17

1. ('29) 16 AIR 1929 Cal 710 (713) : 57 Cal 715 : 126 Ind Cas 121 (DB), *Rajani Mohan* v. *Sambhu Nath*.

2. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy*.

Note 18

1. ('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manickam Pillai* v. *Ratnasami Nadar*. (Lease not for agricultural or manufacturing purpose—Presumed to be monthly tenancy.)

('28) 15 AIR 1928 All 617 (618) : 51 All 285 : 116 Ind Cas 491 (DB), *Basdeo Narain* v. *Mohd. Yusuf*.

1a. *See* ('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiya Lal*. (Lessee under unregistered lease which is compulsorily registrable is mere tenant at will — Notice under S. 106 not necessary. NOTE — This can only mean that such lessee cannot be anything *more* than tenant at will — For a discussion of the principles applicable, see S. 105 Note 19.)

[But see ('16) 3 AIR 1916 Low Bur 34 (34) : 8 Low Bur Rul 351 : 32 Ind Cas 692, *Pazundaung Bazar Co.* v. *T. Gwan Chwan*. (Submitted wrong.)]

2. ('29) 16 AIR 1929 All 387 (387) : 119 Ind Cas 436, *Banwari Barhi* v. *Ram Ratan*. (Perpetual lease from a person beyond his power cannot be construed as an ordinary lease from year to year entitling the lessee to possession.)

Section 106
Note 19

India.[1] According to these principles, a notice to quit must be a clear and unambiguous intimation to the lessor or lessee, as the case may be, of the intention of the party giving the notice that the lease is to terminate at a certain time. No particular form is necessary but there must be no uncertainty or ambiguity in the notice on the above point.[2] But a notice need not be clear and unambiguous in its *expressed* terms. It is sufficient if the notice is such that it can be *rendered* clear and unambiguous by the application of the maxim *id certum est quod certum reddi potest* (that is certain which can be made certain).[3] Further, a notice to quit ought not to be construed with a view to find fault with it but with a view to its validity.[4] The validity of a notice to quit ought not to turn on the splitting of a straw.[5]

In *Harihar Banerji* v. *Ramshashi Roy*[6] their Lordships of the Privy Council laid down the following as the principles deducible from English authorities on this subject: Notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and

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Note 19

1. ('18) 5 AIR 1918 P C 102 (106) : 48 Ind Cas 277 : 46 Cal 458 : 45 Ind App 222 (PC), *Harihar Banerji* v. *Ram Shasi Roy.*
('29) 16 AIR 1929 Pat 444 (448) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath.*
('85) 11 Cal 533 (538) (DB), *Mohamaya Goopta* v. *Nil Madab Rai.*

2. ('85) 7 All 899 (902, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.* (Notice must make it clear that after the date mentioned the tenant would be a trespasser.)
(1889) 61 L T 729 (730) : 54 J P 311, *Gardner* v. *Ingram.*
(1925) 1 K B 14 (21, 22), *Phipps and Co., Ltd.* v. *Rogers.*
(1879) 40 L T 771 (772): 48 L J Q B 681: 4 Ex D 201 : 27 W R (Eng) 928, *Ahearn* v. *Bellman.*
('85) 11 Cal 533 (538) (DB), *Mohamaya Goopta* v. *Nil Madab Rai.*

3. (1925) 1 K B 14 (20), *Phipps & Co., Ltd.* v. *Rogers.*

4. ('31) 18 AIR 1931 Mad 352 (353, 354) : 131 Ind Cas 621, *Ganaprakasam* v. *Vaz.* (Where a notice is sufficiently clear though not drawn with strict accuracy it should be given a rational interpretation and held as sufficient.)
('18) 5 AIR 1918 P C 102 (106, 107) : 48 Ind Cas 277 : 46 Cal 458 : 45 Ind App 222 (PC), *Harihar Banerji* v. *Ramshasi Roy.*
('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*
[But see (1924) 2 K B 149 (152) : 93 L J K B 800 : 131 L T 568, *Precious* v. *Reedie.* (A notice to quit is to be strictly construed and cannot be afterwards amended by the party who serves it.)]

5. (1895) 1 Q B 378 (383) : 64 L J Q B 200 : 72 L T 62 : 43 W R (Eng) 228, *Sidebotham* v. *Holland.*
('38) 68 Cal L Jour 411 (412), *Sudhansu Badini Debi* v. *Narayan Chandra Panda.*
('31) 18 AIR 1931 Mad 352 (354) : 131 Ind Cas 621, *Ganaprakasam* v. *Vaz.*

6. ('18) 5 AIR 1918 P C 102 (106, 107, 110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC).

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Note 19

circumstances. Further, notices to quit are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat, quam pereat* (that an act may avail rather than perish).

But the above principles are only applicable to notices containing errors honestly but inadvertently made. The principles would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes.[6a]

Whether a particular notice is valid according to the above principles depends on the terms of the notice in each case and the facts and circumstances of that case. The undermentioned are illustrative cases.[7]

6a. ('18) 5 AIR 1918 P C 102 (106) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ramshasi Roy.*

7. (1915) 113 L T 694 (695) : (1915) 1 K B 830 : 84 L J K B 823, *May* v. *Borup.* (Notice to quit at earliest possible moment means a notice to terminate the tenancy at the next date when the tenancy could be determined under the agreement and is not invalid as uncertain.)

(1900) 1 Q B 23 : 69 L J Q B 17 : 81 L T 453 : 48 W R (Eng) 73, *Wride* v. *Dyer.* (Tenant held premises on a yearly tenancy from Lady Day to Lady Day. On 24th March 1898, her landlord gave her notice to quit and deliver up the premises "on 24th June 1898, or at the end of your current year's tenancy" — *Held* that the notice must be construed in accordance with the intention of the landlord, and that since it was impossible to suppose that it was intended to be a notice to quit on 25th March 1898, when the current year's tenancy expired it must be taken to be a good notice to quit on 25th March 1899.)

(1889) 61 L T 729 (730):54 J P 311, *Gardner* v. *Ingram.* (A notice to quit given by lessee ran as follows: — I intend to surrender to you the tenancy on or before the 29th September—*Held* the notice was bad. The words in this case mean that the tenant intends to enter into negotiations as to something which cannot be done without the landlord's consent, that he will surrender the lease to the landlord if he will accept it. That is no notice to quit.)

('21) 8 AIR 1921 Pat 307 (308) : 61 Ind Cas 976 (DB), *Sanker Ram* v. *Tulshi Bhagat.* (Lease of a house for dwelling purposes—Notice served on 7th Asarh to vacate the house at the end of the month of Asarh 1324 F. N. or such date of the month on which the defendants thought their monthly tenancy ended—Defendants' contention was that the notice was illegal and uncertain — *Held* that the notice gave more than 15 days' time to quit and further gave the defendants an option to quit on a later date in case the defendants thought that their monthly tenancy ended on such date—The notice was not uncertain for the date for vacating the house had been clearly given. It was only to avoid any doubt or dispute that an option of the nature set forth in the notice was given to defendants.)

('34) 21 AIR 1934 All 787 (788, 789) : 152 Ind Cas 180 (DB), *Tika Ram* v. *Daoji Maharaj.* (A notice was given on 9th November 1927, to the lessee stating that he should vacate the land on 13th May 1927. It appeared that '1927' in the notice was a mistake for '1928' and the parties were not misled on that account — *Held* that this was merely a case of an accidental slip and the notice was valid.)

('97) 25 Cal 36 (38) : 2 Cal W N 106 (DB), *Shama Charan Mitter* v. *Wooma Churn Halder.* (A notice to quit which directs the tenant to vacate a certain quantity of land under his landlord is not bad in law, merely because it includes some land which the tenant is found not to hold under the landlord. Considering that the error is only small and considering that the defendant never took any objection that he was misled by reason of this defect, it was not sufficient to vitiate the notice.)

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Note 19

A notice to quit which contains a clear intimation of the intention to terminate the lease by a certain time is not invalid merely because it visualises the possibility of the relationship of landlord and tenant continuing (or being resumed) in certain contingencies by *mutual agreement* between the parties. The cases noted below[8] fall under this principle.

It will be noted in this connection that once a notice is given, the party giving it cannot himself retract it. The consent of the other side is necessary for waiver of notice : see S. 113. A notice is not bad merely because it refers to the possibility of such waiver. Such reference does not affect the finality of the notice.

A tenancy can be determined only as a whole or not at all. It cannot be determined piecemeal.[9] Hence, a notice to quit with reference to a portion of the holding is bad.[10]

('37) 24 AIR 1937 Cal 331 (333) : 173 Ind Cas 885 (DB), *Sashi Mohan* v. *Lakshmi Narayanjee.* (Where notice to quit was given by the shebait on the footing as if the idols were the sole owners of the premises and it directed that the tenants should vacate the entire premises, while it was found that the idols had only an undivided share in the premises—*Held* that if the notice was sufficient with regard to the whole of the premises it was sufficient with regard to a portion of it, even if the property from which ejectment was sought might have been an undivided portion of the said premises.)

('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banarji* v. *Ramshasi Roy.* (In this case, notwithstanding apparent confusion in description of demised land in the notice, the notice was held to be good.)

('39) 26 AIR 1939 Cal 291 (292) : 182 Ind Cas 8 (DB), *Giridhari Lal* v. *Purnendu Narayan.* (Inaccurate description of the land is not necessarily material defect.)

('25) 12 AIR 1925 All 199 (200) : 78 Ind Cas 651, *Bhagwana* v. *Shib Samentri Prasad.* (Where the notice given by the manager of a temple property was given by him in his capacity as manager but the heading of the notice did not show the fact and the notice was not signed by the manager but by his general attorney — *Held* the notice was nevertheless quite valid.)

('05) 28 Mad 391 (392, 393) (DB), *Narasimha Chari* v. *Gopala Iyengar.* (Patta given at the end of the fasli indicating the change in the conditions of the tenure even for the existing fasli is not sufficient notice.)

8. (1915) 113 L T 694 (695) : (1915) 1 K B 830 : 84 L J K B 823, *May* v. *Borup.* (Notice to quit given by tenants—Statement that in a certain event the notice will be cancelled—The reservation does not invalidate the notice—It only informs the landlord of the hopes and fears of the tenants — The tenants cannot cancel tho notice after giving it — Their statement that they will do so is not to be taken as attaching a condition to the notice—They could only enter into negotiations with the landlord.)

(1918) 2 K B 805 (806) : 87 L J Ch 1122, *Norfolk County Council* v. *Child.* (Notice to quit — Covering letter stating that the notice is given to terminate the lease on the date given therein unless the lessor sees sufficient reason to change his opinion — In the previous year notice had been given but this notice was withdrawn at the request of the tenant, whose rent was in arrear, on his paying off the arrears—*Held* that the notice was not conditional or reserving a right to lessor —Taken in the light of what happened in the previous year it only means that the notice will not be withdrawn as in the previous year unless he sees sufficient reason in the meanwhile to change his opinion.)

9. ('21) 33 Cal L Jour 518 (518) (DB), *Durga Churn* v. *Pandub.*
('21) 64 Ind Cas 550 (550) (DB) (Cal), *Ram Kanie Mandal* v. *Ganesh Chunder Sen.*
('21) 33 Cal L Jour 516 (517) (DB), *Bhimram* v. *Hura Soondery.*

10. ('21) 64 Ind Cas 551 (551) (DB) (Cal), *Atal Chundal* v. *Kedarnath Mukerji.*

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Notes 19–20

It is open to the Court, notwithstanding certain features in a notice which may suggest that it is an attempt to terminate the tenancy partially, to hold, on the construction of the notice in the light of all the facts and circumstances of the case, that the notice is not of this kind and is valid.[11]

A notice is not invalid merely because the landlord treats the person to whom the notice is given as a trespasser and not as a tenant.[12]

Where a notice to quit is invalid or insufficient for any reason, it will not have the effect of determining the lease.[13] But where an invalid notice is accepted and acted upon by the party to whom it is given, the tenancy would be determined.[14] There would be an implied surrender in such a case. But where a lease is really determinable only by six months' notice under this section but the lessor gives only a month's notice, the mere fact that the lessee in his reply notice erroneously admits that he is a monthly tenant will not estop him from contending that the notice was insufficient. The reason is that the lessor is not in any way misled by such a statement.[15]

See also Note 20.

20. Notice to quit with an option to continue on different terms. — A notice must be absolute and unconditional in its terms.[1] Otherwise, it would not amount to a clear and unambiguous intimation of an intention to terminate the lease on a certain date. Thus, a notice giving the lessee an *option either* to vacate the property by a certain date *or* to pay enhanced rent from such date will be bad.[2] On this principle, it has been held that a notice which merely informs

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('39) 26 AIR 1939 Cal 291 (292) : 182 Ind Cas 8 (DB), *Giridhari Lal* v. *Purnendu Narayan.*

('29) 16 AIR 1929 Cal 651 (654) : 120 Ind Cas 455 : 57 Cal 10 (DB), *Bodardoja* v. *Ajijuddin Sirkar.*

11. ('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banarji* v. *Ramshasi Roy.*

12. ('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*

('08) 7 Cal L Jour 107 (109) (DB), *Ram Charan Naskar* v. *Hari Charan.*

13. ('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*

('91) 15 Bom 415*n* (415*n*) : (1880) Bom P J 10 (DB), *Ramchandra Appaji* v. *Daulatji.*

('10) 5 Ind Cas 699 (700) : 6 Nag L R 17, *Udebhan* v. *Jagannath.*

14. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 511, *F. Morgan* v. *Ahmed Moola.*

15. ('24) 11 AIR 1924 Bom 115 (115) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks and Co.* v. *Joosab Mahomad.*

Note 20

1. (1889) 61 L T 729 (730) : 54 J P 311, *Gardner* v. *Ingram.*

(1922) 1 Ch 36 (40) : 91 L J Ch 195 : 125 L T 722, *Freeman* v. *Evans and Fletcher and Co.*

2. (1922) 1 Ch 36 (40) : 91 L J Ch 195 : 125 L T 722, *Freeman* v. *Evans and Fletcher and Co.*

('85) 11 Cal 533 (537, 538) (DB), *Mohamaya Goopta* v. *Nilmadab Rai.*

[*See also* ('85) 7 All 899 (902, 903, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.* (Notice informing lessee that if he did not vacate by the given date a suit will be filed against him for ejectment as well as enhanced rent — *Held*, notice is bad.)]

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the lessee that if he wants to keep the premises after a certain date, he will have to pay enhanced rent at a certain rate is bad.[3] The reason is that such a notice virtually amounts only to giving the lessee an option either to vacate the property by a certain date or to pay enhanced rent.

But, where a notice clearly expresses an intention to terminate a lease by a certain date, the mere fact that it is coupled with an intimation that if the lessee continued in possession after such date he would be liable for enhanced rent does not make the notice bad.[4] The reason is that such a clause in a notice to quit only amounts to an offer of a new tenancy on a higher rent and does not affect the intention to terminate the present lease on the given date. Sometimes, a notice which is expressed as giving an option to the lessee to vacate the property by a certain date or pay enhanced rent thereafter has been treated on construction as a definite notice to quit on such date coupled with an offer of a new tenancy at an enhanced rent from such date.[4a]

Where a notice to quit clearly conveys the intention to terminate the lease by a certain date, the mere fact that the notice provides for its abandonment in case the other party agrees to an enhancement or reduction of the rent, does not affect the validity of the notice.[5] The

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3. ('12) 15 Ind Cas 906 (906, 907) (DB) (Cal), *Shakhi Chand* v. *Ram Chandra.*

4. (1879) 4 Ex D 201 (207) : 48 L J Q B 681 : 40 L T 711 : 27 W R (Eng) 928, *Ahearn* v. *Bellman.* (Notice to quit on a certain day given—Notice contained the following clause "and I further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be increased and made payable in advance" — *Held* by Bramwell, L. J. and Cotton, L. J.— (Brett, L. J., dissenting) that the notice to quit being otherwise sufficient it was not rendered invalid by the additional clause—Notices with an option may be good.)

('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*

('04) 1904 Pun Re No. 5 : 1904 Pun L R No. 42, *Pirbhu* v. *Ramchand.* (Notice does not become bad and insufficient merely because it also contains an offer to the tenant to remain on land on fresh terms from a given date, if the tenant accepts that offer.)

('21) 8 AIR 1921 All 194 (194, 195) : 43 All 330 : 60 Ind Cas 842 (DB), *Shankar Lal* v. *Baburam.*

('19) 6 AIR 1919 Lah 304 (305): 1919 Pun Re No. 34: 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal.*

4a. ('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Mohammad.* (Notice to leave the house within a week or to pay double rent from the expiry of that week and stating that if defendant did not vacate the house it would be assumed that he was prepared to pay double rent.)

('34) 21 AIR 1934 All 115 (116, 117) : 153 Ind Cas 432, *Madan Mohan* v. *Bohra Ramlal.* (Notice giving lessee alternative of vacating on or before a certain date or, if he continued in possession thereafter, of paying enhanced rent — Lessee not vacating — *Held* he had thereby agreed to hold over and to have accepted the proposal as to enhanced rent.)

5. ('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao Ramrao.*

('43) 47 Cal W N 207 (213) (DB), *Dhaniram* v. *Bholanath.* (Landlord's notice to quit addressed to monthly tenant requesting him to enter into a fresh engagement on new terms by the last date of the month of the tenancy at the latest and stating that failing that, the tenancy would be determined from the next day of such last date.)

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reason is that such a provision relates only to the *waiver* of the notice by *mutual consent*. The law allows waiver of a notice to quit by the person who has given the notice with the consent of the other party. (See S. 113.) A mere provision, in a notice, for such waiver by mutual agreement between the parties will not affect the validity of the notice. (See Note 19.)

A notice to quit is not bad, merely because it provides that if the tenant fails to vacate the property by the date fixed in the notice, he will be liable for damages at a certain rate.[6] In such a case there is merely an intimation to the tenant as to the consequences that would follow from his non-compliance with the notice to quit. The clearness of the requisition for quitting the property by a certain date is not affected.

21. Notice required under other sections for determining lease. — The requirements prescribed by this section with regard to a notice apply only to a notice given under this section for determining a lease. Such requirements do not apply to notices issued under other sections of the Act. For instance, a notice under S. 108, cl. (e) expressing the lessee's intention of avoiding a lease on account of the destruction of the property, which is the subject-matter of the lease, need not comply with the requirements prescribed by this section.[1] So also, the notice under S. 111, cl. (g) given by the lessor or his transferee determining a lease on forfeiture being incurred need not comply with the requirements laid down in this section.

22. Notice by lessee — Duty to give up possession. — Under this section, a lease is determinable even by the lessee by a

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('09) 2 Ind Cas 548 (548) (DB) (Cal), *Ganga Das* v. *Ananda Chandra*. (Where a landlord wrote to the tenant asking him to come to an agreement with him to pay increased rent, and concluded by saying "otherwise, I shall take steps to eject you and hence you consider this as 15 days' notice expiring with the end of this month"—*Held* that this was a good notice to quit.)

('96) 22 Bom 241 (243) (DB), *Kikabhai Gandabhai* v. *Kalu Ghela*. (Tenants were by the notice given to them by the landlord allowed two days to make a fresh agreement with him failing which the notice to them to quit at the end of the year became an absolute notice.)

('13) 19 Ind Cas 758 (759) (All), *Jugla* v. *Har Narain Singh*. (A landlord gave a notice to his tenant that he must within fifteen days either execute an agreement binding himself to pay enhanced rent or he must vacate the house — *Held* that the notice was valid.)

(1895) 1 Q B 231 (235), *Bury* v. *Thompson*. (Notice by lessee that the rent is too high and that he will not be able to continue unless reduction is made is good— Confirmed on appeal in (1895) 1 Q B 696.)

('75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Pershad*. (It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it.)

6. ('08) 12 Cal W N 1059 (1064), *Adolphe Stranger* v. *Emma Price*.

('25) 12 AIR 1925 All 199 (199) : 78 Ind Cas 651, *Bhagwana* v. *Shib Sametri Prasad*.

Note 21

1. ('16) 3 AIR 1916 Cal 707 (707) : 31 Ind Cas 697 (DB), *Damoda Coal Co., Ltd.* v. *Hurmook Marwari*.

simple notice given in accordance with the provisions of this section. It is not necessary for the purpose of determining the lease that the lessee must give up possession of the property. Although, under S. 108, cl. (q) the lessee is bound to put the lessor into possession of the property on the determination of the lease, a failure to do so will only entitle the lessor to damages and will not make the determination of the lease by notice by the lessee ineffective or incomplete.[1]

23. Waiver of notice. — As to waiver of notice by the person giving it, see S. 113 and Notes thereon. See also the undermentioned cases.[1]

As to waiver by tenant of the *right* to notice before being evicted, see Note 25.

As to waiver of *defect* in notice, by the person to whom the notice is given, see Note 19.

24. Suit for ejectment — Notice to quit. — Where the defendant in a suit for ejectment has been a *tenant* under the plaintiff, a decree for ejectment cannot be passed against him, unless it is established that the tenancy has been lawfully determined.[1] A notice to quit is one of the modes of determining a lease, although such a mode of determination does not apply to *every* case. Where a lease is determinable by a notice to quit and has not been determined in any other manner according to law, ejectment cannot be decreed against a tenant, unless a sufficient and valid notice to quit has been served upon him.[1a] Such a notice is a *pre-requisite* of the suit. In other words, the

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Note 22

1. ('96) 22 Bom 348 (354) (DB), *Baliramgiri* v. *Vasudev.*
[But see ('10) 8 Ind Cas 355 (355): 1910 Pun Re No. 94, *Niadar Mal* v. *Lewin.* (Submitted not correct.)]

Note 23

1. ('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao.* (Lessor giving another notice to quit after expiry of first notice — This is waiver of first notice.)
('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeshwant* v. *Shiwappa.* (Merely allowing tenant to continue in possession after expiry of notice to quit — No waiver.)
('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 : 42 Ind Cas 655 (DB), *Wali Ahmad* v. *Mt. Hussaini.* (Giving notice and then claiming arrears of rent up to institution of suit is not waiver of notice.)
('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneswar Das* v. *Kamal Deb Adhikar.* (Acceptance of rent for period before expiry of notice is not waiver.)
('05) 29 Bom 580 (613) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secretary of State.* (Acceptance of rent for period after expiry of notice is waiver.)

Note 24

1. ('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govindan Nambudri.*
('03) 13 Mad L Jour 475 (476) (DB), *Nagasamy Aiyar* v. *Perumal Aiyar.*
('17) 4 AIR 1917 Cal 426 (426) : 34 Ind Cas 516 (DB), *Umesh Chandra* v. *Kala Chand.*

1a. ('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bookto Mahato.*
('70) 13 Suth W R 267 (268) (DB), *Bunwari Lal* v. *Mohima Chunder.*

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determination of the lease by such notice must have become complete by the expiration of a valid notice to quit *before* the institution of the suit. Where this is not the case, the suit itself cannot be treated as a notice to quit. Nor can the Court in such a case pass a decree for ejectment against the tenant fixing a certain time within which he must vacate the property.[2] The contrary view taken in the undermentioned cases[3] is, it is submitted, not correct.

But the above principle does not apply to a trespasser who can, therefore, be ejected without any previous notice.[4] (See also section 105, Note 37.)

Where a tenancy is established, the onus of proving that the tenancy has been determined by a notice to quit or otherwise is on the plaintiff.[5] But it has

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('11) 9 Ind Cas 19 (20) (DB) (Cal), *Mozaffar Ali* v. *Darogha Gope.*
('95) 1895 Bom P J 321 (DB), *Annaji* v. *Balkrishna.*
('78) 2 Mad 346 (349) (DB), *Abdulla* v. *Subbarayyar.*
('78) 1 Mad 333 (335) (DB), *Saminada Pillia* v. *Subba Reddiyar.*
('94) 18 Bom 110 (114) (DB), *Dodhu* v. *Madhavrao.*
('76) 25 Suth W R 104 (104), *Kalee Dass* v. *Nistarinee Bewa.*
[*See also* ('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghu nath.* (Case under Berar Land Revenue Code, S. 79.)]

2. ('35) 62 Cal L Jour 201 (204, 205) (DB), *Jamiruddin Saodagar* v. *Hazi Mal Gani.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad.*
('90) 1890 All W N 175 (176) (DB), *Harbansi* v. *Bholai.*
('94) 18 Bom 107 (108) : 1893 Bom P J 44 (DB), *Abu Bakar* v. *Venkataramana.*
('81) 1881 Bom P J 180 (DB), *Yadneshwar* v. *Rama.*
('01) 29 Cal 203 (206) : 6 Cal W N 69 (DB), *Hemangini* v. *Sri Gobinda.*
('07) 34 Cal 57 (63) : 5 Cal L Jour 181 (DB), *Deo Nandan Pershad* v. *Meghu Mahton.* (This appears to be based upon the principle that ejectment can be brought only for an unlawful or tortious detention.)
('80) 5 Cal L Rep 231 (235, 237) (DB), *Jubraj Roy* v. *Mackenzie.*
('79) 4 Cal 339 (341) (DB), *Ram Rotton* v. *Netro Kally.*
('77) 2 Cal 146 (149) : 25 Suth W R 329 (FB), *Rajendronath* v. *Bassider Ruhman.*
('02) 6 Cal W N 199 (201) (DB), *Nabin Majhi* v. *Raj Kumar Gouri Lal.*
('67) 8 Suth W R 385 (386) (DB), *C. J. Phillips* v. *Nund Coomar.*
('69) 11 Suth W R 231 (231) (DB), *Fitz Patrik* v. *George Wallace.*
('96) 6 Mad L Jour 59 (61) (DB), *Venju Padiyachi* v. *Rajava Chetty.*
('10) 5 Ind Cas 699 (701) : 6 Nag L R 17, *Udebhan* v. *Jagannath.*

3. ('75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Pershad.*
('95) 23 Cal 200 (201) (DB), *Ramlal* v. *Dinanath.*
('73) 20 Suth W R 401 (402) (DB), *Mahomad Rasid Khan* v. *Jadoo Mirdha.*
('23) 10 AIR 1923 Pat 340 (341) : 71 Ind Cas 1022 (DB), *Stonewigg* v. *Kameshwar Narayan.*

4. ('34) 21 AIR 1934 Cal 134 (134) : 149 Ind Cas 678, *Sitabuddin* v. *Behari Lal.*
('07) 34 Cal 57 (61) : 5 Cal L Jour 181 (DB), *Deo Nandan Pershad* v. *Meghu Mathon.*
[*See* ('11) 9 Ind Cas 19 (20) (DB) (Cal), *Mozaffar Ali* v. *Darogha Gope.* (If neither party in an ejectment suit admits or sets up a tenancy, then notice to quit would not be required.)]
[*See also* ('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gyi* v. *Maung Tet.* (No lease as defined under S. 105—No notice under S. 106 is necessary for ejectment)]

5. ('15) 2 AIR 1915 All 251 (252) : 29 Ind Cas 437 (DB), *F. S. Old* v. *J. A. Shail.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad*
('02) 26 Bom 360 (362) : 4 Bom L R 58 (DB), *Ganoo* v. *Shri Dev Sidheswar.*
('91) 15 Bom 414*n* (415*n*) : (1880) Bom P J 122 (DB), *Haji Sayyad* v. *Venkta.*

been held that, where it is proved that a notice to quit was *served* on the defendant, the onus is on him to prove that it was invalid.[6]

A plea as to the *absence* of a notice to quit is one which goes to the root of the plaintiff's case and as such can be raised even in second appeal for the first time.[7] As already seen, it is a matter in regard to which the onus of proof is on the plaintiff. In fact, such a notice to quit is an essential part of the plaintiff's *cause of action*. But a plea as to the *invalidity* of a notice cannot be allowed to be raised for the first time in second appeal.[8] This, as already seen, is a matter in regard to which the onus of proof is on the tenant.

In a suit for ejectment against a tenant, the plea of want of notice may be taken as an alternative to a plea of permanent tenancy.[9]

Where, in defence to a suit for ejectment against a tenant after a notice to quit, the tenant sets up a permanent tenancy or any other tenancy, which is not determinable by notice by the lessor, the onus of proving such a tenancy is on the tenant. (See Section 105, Note 43.)

Even after a lease has been determined, a lessee cannot be ejected by the lessor by force. The lessee can only be evicted in due course of law.[10] (See also S. 105, Note 37.)

('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bhookto Mahato.*
('78) 2 Mad 346 (349, 350) (DB), *Abdulla* v. *Pakkeri.*
('43) 30 AIR 1943 Mad 311 (312), *Thirumalareddi Inna Reddi* v. *Gade Gopireddi.*
('28) 112 Ind Cas 257 (258) (DB) (Mad), *Kadiyam Rayudu* v. *Kamarsu Veeraju.*

6. ('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.*

7. ('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad.*
('94) 18 Bom 256 (259) (DB), *Krishnaji* v. *Antaji.*
('94) 18 Bom 110 (113) (DB), *Dodu* v. *Madhavarao.*
('78) 2 Mad 346 (350) (DB), *Abdulla* v. *Subbarayyar.*
('93) 1893 Bom P J 292 (DB), *Krishna* v. *Ladu.*
[See however ('95) 1895 Bom P J 165 (DB), *Vyankaji* v. *Bala.* (Objection taken in appeal — Plaintiff should be given an opportunity for proving that as defendant had disclaimed his title, a notice to quit was not necessary.)
('33) 20 AIR 1933 Lah 377 (378) : 145 Ind Cas 992, *Karam Chand* v. *Amar Nath.* (Suit by landlord to eject a tenant decreed in the lower appellate Court. The tenant appealed from the judgment on the ground that he was not given a month's notice as stipulated in the lease-deed. The case was pending for over two years—*Held* that under the above circumstances, the tenant can have no grievance on the ground of lack of notice and that the High Court will not interfere in second appeal on the technical ground of want of notice : A I R 1926 Lah 129, relied on.)]

8. ('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 : 42 Ind Cas 655 (DB), *Wali Ahmad* v. *Mt. Hussaini Begum.*
('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govindan Nambudri.*
('10) 8 Ind Cas 132 (132) (DB) (Mad), *Musili Naidu* v. *Nataraja Chettiar.*
('24) 11 AIR 1924 Mad 904 (904, 905) : 82 Ind Cas 956, *Raman Menon* v. *Collector of Malabar.*
[*See also* ('10) 5 Ind Cas 813 (814) (DB) (Mad), *Pennusami* v. *Pasupathi.* (Where in a suit to eject notice was pleaded in the plaint and sufficiency of notice was denied in the written statement, but no issue was raised, the contention as to notice must be treated as abandoned by the defendant.)]

9. ('86) 10 Bom 669 (672) (DB), *Purshotam* v. *Dattatraya.*

10. ('29) 16 AIR 1929 Oudh 529 (534) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.*

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Note 25

25. Denial of lessor's title by lessee and notice to quit.— Under S. 111, cl. (g) a denial of the lessor's title by the lessee will make the lease liable to forfeiture at the option of the lessor. In other words, the denial will not *ipso facto* determine the lease. It is such denial coupled with the exercise of option by the lessor in the prescribed manner that will cause the determination of the lease. This principle applies also to a tenancy from month to month or from year to year under this section.

But in the case of a lease from year to year the disclaimer of title by the lessee will, according to the English law, make the lessee liable to ejectment without notice on another principle. This principle has been expressed as follows [1]:

> "The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual six months' notice, evidence of a disclaimer is evidence of an election to put an end to the tenancy and supersede the necessity for such a notice. Hence verbal or written denials of a tenancy have rendered notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

The above principle has also been followed in a series of decisions in India,[2] although there are also some decisions, which do not refer to this distinction between a lease from year to year and other leases.[3]

There is a conflict of decisions whether the denial of title by the

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Note 25

1. ('19) 6 A I R 1919 P C 1 (4) : 42 Mad 589 : 46 Ind App 109 : 50 Ind Cas 631 (PC), *Maharaja of Jeypore* v. *Rukmani.* (Quoting Platt on *Leases.*)
2. ('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikamparambil.*
('85) 9 Bom 527 (529) (DB), *Gopalrao Ganesh* v. *Kishor Kalidas.*
(1900) 24 Bom 426 (433, 434) : 2 Bom L R 228 (DB), *Mahipat* v. *Lakshman.*
('10) 6 Ind Cas 600 (600) (DB) (Mad), *Murugesa Mudaly* v. *Subraya Gramany.*
('33) 20 AIR 1933 Lah 377 (378):145 Ind Cas 992, *Karam Chand* v. *Amar Nath.*
('12) 13 Ind Cas 323 (323, 324) : 1911 Pun Re No. 76, *Zia-ud-din* v. *Gabind Ram.*
(Even if a notice is expressly required by the terms of the lease.)
('12) 15 Ind Cas 584 (586) (Mad), *In re Armugam Pillai.*
('95) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*
('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal.*
('26) 13 A I R 1926 Mad 143 (144) : 91 Ind Cas 316, *Kalliani Amma* v. *Cochin Sircar.*
('28) 112 Ind Cas 257 (260) (DB) (Mad), *Kadiyam Rayadu* v. *Kamarsu Veeraraju.*
('27) 14 AIR 1927 Sind 248 (250) : 104 Ind Cas 412 (DB), *Mulibai* v. *Vassibai.*
('94) 17 Mad 218 (219) : 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta Hegade.*
('12) 15 Ind Cas 52 (52) (DB) (Mad), *Maniyam Pattar* v. *Lakshmana Nattama.*
(Payment of rent by a lessee to the lessor's assignee, who took the property on usufructuary mortgage from the lessor, and attornment to him, do not amount to the denial of the title of a purchaser of the property at court sale held after the date of the said assignment so as to dispense with the necessity of giving notice to quit, prior to an action in ejectment by the said purchaser, to the lessee.)
3. ('02) 12 Mad L Jour 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*
('81) 8 Bom 164 (166, 167) : 1881 Bom P J 181 (DB), *Balaji Sitaram* v. *Bhikaji.*
('06) 33 Cal 339 (341, 342) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra.*

defendant in the suit for ejectment itself will be sufficient for the purpose of obviating the necessity of a notice to quit on the above principle.[4] There is also a conflict of decisions as to whether the assertion of a permanent tenancy by a tenant who is not entitled to such a right will amount to a denial of title for the above purpose.[5]

Under S. 111 (g) as amended by Act XX of 1929 the option of the lessor to forfeit a lease is to be exercised by issuing a written notice to the lessee. This notice need not comply with the provisions of this section.

26. Other modes of determination of lease. — A notice to quit is not the only mode of determining a lease even in cases such as those under this section, in which a notice to quit would be *sufficient* for the purpose. (See section 111.) Where a lease has been *determined* according to the law without any notice to quit, such a notice is not necessary before a suit for ejectment against the tenant.[1] The reason is

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4. *Cases holding that denial in suit itself is enough :*
('92) 17 Bom 631 (636) : 1892 Bom P J 294 (DB), *Lalu Gagal* v. *Bai Motan.*
('94) 18 Bom 256 (259) (DB), *Krishnaji Ramchandra* v. *Antaji Pandurang.*
('88) 12 Bom 678 (682) (DB), *Agarchand Gumanchand* v. *Rakhama Hanmant.*
('07) 17 Mad L Jour 287 (287) (DB), *Kizhakimyakath Abdulla* v. *Mohideen Kutty.*
('10) 5 Ind Cas 924 (924) (DB) (Mad), *Mayan Thariyakath Kathijakuth* v. *Ithikamparambil Kuthussa.*
('83) 8 Bom 228 (230) : 1883 Bom P J 360 (DB), *Baba* v. *Vishvanath Joshi.*
('91) 1 Mad L Jour 218 (220) (DB), *Chidambaram Pillai* v. *Sabapathi Pillai.*
[*See also* ('05) 1 Cal L Jour 116 (119) (DB), *Sujjad Ahmad Chowdhury* v. *Ganga Charan.* (Defendant cannot be allowed to set up an entirely new case of a lease from year to year.)]

Cases holding that denial of title in the suit itself is not sufficient :
('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*
('96) 1896 Bom P J 451 (452, 453) (DB), *Ramchandra* v. *Kashinath.*
('94) 17 Mad 218 (220) : 3 Mad L Jour 287 (DB), *Unhamma* v. *Vaikuntha.*
('03) 27 Mad 23 (25) (DB), *Chinna Narayudu* v. *Harischendana Deo.*
('03) 27 Bom 515 (550) : 5 Bom L R 274 (DB), *Fatehsingji* v. *Bamanji.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prasad.*
('89) 12 Mad 353 (355) (DB), *Subba* v. *Nagappa.*
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramania Chetty.*
('94) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*
('91) 15 Bom 407 (412, 414) (DB), *Vithu* v. *Dhondi.*

5. *Cases holding that such claim will amount to a disclaimer of title :*
('83) 8 Bom 228 (230) : 1883 Bom P J 360 (DB), *Baba* v. *Vishvanath Joshi.*
(1900) 24 Bom 426 (434) : 2 Bom L R 228 (229, 233, 234) (DB), *Mahipat Rane* v. *Lakshman.*

Cases holding that such claim will not amount to a disclaimer of title :
('93) 1893 Bom P J 292 (294) (DB), *Krishna* v. *Ladu.*
('03) 27 Bom 515 (550) : 5 Bom L R 274 (DB), *Fatehsinghji* v. *Bamanji.*
('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.*
('93) 3 Mad L Jour 222 (223) (DB), *Pranambal Achee* v. *Palaniappa.*

Note 26

1. ('09) 2 Ind Cas 993 (994) (Cal), *Sheikh Abdul* v. *Chabil Jan Bibi.*
('21) 8 AIR 1921 Cal 574 (575) : 64 Ind Cas 824 (DB), *Guruprosanna* v. *Madusudhan.*
('13) 19 Ind Cas 824 (824, 825) (SB) (Mad), *Sivatha Muthu* v. *Revd. Mesguita.* (Forfeiture of lease by breach of condition against disobeying lessor's orders regarding the holding.)

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that after a lease has been determined in some manner recognised by the law, the tenant or his representative in interest would be merely in the position of a trespasser and can be ejected from the property without any previous notice to quit.[1a] (See S. 105, Note 37.)

Similarly, where a lease is *voidable* under the law and has been avoided according to the law, the position is the same as if the lease has been lawfully *determined* and the quondam lessee can be ejected without any previous notice to quit.[2]

But a lease cannot be determined except in some way recognised by the law. Thus, a lease of joint land is not *ipso facto* determined by partition among the co-owners and the allotment of the leased land to one of them, so as to dispense with the necessity of a notice to quit before a suit for ejectment by him against the tenant.[3] Where the monthly tenant of a house is obliged to vacate the house under an order from the Plague Authority acting under statutory powers, the tenant is not thereby absolved from liability to give the usual notice to quit, if he desires to put an end to the tenancy.[4]

27. Effect of giving notice where it is not necessary. — Where a notice to quit is given by the landlord although such notice is not necessary for evicting a person from certain immovable property, no tenancy is created merely by reason of such notice.[1]

28. Notice by lessor undertaking to pay compensation for improvements — Effect. — It has been held that where a lessor in his notice to quit has undertaken to pay compensation to the tenant for the improvements effected by him before compelling him to vacate the property, the lessor cannot enforce his right to possession, unless he has paid or tendered such compensation, although there may be no

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('77) 1877 Bom P J 177 (DB), *Suleman Abraham* v. *Asmad Isap.* (Forfeiture of lease by breach of condition.)

('20) 7 AIR 1920 Pat 803 (804) : 59 Ind Cas 893, *Wazir Nonian* v. *Ram Prasad.* (Lease of a service tenure expires when the service ceases.)

('13) 20 Ind Cas 11 (13) (All), *Shyam Lal* v. *Bachchu Lal.* (Sub-lease is determined on surrender of main lease.)

('06) 5 Cal L Jour 53 (55) (DB), *Mrittunjoy Roy Chowdhury* v. *Kenatullah Norya.* (On determination of main lease sub-leases also are determined.)

1a. ('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan.*

2. ('09) 1 Ind Cas 626 (631) : 36 Cal 675 (DB), *Mathewson* v. *Shriram Kanai Sing.* (Avoidance of lease obtained by fraud — Such lease is not void but only voidable.)

3. ('82) 6 Bom 70 (72) (DB), *Pandurang* v. *Yedneshwar.*
('81) 6 Bom 67 (69) : 1881 Bom P J 178 (DB), *Narayan Bhivarao* v. *Kashi.*

4. ('99) 1 Bom L R 739 (741, 742) (DB), *Mohomedally Moola* v. *John Campbell.*

Note 27

1. ('03) 30 Cal 883 (900), *Narsing Dayal Sahu* v. *Ram Narain Singh.* (Lessee for life dying—Heirs continuing in possession—Landlord giving notice to quit does not thereby disentitle himself to mesne profits.)

('17) 4 AIR 1917 Cal 219 (220, 221) : 37 Ind Cas 201 (DB), *Paramananda Singh* v. *Syjon Singh.* (Lessee holding over after expiry of lease—Lessor not assenting —Notice to quit given—This does not create tenancy.)

provision for it in the lease.[1]

29. Determination of main lease by notice — Effect on sub-lease. — The determination of a lease by a valid notice by the lessor will automatically put an end to any *sub-lease* granted by the lessee.[1]

30. Resumption of possession by landlord without giving notice — Effect. — Where a tenure was resumable by the grantor thereof after notice but the latter took possession of the land without giving notice and the grantee acquiesced in such resumption and did not raise any objection on the ground of want of notice, it was held that he could not afterwards contend that the resumption was unlawful for want of notice.[1] It is conceived that in such cases the principle of implied surrender will apply. (See S. 111, Note 10.)

31. Lessee giving up possession before termination of lease — Liability for damages or rent. — Where a tenant gives notice determining a lease but such notice is invalid the lease will continue in force notwithstanding such notice. If, however, the tenant gives up possession and the landlord re-enters on the premises, there will be an *implied surrender* of the lease. (See S. 111, Note 10.) The lessee will not be liable for *rent* after such surrender. But he will be liable for *damages* for premature determination of the lease in breach of the contract of tenancy.[1]

Although a lessee may actually vacate the property before the expiry of the notice given by him to terminate the lease, he will be liable for rent till the last day of the notice.[2]

Where the lessee of a house under a monthly tenancy is obliged to vacate the house under the orders of the Plague Authority, he is not thereby absolved from the duty of giving notice to quit for the usual period if he wishes to terminate the lease, or from the liability to pay rent till the lease is so determined.[3]

Note 28.

1. ('36) 23 AIR 1936 Cal 581 (581, 582) : 167 Ind Cas 281, *Shambu Chandra Haldar* v. *Kanai Lal Goswami.*

Note 29

1. ('97) 21 Bom 311 (313) (DB), *Timmappa Kuppaya* v. *Rama Venkanna.*
('32) 19 AIR 1932 Cal 241 (242) : 59 Cal 739 : 137 Ind Cas 139 (DB), *Yusuf Shaikh* v. *Jyotish Chandra.*

Note 30

1. ('03) 13 Mad L Jour 209 (209) (DB), *Venkata Narasimha* v. *Sobhanadri.*
('14) 1 AIR 1914 Bom 152 (153) : 38 Bom 240 : 23 Ind Cas 786 (DB), *Sitaram* v. *Sadhu.*

Note 31

1. ('23) 10 AIR 1923 Cal 524 (527) : 72 Ind Cas 98 (DB), *Bijoi Chandra* v. *Howrah Amta Light Ry. Co., Ltd.*
('23) 10 AIR 1923 Cal 63 (65) : 49 Cal 345 : 68 Ind Cas 993 (DB), *Jogendra Krishna* v. *Kurpal Harshi and Co.*
(1910) 1 K B 622 (626) : 79 L J K B 389 : 102 L T 187, *Gray* v. *Owen.*
2. ('68) 9 Suth W R 213 (214) (DB), *Ruff* v. *Stokoe.*
3. ('99) 1 Bom L R 739 (741, 742) (DB), *Mahomadally* v. *Campbell.*

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Note 32

32. **Lessee holding over after expiry of notice to quit—Effect.** — Where a lessee continues to be in possession of the property after the lease has been determined by a valid notice, he will not be liable for *rent*.[1] The reason is that in such a case, there will not be any relationship of landlord and tenant between the parties after the expiry of the notice. He will not also be liable for damages for *use and occupation*. (See section 105, Note 70.) But the lessee will be liable for mesne profits. He will also be liable for *damages* for breach of the duty under S. 108, cl. (q) of putting the lessor into possession of the property. The amount awardable as damages is within the discretion of the Court to be exercised according to the circumstances of the case.[2] But, where the notice to quit is *invalid*, it will not have the effect of determining the lease and the lessee will be liable for *rent* even after the expiry of the notice.

Liability for enhanced rent :

Where a notice to quit given by a lessor to the lessee is coupled with a demand of rent at a higher rate if the lessee should continue in possession after the date fixed in the notice, the question arises whether and in what cases the lessee will be liable for rent at the enhanced rate if he continues in possession. Such cases may be broadly divided into two classes :

(1) Those in which the notice to quit is valid and terminates the tenancy on the date mentioned therein.

(2) Those in which the notice is not valid.

In the *first* class, the demand of rent at higher rate is virtually an offer of a fresh tenancy on new terms. In such cases, the question will be whether the tenant has accepted the offer of such new tenancy. If he has done so, he will be liable for the enhanced *rent*. But, if he has not accepted the offer, he will not be liable for the enhanced *rent*.[3]

Note 32

1. ('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munnalal* v. *Buchchu Lal*.

2. ('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Muhammad*. (Double rent may be awarded as compensation.)
[*See* ('98) 22 Bom 348 (354) (DB), *Baliramgiri* v. *Vasudeo*. (Notice by lessee determines lease though possession not given up — Lessee liable for damages for failure to give back possession.)
('28) 15 AIR 1928 Lah 554 (555): 9 Lah 576 : 109 Ind Cas 90 (DB), *Mul Raj* v. *Indar Singh*. (The whole circumstances of the tenancy and the sufficiency in point of time of the notice to vacate the land may properly be taken into consideration : 1904 Pun Re No. 5 relied on.)
('21) 8 AIR 1921 Pat 341 (341) : 60 Ind Cas 72 (DB), *Bisseswar Lal* v. *Rup Kishore*. (Quantum of damages depends upon the rent which the plaintiff could have got from another tenant.)
('23) 10 AIR 1923 Lah 281 (282): 75 Ind Cas 490, *Sahib Dayal* v. *Dhanpat Rai*. (Lease providing for payment of enhanced rent if lessee fails to vacate on notice —Enhanced rent for one month awarded as damages.)
('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra*. (It is open to the Court to assess damages at a rate which it thinks to be fair.)]

3. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan*.

But he will be liable for mesne profits and damages on the principles mentioned above.[4]

Does the continuation in possession after the date fixed in the notice to quit amount, by itself, to an acceptance by the tenant of the offer of a new tenancy on different terms in such cases? There is a conflict of decisions on this question. One view is that a new tenancy is not created *ipso facto* by the continuation of the tenant in possession in such cases.[5] The opposite view has been taken in the undermentioned cases.[6]

In the *second* class, the lease will continue to be in force even after the date fixed in the notice and there will be no question of the offer of any *fresh* tenancy on new terms. In such cases the question will be whether there is a valid contract for the *variation* of rent. According to the Oudh Chief Court[7] even if the notice to quit is invalid, the continuance in possession of the tenant after the date fixed in the lease without protesting against the proposal to enhance rent will amount to a binding agreement to pay such enhanced rent. This view is not accepted by the Patna and Nagpur High Courts.[8] It is submitted that the Oudh view is not correct.

33. Notice to quit—Who can give. — Under this section, a lease can be determined by a notice to quit either by the lessor or the

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('33) 20 AIR 1933 Oudh 465 (466) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mahomed Noor* v. *Ashig Beg.* (Tenant protesting against enhancement of rent — He is not liable for enhanced rent.)

4. ('24) 11 AIR 1924 Lah 643 (643, 644): 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Muhammad.* (Double rent standard allowed as measure of compensation.)

5. (1900-02) 1 Low Bur Rul 82 (83), *Maung Po Yin* v. *Mamoojee Moosaji.* (Tenant not liable for enhanced rent but for mesne profits and damages.)

('04) 1904 Pun Re No. 5 : 1904 Pun L R No. 87, *Pirbhu* v. *Ramchand.* (It will depend upon the facts disclosed in each case, whether the tenant is to be presumed to have accepted the terms offered.)

('21) 8 AIR 1921 All 194 (194, 195): 43 All 330 : 60 Ind Cas 842 (DB). *Sham Das* v. *Bahadur Singh.* (In absence of anything to show acceptance of the new terms, tenant can be sued in ejectment.)

6. ('34) 21 AIR 1934 All 115 (116, 117) : 153 Ind Cas 432, *Madan Mohan* v. *Bohra Ram Lal.*

('25) 12 AIR 1925 Oudh 189 (190) : 28 Oudh Cas 77 : 82 Ind Cas 585, *S. Burge* v. *Md. Inamullah Khan.*

('33) 20 AIR 1933 Oudh 465 (465) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mohammad Noor* v. *Ashiq Beg.*

('40) 27 AIR 1940 Nag 140 (141) : 189 Ind Cas 895, *Nandlal* v. *Anant Govind.*

[*See also* ('11) 11 Ind Cas 270 (272, 273) (DB) (All), *Scott* v. *Jotis Sarup.* (In this case there was a contract, after the notice to quit, under which the lessee agreed to vacate by a certain date—He failed to do so — *Held*, he was liable for breach of contract and the amount mentioned in the notice to quit might be awarded as damages.)]

7. ('33) 20 AIR 1933 Oudh 465 (465) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mohammad Noor* v. *Ashiq Beg.* (Principle applies to the converse case of a tenant proposing a reduction of rent.)

('26) 13 AIR 1926 Oudh 79 (80): 89 Ind Cas 578, *Baboo Lal* v. *Mirza Md. Askari.*

8. ('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal Choudhry.*

('40) 27 AIR 1940 Nag 140 (141) : 189 Ind Cas 895, *Nandlal* v. *Anant Govind.*

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lessee. The expression "lessor" will include any person who would be entitled to the possession of the property on the termination of the lease.[1] (See also Note 35.) Similarly, the term "lessee" will include any person in whom the leasehold interest is vested for the time being.

34. **Who can give notice to quit—Co-lessors.**—In the case of co-lessors, who are joint tenants, the rule under the English law is that any one of them can put an end to the tenancy by giving a notice to quit.[1] This principle was also applied in the undermentioned decision in India.[2] The English view is based on the theory that a tenant holds the premises only so long as he and the cosharer landlords *all* agree.[3] But according to the general view in India, a lease cannot be determined by notice by one or some of the co-lessors alone. This view is based on the theory that the relationship created by contract with several joint landlords continues, until there exists a new and complete volition to change it.[4] One co-lessor cannot give a notice to quit even as to his

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Note 33

1. ('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manikkam Pillai* v. *Rathnasami Nadar.*
('19) 6 AIR 1919 Lah 31 (31, 32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tekchand.*

Note 34

1. ('17) 4 AIR 1917 Cal 621 (623, 624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji.* (See the English authorities cited in this decision.)
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad.*
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi.*
[See however (1871) 5 H L 134 (146) : 20 W R (Eng) 150, *Liddy* v. *Kennedy.* (Notice must be by all the persons who have acquired an interest in the reversion.)]
2. ('87) 11 Bom 644 (649), *Ebrahim Pir Mahomad* v. *Curselji Sorabji.*
[*See also* ('05) 29 Mad 29 (34) (DB), *Appa Rao* v. *Prattipati Ramayya.* (Subrahmania Ayyar, Offg. C. J. — A tenant in common may have ejectment to the extent of his interest on proper notice to quit—See *Cutting* v. *Derby*, (1776) 2 W Bl 1077 and *David Whayman* v. *Chaplin*, 3 Taunton 119, 120.)]
3. ('17) 4 AIR 1917 Cal 621 (623, 624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji.*
4. ('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeshwar Pershad.*
('81) 7 Cal 414 (417, 418) : 9 Cal L Rep 76 (DB), *Radha Proshad* v. *Esuf.*
('35) 22 AIR 1935 Bom 262 (263) : 156 Ind Cas 898, *Vagha* v. *Manilal.*
('88) 15 Cal 40 (46, 47) (DB), *Harendra Narain* v. *Moran.*
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi.*
('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian.*
('71) 16 Suth W R 138 (139) (DB), *Alum Manjee* v. *Ashad Ali.*
('35) 22 AIR 1935 Cal 577 (577) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari.*
('79) 3 Bom 23 (24, 25) (DB), *Balaji* v. *Gopal.*
('07) 7 Cal L Jour 251 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan.*
('05) 29 Mad 29 (32, 33, 34) (DB), *Appa Rao* v. *Prattipati Ramayya.*
('20) 7 AIR 1920 Cal 513 (514): 57 I.C. 895, *Prianath Naik* v. *Promatha Nath.*
('75) 12 Bom H C R (A C) 85 (87) (DB), *Krishnarav* v. *Govind.*
[See however (16) 3 AIR 1916 Cal 906 (906) : 34 Ind Cas 56 (DB), *Karamat Ali* v. *Hanuman Das.* (Co-owner sending the notice, not on his own behalf but only as being in charge of sending notices on behalf of others and also verbally asking the tenant to vacate the property—*Held* notice sufficient.)]

own share in the property.[5] On the above principles, even where a tenant has incurred the liability to have his lease forfeited under S. 111, the lease cannot be determined, except where all the co-lessors concur in doing so.[6]

But, where one cosharer landlord has been acting as *manager* on behalf of all the cosharers, he can give a valid notice to quit on behalf of all.[7] This is on the principle of agency. (See Note 38.) Similarly, in the case of a lease of property belonging to a Hindu joint family a notice to quit by the manager of the family is enough.[8]

Where the tenant has dealt with one co-owner as the sole owner and sole landlord and by so doing is estopped from denying his title, such co-owner can give him notice to quit and sue him in ejectment.[9]

Where a person is co-owner with others with regard to one property and a sole owner of another property and both properties are separately let to the same tenant, such co-owner can give a notice to quit with regard to the separate property.[10]

The principle that the concurrence of all cosharers is necessary for a suit for ejectment by determining a tenancy does not apply to a suit for ejectment against a trespasser.[11] Similarly, a suit for ejectment can be brought against a tenant at sufferance (i. e., a tenant who holds over after the determination of his tenancy without the assent of the landlord) by one of the cosharer landlords alone.[12] The reason is that such a

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5. ('04) 31 Cal 786 (790) : 8 Cal W N 325 (DB), *Gholam Mohiuddin* v. *Khairan.*
('20) 7 AIR 1920 Cal 513(515) : 57 I.C. 895, *Prianath Naik* v. *Promatha Nath.*

6. ('81) 7 Cal 470 (473) : 9 Cal L R 260 (DB), *Reasut Hossein* v. *Charwar Singh.*
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad.*

7. ('35) 22 AIR 1935 Bom 219 (222) (DB), *Devji Arjan* v. *Bhoja Vaija.*
[But see ('75) 12 Bom H C R (A C) 85 (87) (DB), *Krishnarav* v. *Govind.* (Where a suit was brought by one of two cosharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other cosharer, *held* that the suit was not maintainable, and that the plaintiff could only sue jointly with his cosharer though the plaintiff was sole manager of the joint estate.)]

8. ('19) 6 AIR 1919 Lah 304 (305): 1919 Pun Re No. 34: 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal.*

9. ('07) 7 Cal L Jour 257 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan.*
('05) 29 Mad 29 (35) (DB), *Appa Rao* v. *Prattipati Ramayya.*
[*See also* ('19) 6 AIR 1919 Lah 304 (305) : 1919 Pun Re No. 34 : 51 Ind Cas 121. *Muharram Ali* v. *Bansi Lal.* (Property belonging to *A*, a Hindu, leased by *B*, *A*'s son—*B* is sole lessor and he can give notice.)]

10. ('35) 22 AIR 1935 Cal 577 (578) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari.*

11. ('20) 7 AIR 1920 Cal 513 (515) : 57 Ind Cas 895, *Prianath Naik* v. *Promatha Nath.*
('81) 7 Cal 414 (417, 418) : 9 Cal L R 76 (DB), *Radha Proshad* v. *Esuf.*
('88) 15 Cal 40 (46, 47) (DB), *Harendra Narain* v. *Moran.*
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendranath* v. *Krishna Sakhi.*

12. ('27) 14 AIR 1927 Bom 192 (194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal* v. *Bhudar Purshottam.* (The reason of the rule which requires one fresh and common volition of co-owners to put an end to that which commenced under their common volition does not apply to a case where what commenced under a common volition has come to an end and where the person concerned requires a fresh common volition to continue in possession.)

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tenant is no better than a trespasser in the eye of the law. (See S. 105, Note 37.)

Where a notice to quit is given by all the cosharer landlords, the tenancy will be determined on the expiration of the notice. Hence, after such expiration the tenant will be only a tenant at sufferance and a suit for ejectment can be brought against him by one or some of the cosharers alone.[13]

It has been held that, except where there is a special provision of law to the contrary, one co-owner cannot sue in respect of the common property in *his own name* on behalf of all.[14]

One cosharer landlord cannot sue for his own share of the rent, unless there is an agreement for the payment of rent separately to each landlord.[15] One cosharer alone cannot enhance the rent of the holding or sue for enhancement of such rent,[16] except where the rent has been paid separately to the cosharer landlords.[17]

Joint receivers :

A notice to quit given by one of two joint receivers is not valid. The reason is that the object of the Court in appointing two joint receivers is that the estate may have the benefit of the opinion of both as regards its management. Hence, one of the receivers cannot delegate his duties to the other.[18]

Co-trustees of religious or charitable endowment :

A notice to quit by one only of two Urlans of a Malabar Devaswom is invalid.[19]

35. Who can give notice to quit—Assignment by lessor. — As seen in Note 33, the term "lessor" in this section includes any

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('08) 35 Cal 807 (811): 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad*. [But see ('10) 5 Ind Cas 277 (277) (DB) (Cal), *Thakur Ram* v. *Shakroo Mian*. (Submitted wrong.)]

13. ('34) 21 AIR 1934 Cal 127 (128) : 149 Ind Cas 559 (DB), *Jarman Gomez* v. *Ram Kumar*. (Other cosharers made *pro forma* defendants.)
('86) 13 Cal 75 (78) (DB), *Dwarka Nath* v. *Kali Chunder*. (Suit brought by all — Withdrawal by one—This will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.)

14. ('07) 7 Cal L Jour 257 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan*.
('96) 21 Bom 154 (158, 159) (DB), *Balkrishna* v. *Moro*.

15. ('79) 4 Cal 96 (102, 103) : 2 Cal L R 370 (FB), *Guni Mahomed* v. *Moran*.
('81) 7 Cal 150 (152) : 8 Cal L R 445 (DB), *Jadoo Shat* v. *Kadumbinee*.

16. ('79) 3 Bom 23 (24, 25) (DB), *Balaji* v. *Gopal*.
('35) 22 AIR 1935 Bom 262 (263) : 156 Ind Cas 898, *Vagha* v. *Manilal*.
('79) 4 Cal 96 (102, 103) : 2 Cal L R 370 (FB), *Guni Mahomed* v. *Moran*. (One cosharer cannot enhance the rent of his share, such enhancement being inconsistent with the continuance of the lease of the entire tenure.)

17. ('83) 9 Cal 864 (865) (DB), *Bidhu Bhushun* v. *Komaraddi*.

18. ('17) 4 AIR 1917 Cal 621 (623, 624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji*.

19. ('24) 11 AIR 1924 Mad 771 (772): 80 I. C. 139 (DB), *Kannan Kutty* v. *Velu*. [See however ('13) 18 Ind Cas 77 (78, 79) (DB) (Mad), *Raja Ram* v. *Ram Roy*. (Legal arrangement between co-trustees of a chatram under which they were in management of separate properties—Notice by one with regard to property under his separate management is valid.)]

person who would be entitled to the possession of the property on the termination of the lease. Hence a subsequent lessee of the property for a term of years can give a notice to quit under this section.[1] (See S. 109.) A notice to quit must be given by all persons who have acquired an interest in the reversion.[2]

Where the lessor has assigned his interest in the property to another, the latter can give notice to quit, even though a notice of the assignment has not been given to the lessee.[3] After the landlord has assigned the reversion to another, he cannot issue a notice to quit under this section.[4] But, where under the terms of the assignment the landlord has undertaken to recover possession from the tenant and hand over the property to the transferee, a notice to quit by the assignor even after the assignment will be valid and effective.[5] The reason is that in such a case the right to the reversion must be deemed to be vested in the assignor for the limited purpose of recovering possession from the tenant.

36. Who can give notice — Miscellaneous. — A receiver appointed by the Court can, if so authorised by the order of appointment, issue a notice to quit against a tenant of the property of which he has been appointed receiver.[1] As to the power of joint receivers, see Note 34.

A *cestui que trust* cannot give a notice to quit in regard to trust property. It is only the trustee or his agent that can do so. A *cestui que trust* is not the agent of the trustee.[2]

The trustee of a religious society can give notice to quit to a tenant of property belonging to the society.[3] As to the power of joint trustees, see Note 34.

Note 35

1. ('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manikkam* v. *Rathnasami.*

('19) 6 AIR 1919 Lah 31 (31, 32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*

(1903) 90 L T 89 (90), *Wordsley Brewery Co.* v. *Halford.* (Grant of lease passes the reversion and not merely the attornment.)

[*See also* ('08) 12 Cal W N 1059 (1063), *Adolphe Shrager* v. *Emma Price.* (*Interesse termini* gives an immediate right of entry to the owner thereof and entitles him to give a notice to quit.)

('09) 1 Ind Cas 66 (67) (DB) (Cal), *Chandra Sarkar* v. *Anil Bandhu.* (Subsequent lessee can give notice to quit to a prior tenant at will.)]

2. (1871) L R 5 H L 134 (146) : 20 W R (Eng) 150, *Liddy* v. *Kennedy.* (Lessor executing a deed by which he constituted himself and his brother tenants in common with regard to the leased property—Both must join in giving the notice.)

3. ('19) 6 AIR 1919 Lah 31 (31, 32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*

4. (1903) 90 L T 89 (90), *Wordsley Brewery Co.* v. *Halford.* (Landlord granting subsequent lease—Only subsequent lessee, and not landlord, can give notice to quit.)

5. ('24) 11 AIR 1924 Mad 904 (905) : 82 Ind Cas 956, *Raman Menon* v. *Collector of Madras.*

Note 36

1. ('91) 18 Cal 477 (480) (DB), *Huri Das* v. *Macgregor.*

2. (1912) 2 Ch 504 (511) : 81 L J Ch 710 : 107 L T 120, *Stait* v. *Fenner.*

3. ('04) 8 Cal W N 918 (922) (DB), *Parmanand Karan* v. *Baptist Mission Society of London.*

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Note 37

37. Notice to quit—To whom to be given.—Where a notice to quit is given by the lessor, it is to be given to the lessee or to the person in whom the leasehold interest may be vested. Where the notice is given by the lessee, it is to be given to the lessor or to any other person who may be entitled to the immediate reversion in the demised property.

Co-lessees :

Where the lease-hold interest is not vested in a single person but in joint tenants the notice to quit must be given to all the joint tenants.[1] But proof of service of such notice on one joint tenant will be *prima facie* evidence of such notice having reached all the joint tenants.[2] But this presumption will only arise where a notice to quit has been prepared, addressed and sent to all the joint tenants. Where no notice was addressed to one of the joint tenants at all, the presumption cannot arise. In such a case the mere service of notice on the other joint tenants will not be sufficient to determine the lease.[3]

Where the joint tenants constitute members of a joint Hindu family living together in the same house, the service on one of them, at their residence, of a notice addressed to all of them is enough.[4] In such a case, it is not necessary that separate copies of the notice must be served.[5]

Where a lease has been granted to one member of a joint Hindu family, the lease can be determined by a notice to quit issued to such member alone and it is not necessary to serve a notice on all the members of the family.[6]

Lessee's heirs :

Where a lessee dies leaving a number of heirs, all the heirs must be served with a notice to quit if the lease is to be determined.[7] Where there are several co-lessees, one of whom dies, a notice to quit to the survivors alone is not enough. A notice to quit must be served on the

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Note 37

1. ('18) 5 AIR 1918 P C 102 (111, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ramshashi Roy.*
('25) 12 AIR 1925 Cal 752 (753, 754) : 87 Ind Cas 708 (DB), *Bejoy Chand Mahatab* v. *Kali Prasanna.*
[But see ('06) 30 Bom 137 (146) : 7 Bom L R 735 (DB), *Secy. of State* v. *Wamanrao.* (Joint occupation by three executors of the premises of deceased tenant—Notice to quit served only on one of them is enough.)]
2. ('18) 5 AIR 1918 P C 102 (111, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ramshashi Roy.*
('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijudin.*
('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman* v. *Khanderao.*
3. ('25) 12 AIR 1925 Cal 752 (753, 754) : 77 Ind Cas 708 (DB), *Bejoy Chand Mahatab* v. *Kali Prasanna.*
4. (1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*
5. (1900) 4 Cal W N 572 (574) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*
6. ('97) 1897 Bom P J 188 (188) (DB), *Vishwanath* v. *Venkata Charya.*
7. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*

heirs of the deceased also. Otherwise the notice will not be sufficient to determine the lease.[8]

Where a sole tenant dies leaving several heirs, *separate* notices to quit served on all of them are enough to determine the lease. It is not necessary that there must be a *single* notice to all of them.[9]

Lessee's assignee:

The assignee of a lease is entitled to a notice under this section.[10] But a sub-lessee is not entitled to any notice before he can be ejected by the superior lessor. The reason is that there is no privity between the two.[11] An assignee of a lease, on the other hand, stands in the shoes of the assignor, i.e., the original lessee and there is privity between such assignee and the lessor. Where a tenancy is purchased by one person benami in the name of another, a notice to the real purchaser is enough to determine the lease. A notice to the benamidar is not necessary.[12]

38. Notice to or by agent. — This section is subject to the general law of agency. Hence a notice to quit can be given by[1] or to a duly authorised agent so as to bind the principal. It is conceived, however, that when a notice is given by some person other than the lessor or lessee himself, the circumstances must show that the party to whom the notice is given knows that the person giving the notice is the agent of the other party. Otherwise, the notice will lack the essential quality of a notice to quit, namely, the quality of informing the person, to whom the notice is given, that the *other party* to the lease intends to terminate the lease by a certain date. But it has been held in England that where a notice is given by a general agent, his authority need not appear on the face of the notice.[2] This is perhaps because in such a case the party served with notice may be presumed to have notice of the authority of the person who actually gives the notice.

Where an unauthorised person gives a notice to quit on behalf of another, the notice will be invalid. It cannot be ratified by the person on whose behalf it purports to be given.[3] This is expressly provided for under the Contract Act: see S. 200 of that Act and illustration (b) to that section.

An authority to give a notice to quit need not be in writing.[4] The authority to sue in ejectment includes an authority to give a notice to quit.[5]

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8. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*
9. ('02) 6 Cal W N 134 (138) (DB), *Ismail Khan Mahomed* v. *Kali Krishna.*
10. ('07) 5 Cal L Jour 205 (207) (DB), *Habul* v. *Kashimani Debi.*
11. ('97) 1897 Bom P J 188 (188) (DB), *Vishwanath* v. *Venkata Charya.*
12. ('26) 13 AIR 1926 Cal 634(637):92 I.C. 963, *Gopal Chandra* v. *Satya Bhanu.*

Note 38

1. ('35) 22 AIR 1935 Cal 577 (578) : 157 I.C. 1115, *Panchu Charan* v. *Benode Behari.*
2. (1868) 3 Q B 567 (572), *Jones* v. *Phipps.*
3. ('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim* v. *Eusuf.*
4. ('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijuddin.*
5. ('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijuddin.*

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The provision in the second paragraph of the section that a notice to quit must be signed by or on behalf of the person giving the notice only refers to the *signature* to the notice. The provision does not refer to the *giving* of the notice, i.e., the *decision* to give the notice. The agent's authority under the general law relates to the *decision* to give notice.

As regards the authority of an agent to *receive* a notice, the section provides that a notice must be sent by post or served personally on the party to be bound by the notice. If the notice is to be served on any other person so as to bind the person for whom the notice is meant, the service must be on one of his family or servants at his residence. This provision does not mean that a notice cannot be directed to an *agent* of the other party to the lease who does not reside with him. The provision only means that in serving a notice on the agent or the principal, the procedure laid down in the section must be followed.

Under the general law, a notice served on an agent who is duly authorised to receive it will bind the principal, although such notice may not actually reach or be brought to the knowledge of the principal.[6] Under S. 229 of the Contract Act, a notice given to an agent in the course of the business transacted by him for the principal shall, as between the principal and third parties, have the same legal consequence as if it had been given to the principal. This provision applies also to notices to quit.[7]

As regards the authority to take delivery of a notice to quit sent by post or to *sign* the postal acknowledgment form for such notice sent by registered post, see Note 45.

39. Period of notice. — This section requires a notice of six months in the case of a yearly tenancy and a notice of fifteen days in the case of a monthly tenancy. The parties to a lease may provide for a shorter or longer notice than this by special contract, in which case, the provisions of this section will not apply. But in any case, if the period of the notice is shorter than that prescribed (by this section or contract, as the case may be) such notice will not be sufficient to terminate the lease.[1] But the notice may be for a longer period than required.[2]

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6. ('18) 5 AIR 1918 P C 102 (110, 111, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ramsashi Roy.*
('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon* v. *Meharali.*
7. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon* v. *Meharali.*

Note 39

1. ('93) 3 Mad L Jour 222 (223) (DB), *Pranambal Achee* v. *Palaniappa Mudaliar.*
('29) 16 AIR 1929 Nag 332 (333) : 124 Ind Cas 256, *Mulchand Balbhaddar* v. *Municipal Committee, Gondia.*
('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmed Moolla.*
('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*
('08) 12 Cal W N 724 (725) (DB), *Bhola Nath* v. *Durga Prosad.*
2. ('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*

Where a notice falls short of the requisite period, the mere fact that the tenant is actually allowed to hold the property for the full length of the period for which notice ought to have been given and a suit for ejectment against him is brought only afterwards, will not cure the defect in the notice so as to make it effectual for the purpose of terminating the tenancy.[3] But where the party to whom a notice is given accepts it and acts upon it, the fact that it is not of the requisite length will not matter.[4] In such a case, the lease will be terminated on the principle of surrender. (See S. 111.)

To terminate a tenancy under this section the notice must be of fifteen *clear* days or six *clear* months according as the tenancy may be a monthly or a yearly one.[5] This means that the period from the service of the notice to the time when the lease is expressed therein as terminated must not be less than fifteen days or six months as the case may be. This would require the exclusion of the day on which the notice is served but not of the day on which the tenancy is purported to be terminated.[6] The reason is that the tenant would be entitled under the notice to hold on till the midnight of such day.

Where a notice is prescribed by the contract of lease itself and consequently this section does not apply but the contract does not specify the length of the notice, it has been held that the period for which notice is to be given must be determined according to the principles of English law and that at least a notice of six months must be given in the case of a tenancy from year to year.[7]

40. Expiring with end of year or month of tenancy. — A notice under this section must expire with the end of a year or month of the tenancy as the case may be. This means that the time at which the notice says that the tenancy is to terminate must coincide with the time at which a year or month of the tenancy (as the case may be) expires. Thus, where under a monthly tenancy the usual calendar month according to the British calendar is intended to be the month of the tenancy, a notice under this section must be for terminating the tenancy at the *end* of a calendar month. A notice which does not expire with the

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('32) 19 AIR 1932 P C 279 (280) : 59 Ind App 414 : 141 Ind Cas 514 (P C), *Benoy Krishna Das* v. *Salsiccioni.*

('20) 7 AIR 1920 Cal 361 (361) : 58 Ind Cas 835 (DB), *Gaya Nath* v. *Anukul Chandra.*

('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.*

(1894) 7 C P L R 150 (151), *Upasia* v. *Jago.*

3. (1900) 28 Cal 118 (122) : 4 Cal W N 790 (DB), *Subodini* v. *Durga Charan.*

('91) 15 Bom 407 (411) (DB), *Vithu* v. *Dhondi.*

4. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmed Moolla.*

5. (1900) 28 Cal 118 (122) : 4 Cal W N 790 (DB), *Subodini* v. *Durga Charan.*

6. ('15) 2 AIR 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*

('08) 12 Cal W N 1059 (1064), *Adolphe Shrager* v. *Emma Price.*

7. ('19) 6 AIR 1919 Pat 108 (111) : 50 Ind Cas 8 (DB), *Ganga Singh* v. *Chairman Dist. Board, Patna.*

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end of a year or month of the tenancy (as the case may be) will be invalid under this section.[1] Thus, a notice terminating the tenancy *before* the end of the current year or month of the tenancy, in which such notice is given, will be bad.[2]

Where a notice to quit under this section does not expire with the end of a month or year of the tenancy as required by this section, the mere fact that the notice is for a longer period than is required under this section[3] or that it expires *after the end of the current* year or month of the tenancy will not validate the notice. Similarly, where a notice under this section does not expire with the end of a year or month of the tenancy, the mere fact that the tenant is allowed to hold on till the end of such a period and the suit for ejectment is brought against him only afterwards cannot cure the defect in the notice so as to make it effective for the purpose of terminating the tenancy.[4]

The question whether a notice to quit expires with the end of a year or month of the tenancy is one of construction of the notice in each case. In construing a notice for this purpose, the principles mentioned in Note 19 must be remembered. Under those principles the validity of a notice must not be made to depend on the "splitting of a straw" as it is put. If a notice, on a fair and rational construction, clearly expresses the intention to terminate the lease at the end of a year or month of the tenancy, it must not be held to be invalid merely because on a hypercritical examination of it there may be some reason for saying that it is not accurate.

On this principle, it is immaterial whether a notice is to quit on the last day of a month or year of the tenancy[5] or on the next day

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Note 40

1. ('85) 7 All 899 (902, 903, 904) : (1885) All W N 288 (FB), *Bradley* v. *Atkinson*. (On appeal from 7 All 596.)
('26) 93 Ind Cas 643 (644) (DB) (Cal), *Khosal Chandra* v. *Brindarani*.
('96) 1896 All W N 51 (51), *Sahtawan* v. *Mohan Singh*.
('98) 2 Cal W N 383 (384) (DB), *Shaik Sona Ullah* v. *Troylukho Nath*.
('28) 15 A I R 1928 Cal 392 (395) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janki Nath*.

2. ('10) 5 Ind Cas 699 (700) : 6 Nag L R 17, *Udebhan* v. *Jagannath*.
(1891) 4 C P L R 32 (32), *Harlal Onkar* v. *Narain Das*.

3. ('20) 7 AIR 1920 All 104 (105) : 57 Ind Cas 593 (DB), *Seoti Bibi* v. *Jagannath*.
('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit*.
('96) 1896 All W N 51 (51), *Sahtawan* v. *Mohan Singh*.
('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand*.
('23) 10 AIR 1923 Cal 524 (527) : 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co., Ltd*.
('85) 7 All 899 (902, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson*.

4. ('85) 7 All 899 (902-904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson*.

5. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan*.
('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni*.

after that.[6]

Similarly, a notice requiring a yearly tenant to vacate before the expiry of the last day of the year is good, as there is no appreciable interval between the expiry of the notice and the end of a year of the tenancy.[7]

A notice to quit by the last day of a year or month of the tenancy is valid.[8] Such a notice intends to keep the lease in force till the midnight of the day mentioned.

Under the English law also, a *periodic* tenancy, such as those referred to under this section, can only be terminated by a notice expiring with the *end* of a current period of the tenancy and not at any other time.[9]

It must be noted that a notice may be valid under this section, although the period of notice is *longer* than is required under this section. (See Note 39.) Hence, where a notice expires with the end of a year or month of the tenancy, it is not invalidated by the fact that the period between the service of the notice and the end of such month or year exceeds fifteen days or six months. In other words, the provision in the section that a tenancy mentioned therein is terminable by a notice of fifteen days or six months expiring with the end of a month or year of the tenancy does not mean that *exactly* a period of fifteen days or six months (and not a day more) must elapse between the service of the notice and the end of a month or year of the tenancy. It only means that the notice must be for terminating the tenancy *at the end* of such a month or year and not at any other time, and that the notice must be served *at least* fifteen days or six months before the end of such period. Thus, suppose in the case of a tenancy from month to month, a month of tenancy is the usual calendar month according to the British calendar. Suppose, in such a case a notice is given on the 5th of a month terminating the tenancy at the end of the month. The notice will not be invalid merely because the notice is given more than fifteen days before the end of the month.

41. Year or month of tenancy. — A year or month of the tenancy at the end of which a notice under this section is required to expire is not the *calendar* year or month in which the notice is given. The year or month referred to is the year or month calculated with

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('25) 12 AIR 1925 Bom 167 (168) : 94 Ind Cas 631, *Mahomedally* v. *Haji Abdulla.*

('08) 12 Cal W N 1059 (1064), *Adolphe Shrager* v. *Emma Price.*

6. ('31) 18 AIR 1931 Mad 352 (354) : 131 Ind Cas 621, *Gnanaprakasam* v. *Vaz.*

('38) 68 Cal L Jour 411 (412), *Sudhansu Badini* v. *Narayan Chandra.*

('43) 47 Cal W N 207 (213), *Dhaniram Agarwalla* v. *Bholanath.*

7. (1900) 27 Cal 570 (577, 578) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*

8. ('37) 24 AIR 1937 Nag 139 (140) : ILR (1937) Nag 214 : 170 Ind Cas 790, *Sheikh Nuroo* v. *Meghraj Ramkaran.*

('21) 8 AIR 1921 All 194 (194) : 43 All 330 : 60 Ind Cas 842 (DB), *Shankar Lal* v. *Babu Ram.*

9. (1924) 1 K B 117 (125) : 93 L J K B 107 : 130 L T 26, *Queen's Club Gardens Estates, Ltd.* v. *Bignell.*

(1924) 2 K B 149 (152) : 93 L J (K B) 800 : 131 L T 568, *Precious* v. *Reedie.*

[But see (1922) 2 K B 95 (103, 107) : 91 L J K B 643 : 127 L T 337, *Simmons Crossley.* (Not followed in (1924) 2 K B 149.)]

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reference to the *commencement* of the tenancy.[1]

The provisions of S. 110 must be applied in determining on which day a lease commences for the above purpose. Thus, where no particular day is expressed as the commencement of a lease, the lease will commence on the day on which it is *made*. But where a day is named as the commencement of the lease, such day is to be excluded from calculation in computing the period of the lease.[2] Where it is uncertain from what day of the month, a tenancy from month to month began, it may be presumed that it began from the 1st day of a calendar month.[3]

Though in the case of a monthly tenancy the lease-deed may be executed and the tenant may enter into possession in the middle of a calendar month, the parties may agree that the period of the tenancy should only run from the beginning of such month i.e., from the 1st day of the month. In such cases, a month of the tenancy would coincide with the *calendar* month. Such an agreement may be express or implied. It may be implied from the date fixed for the payment of rent.[4]

Where a lease expires and the tenancy is renewed under S. 116 from year to year or month to month in favour of the tenant, who holds over after such expiry, the renewed tenancy will run from the termination of the original lease. Where the original lease was for a definite term of a year or years, the lease would, under S. 110, last during the whole of the anniversary of the day from which it commenced. Hence, in such cases, the tenancy by holding over will commence from the next day after such anniversary, and a month of the tenancy must be determined with reference to such commencement.[5] Thus, for instance, if a lease for four years commenced from 1st June 1921, the lease would last through the whole of 1st June 1925. If the tenant held over and the tenancy was renewed from month to month under S. 116, such tenancy must be held to have commenced on the 2nd June 1925.

Note 41

1. (1894) 7 C P L R 150 (151), *Upasia* v. *Jago.*
('13) 19 Ind Cas 758 (759) (All), *Jugla* v. *Har Narain Singh.*

2. See however (1895) 1 Q B 378 (383) : 64 L J Q B 200 : 72 L T 62 : 43 W R (Eng) 228, *Sidebotham* v. *Holland.* (NOTE — This English decision lays down a rule contrary to S. 110.)

3. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *Bagchi* v. *Morgan.*
('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra Tewary* v. *Secretary of State for India.* (Month according to Bengali calendar.)

4. ('36) 23 AIR 1936 Oudh 306 (307) : 12 Luck 241 : 162 Ind Cas 712 (DB), *Ramji Lal* v. *Secy. of State.*
('07) 30 Mad 109 (111):16 Mad L Jour 533 (DB), *Arunachella Chettiar* v. *Ramiah Naidu.*

5. ('32) 19 A I R 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna* v. *Salsiccioni.*
('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmatullah* v. *Md. Husain.*
('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit.*
[*See also* ('31) 18 A I R 1931 Mad 352 (353, 354) : 131 Ind Cas 621, *Gnanaprakasam* v. *Vaz.* (In this case, however, it was held that there was a contract for making the month of the monthly tenancy by holding over, coincide with a *calendar* month.)]

Hence, a month of the tenancy would, in the case, be the period from the 2nd day of any calendar month, during the currency of the lease, to the 1st day of the next calendar month, both days being included. In other words, so long as the lease has not been determined, the 1st day of every *calendar* month would be the last day of a month of the *tenancy*. Hence, a notice to quit on the 1st of any calendar month would be a notice expiring with the end of a month of the tenancy.

In some decisions,[6] however, the tenancy by holding over in such cases is treated as commencing on the *anniversary* of the day on which the original lease for a term had commenced. It is submitted that such decisions overlook the provisions of S. 110 and are not correct law in view of the express decision of the Privy Council in *Benoy Krishna* v. *Salsiccioni*.[7]

42. Calendar for calculation of time.—The terms "month" and "year" have been defined in the General Clauses Act of 1897, S. 3, clauses (33) and (59) respectively as being reckonable according to the British calendar. These definitions are made applicable to this Act by S. 4 of the General Clauses Act. Hence, the expressions year to year, month to month, six months' notice, year of tenancy, and month of tenancy, occurring in this section must be understood and interpreted according to the British calendar. But this rule will not apply where there is a contract to the contrary. Such contract may be express or implied. Thus, there may be an implied contract that a year to year lease must be reckoned according to the Bengali calendar and not according to the British calendar. In such a case, a notice of six months expiring with a year of the tenancy calculated according to the Bengali calendar will be sufficient to terminate the tenancy.[1] The same principle will apply to a tenancy from month to month *mutatis mutandis*.[2]

It has been held that the expression "month" used in a business or legal document means a *calendar* month.[3]

43. Form of notice. — The general principle is that where there is no statutory provision for the determination of a tenancy by a

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6. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa*.
('26) 93 Ind Cas 643 (644) (DB) (Cal), *Khoshal Chandra* v. *Brindarani*.
('27) 14 A I R 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank Ltd.* v. *Janoki Nath Roy*.

7. ('32) 19 A I R 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC).

Note 42

1. ('16) 3 A I R 1916 Cal 576 (577) : 30 Ind Cas 887 (DB), *Behari Nath* v. *Kailas Chandra*.

2. ('27) 14 A I R 1927 Cal 941 (944) : 103 Ind Cas 93 (DB), *Kesoram Poddar* v. *Banamali Dey*.
[*See also* ('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra* v. *Secy. of State*. (Non-agricultural lease—Presumption was that it was monthly tenancy expiring with the last day of each month of Bengali year.)]

3. (1925) 1 K B 14 (21, 22) : 93 L J K B 1009 : 132 L T 240, *Phipps and Co.* v. *Rogers*.

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written notice, a notice to quit may be oral.[1] But this section expressly requires a notice to quit to be in writing. The section permits such a notice to be signed either by the person who gives it or on his behalf by some other person. This means that a notice under this section may be signed by a party personally or by his authorised agent.[2]

A notice to quit implies that it is addressed to the person to whom the notice is given. Where this is not the case, there would be no valid notice under this section. Thus, the mere institution by the lessor of proceedings for the possession of the leased property under S. 145 of the Criminal Procedure Code will not be a notice to quit.[3] Similarly, a mere resolution passed by a Municipal Council deciding to determine a lease granted by the municipality will not, in itself, amount to a notice to quit under this section.[4]

44. Mode of service. — A notice under this section must be served in one or other of the four modes prescribed by the section. These are :

(1) By post.
(2) By delivery or tender to the addressee personally.
(3) By delivery or tender to one of his family or servants at his residence and
(4) By affixing the notice to a conspicuous part of the demised property.

Out of the methods 2 to 4, the last is to be resorted to only when 2 and 3 are not practicable.[1] The sender of the notice is free to adopt any of the *other* three modes of service as he may think fit.[2] For instance, he can get the notice served by delivery or tender to a member of the addressee's family or to one of his servants at his residence though service of the notice personally on the addressee is not impracticable.[3] Similarly, a notice may always be sent by post although the other modes of service prescribed by the section are not impracticable.

But when a notice is not sent by post, the delivery or tender of the notice must be made to the addressee personally except when such delivery or tender is made at his *residence*, in which case it may be

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Note 43

1. ('07) 34 Cal 57 (63, 64) : 11 Cal W N 225 (229, 230) (DB), *Deo Nundan* v. *Meghu Mahton.*
2. ('15) 2 A I R 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobindachandra* v. *Dwarka Nath.* (Notice signed by am-mukhtear—Power of attorney not produced—But defendant admitting that person signing was am-mukhtear—Notice valid.)
('25) 12 AIR 1925 All 199 (200) : 78 I.C. 651, *Bhagwana* v. *Shib Sametri Prasad.*
3. ('79) 4 Cal 339 (341) (DB), *Ram Rotton* v. *Netro Kally.*
4. ('28) 15 AIR 1928 All 95 (95, 96) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

Note 44

1. ('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.*
('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*
2. ('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*
3. (1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*

made to one of his family or servants.[3a] It follows from the above that *personal* service on the addressee can be effected at any place. But vicarious service can only be at his residence.[4]

Where a notice is desired to be served at the residence of the addressee it must be delivered or tendered to him or to one of his family or servants. In the absence of such delivery or tender, merely beating a drum and affixing the notice to the wall of the house wherein the addressee resides will not be enough.[5]

The *tender and refusal* of a notice is as good as *delivery* of the notice for the purpose of this section. This principle applies also to cases where the refusal is not by the addressee himself but by one of his family or servants at his residence.[6]

It is conceived that where a notice is delivered or tendered at the *residence* of addressee, to one of his family or servants, the service would be effective although the notice has not actually reached the addressee.

The advertisement of a notice in a newspaper will not be a valid mode of service under this section.[7]

As to whether sending a notice to a party's pleader or solicitor will be enough, see Note 46. As to the presumption arising from service of notice on one of the joint tenants, see Note 37.

It has been held in England (where there are statutory provisions prohibiting certain acts being done on Sundays) that a notice to quit by a tenant is good though given on a Sunday.[8]

45. Service by post. — The section as amended by Act XX of 1929 expressly recognises service by post as a valid mode of service of a notice under this section. As the Special Committee point out in their Report the amendment only gives express legislative effect to what was already regarded as the law on the subject both in India and in England.[1]

3a. ('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.* (Delivery or tender to member of family or servant at residence is enough though there is no proof of *prior* tender or delivery to tenant personally.)

4. ('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ram Shahi Roy.*
('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

5. ('19) 6 AIR 1919 Cal 400 (401) : 51 Ind Cas 44, *Biseswar Roy* v. *Pitamber Nath.*

6. ('10) 5 Ind Cas 783 (784) (DB) (Cal), *Latifdar Rahman* v. *Forbes.*
('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari Dasi.*

7. ('83) 7 Bom 474 (478) (DB), *Chandmal* v. *Bachraj.* (NOTE—This was a case before the Act—But the law would be the same under the present section.)

8. (1867) 16 L T 157 (158), *Sangster* v. *Noy.*

Note 45

1. ('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458:45 Ind App 222 : 48 Ind Cas 277 (PC), *Hari Har* v. *Ramsashi.*
(1906) 2 K B 81 (82) : 75 L J K B 476 : 94 L T 778 : 54 W R (Eng) 604, *Sivewright* v. *Allen.*
('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*

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The principle of the matter is this. If a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would apply with still greater force to letters which the sender has taken the precaution to register and is not rebutted by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.[2]

In this connection, reference may also be made to the following statutory provisions:

(1) Under section 16 of the Evidence Act, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Illustration *(b)* to the section is as follows: "The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office are relevant."

(2) Under S. 114 of the Evidence Act, illustration *(f)*, the Court may presume that the common course of business has been followed in particular cases. Under this principle, where it is shown that a letter was properly directed and posted, the Court may presume that it duly reached the addressee. But the presumption under S. 114 is only one of *fact*[3] and the Court may decline to draw such presumption in the circumstances of a given case. For instance, if it is shown that the usual course of the post was interrupted by disturbances, the Court may refuse to presume that the letter reached the addressee.

(3) Under S. 27 of the General Clauses Act of 1897, where any Act of the Central Legislature requires or authorises any document to be served or sent by post, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

It must be emphasised that the presumption of due service arising on general principles and from the above provisions of law, applies only in cases in which it is shown that the notice was properly *addressed.*[4]

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2. ('18) 5 AIR 1918 P C 102 (111, 112): 46 Cal 458: 45 Ind App 222: 48 Ind Cas 277 (PC), *Harihar* v. *Ramsashi.*

('29) 16 AIR 1929 Cal 651 (653): 57 Cal 10: 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijuddin.*

('36) 164 Ind Cas 446 (448) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.* (Notice sent by registered post—Postal acknowledgment received—Service held proved.)

3. ('08) 7 Cal L Jour 251 (258, 259) (DB), *Hossein* v. *Gopi.*

4. ('08) 7 Cal L Jour 251 (258, 259) (DB), *Hossein* v. *Gopi.* (There is no presumption that a letter which was posted was properly addressed.)

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The express provision under the amended section that the notice may be sent by post only contemplates the sending by post to the *correct address.*[5]

Suppose, a notice is sent by registered post but is returned as having been refused by the addressee. This will be sufficient service of the notice for the purpose of this section,[6] as a valid *tender and refusal* of a notice have the same effect as a *delivery* thereof. But there is a conflict of decisions as to whether the production in Court of the cover, in which the notice was sent, with the endorsement of the postal official to the effect that it was refused by the addressee, would be sufficient to prove tender and refusal by the addressee. The general view is that the production of such cover will be enough for the purpose.[7] But the contrary view has been taken in the decision noted below.[8]

In the undermentioned case,[9] the Bombay High Court held that where a notice sent by post is tendered to the addressee but refused by him and returned unopened to the sender, it cannot be held to be validly served. The reason given was that one cannot assume that, because an addressee declines to accept a particular envelop, he has guessed correctly its contents. The view is against the general consensus of opinion in the matter.

Although the amendment of 1929 only gives express legislative effect to an already accepted principle, one thing must be noted. Before the amendment the provision in the section that the notice must be delivered or tendered personally to the addressee or to one of his family or servants at his residence was also applicable to service through the post office.[10] Under the amended section, the above provision will not

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5. ('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.*

6. ('20) 7 AIR 1920 All 104 (105) : 57 Ind Cas 593 (DB), *Seoti Bibi* v. *Jagannath Prasad.* (Notice to quit contained in a post card.)
('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*
('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari.*

7. ('38) 25 AIR 1938 All 388(389, 390) : 176 I.C. 393, *Bachcha Lal* v. *Lachman.*
('36) 164 Ind Cas 446 (448) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.*
('88) 15 Cal 681 (683) (DB), *Jogendro Chunder* v. *Dwarka Nath.*
('20) 7 AIR 1920 Cal 287 (288) : 54 Ind Cas 5 (DB), *Girish* v. *Kishore.*
('02) 6 Cal W N 134 (137) (DB), *Ismail Khan* v. *Kali Krishna.*
('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.*
('71) 16 Suth W R 223 (224) (DB), *Lootf Ali* v. *Pearee Mohun.*
[*See also* ('18) 5 AIR 1918 Cal 216 (217) : 45 Ind Cas 917 (DB), *Kalamua Khadim* v. *Amir Ali.*]

8. ('15) 2 AIR 1915 Cal 313 (315, 320) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*
[*See also* ('18) 5 AIR 1918 Nag 202 (202) : 48 Ind Cas 904, *Raja Udram* v. *Khanbeg Amirbeg.* (Where a defendant denied the receipt of notice alleged to have been sent to him through registered post it is incumbent upon the plaintiff to call upon the post peon to prove that the registered post card was tendered to him and was refused by the defendant.)]

9. ('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao.*

10. ('01) 28 Cal 118 (120): 4 Cal W N 790 (DB), *Subadini* v. *Durga Charan Lal.*

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apply to service of notice by post.[11] Thus, before the amendment, if a notice sent by post was delivered to a servant of the addressee at his place of *business* (not being the addressee's *residence*) the service would not have been sufficient.[12] But such delivery would be sufficient under the amended section.

At the same time, it must be noted that *mere despatch* of a notice by post would not be sufficient even under the amended section. Thus, if it is shown that a notice sent by post has not reached the addressee, there would be no effective service under this section, unless it is proved that the notice was delivered or tendered to one of his family or servants at his residence by the postman. On the question whether the notice has reached the addressee or not, the Court is entitled to draw upon the usual presumptions which the law allows as to communications sent by post. The section does not create any *new* presumption in regard to this matter. So, if a question arises whether a notice sent by post has reached the addressee or was tendered to him, the considerations that would govern the determination of the question would be the same after the amendment as before. The remarks of the Allahabad High Court in the undermentioned decision[13] which imply the contrary are, it is submitted, not correct.

From the above discussion, it will be clear that where a notice is delivered to some person other than the addressee himself the question whether it has been sent by post or otherwise is material in two ways :

(1) If the notice is sent by post the question *where* it is delivered is not material so long as it reaches the addressee in time. But if the notice is not sent by post and it is delivered to some person other than the addressee himself the service will not be valid unless, *inter alia*, the delivery is made at the *residence* of the addressee.

(2) Where a notice sent by *post* is delivered to some person other than the addressee himself, the service will not ordinarily be valid if the notice has not actually reached the addressee unless the person to whom it was delivered was duly authorised by the addressee to receive such notice. But where a notice is delivered or tendered at the *residence* of the addressee to a member of his family or to one of his servants, the service will be effective and valid although the notice does not actually reach the addressee. This rule will also apply to notices sent by post.

46. Service of notice on party's pleader or solicitor. — The service of a notice to quit on a party's pleader or solicitor will not be valid under this section, unless such pleader or solicitor is authorised as an agent to *receive* such notices on his behalf.

In the following cases the service by post was held to be good as the notice was delivered or tendered as provided for by the section :
(1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*
('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari.*

11. ('38) 25 AIR 1938 All 388 (389, 390) : 176 Ind Cas 393, *Bachcha Lal* v. *Lachman.*

12. ('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

13. ('38) 25 AIR 1938 All 388 (389, 390) : 176 Ind Cas 393, *Bachcha Lal* v. *Lachman.*

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But in the undermentioned cases[1] the view was expressed that, if a notice is sent to a party's pleader or solicitor and is sent by such pleader or solicitor to the party, this would be tantamount to a *personal* service on the party, though it is an indirect mode of service. It is submitted with respect that this view is not correct.

In the above circumstances, unless the pleader or solicitor is authorised to *receive* the notice on his client's behalf the service will not be valid, merely because the lawyer forwards the notice to the client and the notice reaches the client's hands eventually.

As regards the question of treating the notice as being served on the client *personally*, no doubt, the section does not require that the giver of the notice must serve the notice himself personally. But it is certainly contemplated that the person who delivers the notice must be the giver of the notice himself or his agent. Thus, if A wishes to give a notice to quit to B but hands over the notice to C who is not A's agent, the mere fact that C delivers it to B is not tantamount to a "delivery" of the notice to B within the meaning of the section. Hence, in such a case, unless C is a member of the family of B or is his servant and the notice is delivered to C at B's *residence*, the service will not be effective under this section. Hence, the fact that a notice to quit eventually finds its way into the hands of a party after being first delivered to his lawyer will not amount to a service of the notice *personally* on the party himself as contemplated by this section.

47. Leases by Government. — This section does not apply to leases of land by the Government, as the Crown Grants Act expressly excludes from the operation of this Act transfers of land and interests therein by or on behalf of the Crown. (See S. 105, Note 1.) But the English common law rule has been applied to such cases as a principle of justice, equity and good conscience. It has accordingly been held that a lease by the Government for building purposes fixing no term must be presumed to be a yearly tenancy determinable by six months' notice expiring with a year of the tenancy.[1]

A notice to quit given on behalf of the Government need not be signed by the Secretary of State for India himself. A notice signed by the Collector will be enough.[2]

Note 46

1. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon Haji Hamid* v. *Meherali Din Mahomed.*
('96) 22 Bom 754 (757), *Bhojobhai* v. *Hayen Samuel.*

Note 47

1. ('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.* (Notice given only to original lessees and not to transferees from them is bad.)
('37) 24 AIR 1937 Pat 399 (402, 406) : 171 Ind Cas 461 (DB), *Secretary of State* v. *Sarat Chandra.* (Tenancy-at-will becomes one from year to year on payment of rent.)
('37) 24 AIR 1937 Pat 444 (446) : 170 Ind Cas 677 (DB), *Secretary of State* v. *Beni Prasad Sahu.* (There was no evidence as to the commencement and hence the notice ending with the end of the financial year was assumed to be valid.)
2. ('08) 8 Cal L Jour 34 (37) (DB), *Rakhal Chandra* v. *Secy. of State.*

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Notes 48–49

48. **Lease by municipality.** — A municipality is not outside the purview of this section. A lease by a municipality will, therefore, be subject to the provisions of this section. Such a lease cannot, therefore, in the absence of a contract to the contrary, be determined by a mere resolution passed by the Municipal Council and without any notice being served on the lessee in accordance with the provisions of this section.[1]

49. **Notice in cases not governed by this section.** — This section embodies a principle of general applicability. Hence even in cases in which a lease is not governed by this section, it will be regarded, in the absence of a contract, local law or usage to the contrary, as determinable by a sufficient notice given by either party to the other.[1] The lease will not be determinable without such notice.[2]

The requirements of this section as to the validity of a notice will not apply to such cases.[2a] The question of the sufficiency of notice in such cases will have to be determined according to the principles of justice, equity and good conscience. It will have to be seen in each case whether the notice given is a *reasonable* one with regard both to the length of such notice and the time at which it is to expire.[3] The question

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Note 48

1. ('28) 15 AIR 1928 All 95 (95, 96) : 107 Ind Cas 690, *Aminullah* v. *Emperor*.

Note 49

1. See cases under foot-note (2).

2. ('33) 20 AIR 1933 Mad 165 (165, 166) : 145 Ind Cas 690, *Gurumurthi* v. *Rangiah*.

('75) 23 Suth W R 271 (271), *Betts* v. *Jamie Shaikh*.

2a. ('28) 15 AIR 1928 Lah 348 (348, 349) : 106 Ind Cas 537, *Ram Nath* v. *Badri Nath*. (This section does not apply to the Punjab.)

('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Sommake*. (Neither the provisions of the Transfer of Property Act nor the principles of English law in regard to a notice to quit are strictly applicable to agricultural leases in India.)

3. ('67) 7 Suth W R 152 (152) (DB), *Ram Khelawan Singh* v. *Mt. Soondra*. (Implied tenancy by holding over.)

('80) 15 Bom 415*n* (415*n*) : 1880 Bom P J 10 (DB), *Ramchandra* v. *Daulatji*. (Notice to a yearly tenant in November to quit in the following March is an insufficient notice.)

('09) 2 Ind Cas 656 (659) : 36 Cal 927 (DB), *Pertab Narain* v. *Maigh Lal*.

('99) 26 Cal 761 (764) (DB), *Digambar* v. *Jhari*.

('70) 13 Suth W R 267 (268) (DB), *Bunwari* v. *Mahima Chandra*.

('43) 75 Cal L Jour 431 (433) (DB), *Harendra Nath* v. *Benoyendra Nath*. (Pre-T. P. Act tenancy.)

('28) 15 AIR 1928 Pat 354 (355) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad*.

('74) 21 Suth W R 268 (269) (DB), *Mt. Tetra Kooer* v. *Bhunjan Roy*.

('75) 23 Suth W R 440 (440) (DB), *Hem Chunder* v. *Radha Pershad*.

('68) 10 Suth W R 33 (35) (FB), *Bakranath* v. *Binodram*. (Notice given in the last month of a current year would not be sufficient.)

('04) 8 Cal W N 774 (778) (FB), *Sulatu Dass* v. *Jadu Nath*.

('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoon Nessa Bibi* v. *Satya Sebak*.

('15) 2 AIR 1915 Cal 709 (709, 710) : 16 Ind Cas 937 (DB), *Haridas* v. *Upendra Narain*.

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will necessarily depend on the facts and circumstances of each case.[4] Local custom will also have to be given due consideration in determining the reasonableness of a notice.[5] The provisions of this section, though not directly applicable, may be kept in view as a guide to what may be a reasonable notice.[6]

On the above principles, a six months' notice will not be indispensable in every case to determine a yearly tenancy.[7] Nor will it be

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('07) 11 Cal W N 1124 (1126) (DB), *Debendra Nath* v. *Syama Prosanna.*
('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.*
('18) 5 AIR 1918 Nag 210 (211, 212) : 48 Ind Cas 354, *Banmali* v. *Nihal Singh.*
('33) 20 AIR 1933 Mad 165 (165, 166) : 145 Ind Cas 690, *Gurumurthi* v. *Rangiah.*
('12) 16 Ind Cas 351 (352) (DB) (Cal), *Raimala* v. *Shiba Sundari.*
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian.* (15 days' notice in the middle of the cultivation season was not a sufficient notice.)
('86) 13 Cal 3 (7) (DB), *Kali Kishan* v. *Golam Ali.*
('78) 2 Mad 346 (350) : 3 Ind Jur 160 (DB), *Abdulla* v. *Subbarayar.* (What is reasonable notice is a question the answer to which must depend upon the time which should be allowed for the convenient removal and procuring of another farm, possibly, by the tenant on the one hand, and for the landlord on the other hand to procure another suitable tenant—Probably the rule in England, viz., six months, will be adopted whenever the question will be considered.)
('86) 12 Cal 93 (95) (DB), *Bidhumukhi Dabea* v. *Kefyutullah.*

4. ('29) 16 AIR 1929 Mad 617 (621) : 118 Ind Cas 279 (DB), *Kochadai Devasthanam* v. *Periakaruppa.*

5. ('69) 6 Bom H C R (A C) 31 (33), *Nanabhai Rustamji* v. *Pestanji Jamsetji.*
('73) 1873 Bom P J 66 (DB), *Shanoba* v. *Balya.*
('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Somakke.*

6. ('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.*
[*See also* ('33) 20 AIR 1933 Lah 134 (134) : 141 Ind Cas 513, *Rattan Sen* v. *Krishan Kaur.* (In the case of a monthly tenancy, the tenant, according to a rule recognized in the Punjab Courts, is entitled to 15 days' notice terminating with the month of the tenancy, and a notice giving the tenant one week or 11 days to vacate is invalid.)]

7. ('17) 4 AIR 1917 Low Bur 67 (68): 42 Ind Cas 375, *Maung Po O* v. *Muniandi Servai.*
('09) 2 Ind Cas 656 (659): 36 Cal 927 (DB), *Pertab Narain* v. *Maigh Lal.* (There is no fixed rule of law as to how many days' notice will be a reasonable notice in the case of leases not governed by Transfer of Property Act—But the "tendency of the law is to narrow the field of uncertainty and the growth of law in various directions points to the substitution of the fixed for the fluid, and although it cannot be said that any fixed rule has been established by the cases, they show a tendency in that direction, that is to say, as to the length of notice and the time at which the notice should expire.")
('86) 13 Cal 3 (7) (DB), *Kali Kishen* v. *Golam Ali.*
('86) 12 Cal 82 (89, 90) (DB), *Radha Govind* v. *Rakhal Das.* (In this case 30 days' notice was held reasonable as no evidence was given to prove that the condition of the crops on the land or the custom of the country was such that the defendant was entitled to a longer notice.)
('33) 20 AIR 1933 Mad 165 (165, 166): 145 Ind Cas 690, *Gurumurthi* v. *Rangiah.*
('43) 75 Cal L Jour 431 (433) (DB), *Harendra Nath* v. *Benoyendra Nath.* (If a tenancy is in existence from before the Transfer of Property Act, the provisions of that Act do not apply to it, and the tenant is entitled only to a reasonable notice to quit—If on the analogy of the provisions of the Act six months' notice is deemed reasonable, a shortage of only three days will not render a notice to quit served on him unreasonable.)

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necessary that the notice must expire with a year of the tenancy.[8] But generally a notice of six months is considered reasonable in such cases.[9] This period of six months is to be calculated according to the calendar which the people generally follow in the particular locality. Thus, in regard to tenancies in the mofussil of Bengal, the six months' period must generally be calculated according to the Bengali calendar.[10] Further, a notice purporting to terminate an agricultural tenancy should either ask for possession at the end of the agricultural year or at least when the crop of the year has been harvested.[10a]

A notice will not be reasonable if it requires the tenant to quit the property immediately and does not fix any time for doing so.[11] It is conceived that in such cases, the alleged notice will not be a *notice* at all to quit but simply a demand for possession.

The undermentioned are illustrative cases as to what will be a reasonable notice[12] and what will not be such notice.[13]

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8. ('86) 13 Cal 3 (7) (DB), *Kali Kishen* v. *Golam Ali.*
('85) 12 Cal 93 (95) (DB), *Bidhumukhi Dabea* v. *Kefyutullah..*
('25) 12 AIR 1925 Mad 346 (347) : 85 Ind Cas 339, *Jaru Poojari* v. *Somakke.*
('83) 9 Cal 48 (49) : 11 Cal L R 143 (DB), *Jugut Chunder Roy* v. *Rup Chand.* (Three months' notice expiring within 7 days of the close of the year—No crop was on the ground at the time of expiry of notice—Notice held reasonable.)
('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneswar Das* v. *Sree Kamal Deb.*

9. ('01) 5 Cal W N 801 (804) (DB), *Durga Mohun* v. *Rakhal Chandra.*
('07) 11 Cal W N 1124 (1126) (DB), *Debendra Nath* v. *Syama Prosanna.*
('12) 14 Ind Cas 152 (152, 153) (DB) (Cal), *Baroda Prasad* v. *Parsanno Kumar.* (Yearly tenancy for building purpose.)
('95) 20 Bom 759 (761) : 1895 Bom P J 291 (DB), *Ambabai* v. *Bhau.*
('80) 1880 Bom P J 209 (DB), *Amarsang* v. *Bai Man.*

10. ('15) 30 Ind Cas 886 (887) (Cal), *Gopi Nath* v. *Abdul Gafur.*
('07) 11 Cal W N 1124 (1126) (DB), *Debendranath* v. *Syama Prosanna.*
('15) 2 AIR 1915 Cal 709 (709, 710) : 16 I. C. 937 (DB), *Hari Das* v. *Upendra Narain.*

10a. ('30) 17 AIR 1930 Pat 143 (144) : 123 I. C. 609 (DB), *Nandu Mahton* v. *Bholu Mahton.*
('28) 15 AIR 1928 Pat 354 (356) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad.*
('02) 29 Cal 203 (206, 207) : 6 Cal W N 69 (DB), *Hemanginee* v. *Srigobinda.*
('97) 24 Cal 720 (722, 723) (DB), *Kishori Mohun* v. *Nund Kumar.*
[*See also* ('13) 19 Ind Cas 588 (589) : 40 Cal 858 (DB), *Guru Charan* v. *Sukhlal Hajam.*]

11. ('71) 16 Suth W R 185 (186) (DB), *Jumaut Ali* v. *Chutturdharee.*
('75) 23 Suth W R 271 (272), *C. G. D. Betts* v. *Jamie Shikh.*

12. ('74) 12 Beng L R 263 (265), *Nocoordass* v. *Jewraj Baboo.* (Monthly tenancy —Notice to quit at end of month sufficient.)

13. ('78) 2 Mad 346 (350): 3 Ind Jur 160 (DB), *Abdulla Rawutan* v. *Subbarayyar.* (Where in the case of a yearly tenancy a notice to quit was given on 25th June for immediate possession or possession at the end of the fasli, i.e., 12th July (of the same year) it was held that the notice was not reasonable.)
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian.* (15 days' notice in the middle of the cultivation season held not sufficient.)
('80) 5 Cal L R 231 (234) (DB), *Jubraj Roy* v. *Mackenzie.* (Notice to quit within thirty days served by a landlord on his tenant, at a time when the crops are ripening, is unreasonable and insufficient.)

A *verbal* notice is quite sufficient to determine a tenancy,[14] unless there is any express provision requiring a *written* notice. See also the undermentioned case.[15] Section 106 Note 49

Section 107

[a]**107.** A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

[b][All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.]

[c][Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

[d][Provided that the [e](Provincial Government) may, [f](* * *) from time to time, by [g](notification) in the [h](Official Gazette), direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

a. As to limitation to the territorial operation of this section, see section 1. Section 107 extends to every cantonment in British India by virtue of Section 287 of the Cantonments Act, 1924 (II of 1924).

b. This paragraph was substituted for the original by Section 5 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904). The original paragraph ran as follows: "All other leases of immoveable property may be made either by an instrument or by oral agreement."

c. This paragraph was inserted by Section 55 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

('79) 4 Cal 339 (341) (DB), *Ram Rotton Mundul* v. *Netro Kally Dassee*. (Ten days' notice to quit is not sufficient.)

('03) 13 Mad L Jour 137 (138) (DB), *Annammal* v. *Venkataraghavachari*. (In the case of an agricultural holding a notice to the tenant to quit in a month is not reasonable.)

('80) 15 Bom 415*n* (415*n*) : 1880 Bom P J 10 (DB), *Ram Chandra* v. *Dowlatji*. (Yearly tenancy — Notice of 3rd November 1876, requiring the tenant to give up possession in March 1877 was insufficient.)

14. ('29) 16 AIR 1929 Nag 169 (170) : 26 Nag L R 163 : 116 Ind Cas 662, *Zingu* v. *Ramji*. (Agricultuiral tenant.)

('75) 23 Suth W R 312 (313) (DB), *Shaikh Golam Mehdee* v. *Amjad Ali*.

15. ('29) 16 AIR 1929 Pat 630 (633) : 119 Ind Cas 551 (DB), *Jhagru Mian* v. *Raghunath Singh*. (Section 106, T. P. Act, was not applied as the lease was agricultural lease and according to Chota Nagpur Tenancy Act which applied to the case, no notice was necessary.)

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d. This proviso was added by Section 5 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904).

e. Substituted by A. O. for the words "Local Government".

f. The words "with the previous sanction of the Governor-General in Council" were repealed by A. O.

g. The following notifications have been issued under this section :—

Bengal :

Any license to prospect for minerals for a term less than one year or any renewal of such license for a similar term may be made by unregistered instrument. —— Calcutta Gazette, 1915, Part I, Page 2066.

Bombay :

1. Elsewhere than in the Province of Sind, leases of immoveable property other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, may be made by unregistered instrument. —— Bombay Gazette, 1910, Part I, Page 59 (as amended).

2. In supersession of Government notification in the Revenue Department, No. 434 dated the 17th January 1910, the provision of Section 107 shall, with effect from the 1st day of December, 1913, cease to apply to leases for agricultural purposes of immoveable property in the following areas :—

(a) The Mahim, Bassein and Salsette Talukas of the Thana District.

(b) The Pen and Panvel Talukas of the Kolaba District.

—— Bombay Gazette, 1913, Part I, Page 710.

United Provinces :

Leases of houses other than leases from year to year or for any term exceeding one year or reserving a yearly rent may, when the total amount of the rents reserved thereby does not exceed Rs. 50 (fifty-rupees), be made by unregistered instrument or by oral agreement without delivery of possession. —— U. P. Gazette, 24-6-1905.

h. Substituted by A. O. for the words "Local Official Gazette."

Synopsis

1. Scope of the section.
2. Law in the Punjab.
3. Term of a lease.
4. "From year to year."
5. For any term exceeding one year.
6. Reserving a yearly rent.
7. Effect of non-registration.
8. Lease coming within the first para created by oral agreement, if can be treated as valid lease under second paragraph.
9. Paragraph 2.
10. Paragraph 3.
11. Proviso.
12. Crown Grants Act and this section.
13. Lease embodied in a decree or order of a Court.
14. Leases and the doctrine of part performance.
15. Agreement to lease.

Other Topics (miscellaneous)

Agreement of lease — Possession — Part performance. See Note 14 and S. 53A Note 17.

Agricultural leases, how created. See S. 117 Note 4.

Lease contained in several documents — Registration. See Note 7.

Leases by Government. See Note 12.

Oral agreement accompanied by delivery of possession. See Note 9.

Signed both by the lessor and the lessee. See Note 10.

Rent-note or kabuliat, whether a lease. See Note 10.

1. Scope of the section.—The section prescribes the formalities that must be adopted in order to effect a valid lease under this Act. A lease from year to year or for a term exceeding one year or reserving

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Note 1

a yearly rent can be made only by a registered instrument. A lease for a term of one year or less than a year can be made by oral agreement accompanied by delivery of possession.

The proviso to the section empowers the Provincial Government to dispense with the formality of registration or of delivery of possession prescribed for effecting leases coming within the second paragraph of the section.[1]

The registration of a document under this section is made dependent not upon the value of the property as in S. 54 or upon the amount of rent but upon the *period* of the lease. Thus, a document creating a lease for a term exceeding one year will require registration even though the value of the property or the amount of rent is very small: and a lease for a term of one year or less will not require even a written instrument even though the value of the property or the amount of rent may be very large.

Before the passing of this Act there was no provision requiring leases to be made in writing and all leases could be made by oral agreement accompanied by delivery of possession.[2] But if they were made in writing the document was required to be registered under the Registration Act if the lease was for a term exceeding one year or from year to year or reserving a yearly rent.[3] Now the documents creating

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Section 107 — Note 1

1. ('36) 23 AIR 1936 Nag 174 (175) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Syed.*

2. ('70) 14 Suth W R 250 (250) (DB), *Nursingh Poorkaet* v. *Bikrum Majee.* (If verbal lease was accompanied by delivery of possession it could prevail against a subsequent registered lease.)

('10) 8 Ind Cas 668 (671, 672) : 35 Mad 95 (102) (FB), *Ajam Sahib* v. *Ananthanarayana Aiyar.* (Per Krishnaswami Ayyar J.)

('25) 12 AIR 1925 Cal 309 (311) : 52 Cal 43 : 85 Ind Cas 103 (DB), *Abdul Hakim* v. *Elahi Baksha.* (Tests which lead to a presumption of permanent tenancy in case of lease of non-agricultural holdings stated.)

[*See also* ('11) 10 Ind Cas 489 (489, 490) (DB) (Cal), *Akram Ali* v. *Durga Prosonna.*]

3. ('12) 14 Ind Cas 540 (542) : 39 Cal 1016 (DB), *Raimoni Dasi* v. *Mathura Mohan.* (A registered kabuliat would do if it is accepted by the lessor.)

('69) 12 Suth W R 289 (290) (DB), *Puroma Soonduree* v. *Prollad Chunder.*

('69) 11 Suth W R 16 (16) (DB), *Mt. Kaboolun* v. *Shumsheir Ali.* (Unregistered deed not admitted in evidence.)

('74) 1874 Bom P J 343 (344) (DB), *Dhundiraj* v. *Cavasji.* (Assuming that kabuliat is a lease passing rights to the lessee.)

('10) 8 Ind Cas 668 (671, 672) : 35 Mad 95 (102) (FB), *Ajam Sahib* v. *Ananthanarayana Aiyer.* (Per Krishnaswami Ayyar, J.)

('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Prayag.*

('80) 2 Mad 67 (73) : 6 Ind App 170 (P C), *Ramasami* v. *Collector of Madura.*

('72) 4 N W P H C R 36 (37) (DB), *Sheogholam* v. *Buddree Nath.*

[*See also* ('70) 13 Suth W R 307 (309) (DB), *Dinanath* v. *Debnath.* (Document not admitted in evidence not being registered.)

('74) 1874 Bom P J 409 (409) (DB), *Jogoji* v. *Parashram.*

('94) 18 Bom 745 (747) (DB), *Gurunath* v. *Chenbasappa.* (Unregistered document not admitted in evidence and a suit based upon it dismissed.)

('68) 8 Agra 233 (233) (DB), *Majid Hussain* v. *Jeeawon Khewat.*

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such leases will be registrable both under this Act as well as the Registration Act.[4] Where a lease for a term of one year or less is made in writing, the document creating such lease is not required to be registered under the Registration Act.[5] Before the year 1904, a valid lease for one year or less could be created under this Act, by an unregistered instrument.[6] The third paragraph of the section was substituted in 1904 for the old paragraph and since then such a lease cannot be created by an unregistered instrument.[7]

2. Law in the Punjab. — This Act does not apply to the Punjab. But by a notification No. 183-st, issued by the Punjab Government on 27th April 1935 under S. 1 of this Act, the present S. 107 has been made applicable to all the municipal areas in that province. The result is that in all the *non-municipal areas* in the Punjab a lease for any term can be effected by oral agreement accompanied by delivery of possession[1] though, if made in writing it may require registration under the Registration Act, 1908, that Act being applicable there.[2] In all the *municipal areas* after 1935 a lease can be effected only in the manner prescribed by this section.[3]

3. Term of a lease. — The term of a lease is to be determined from the document of lease, where there is one, construed in the light of surrounding circumstances.[1] Where no period is specifically fixed, but there are words in the deed indicating the period in general, the period

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('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.* (Lease from year to year. It was not necessarily registrable under the Registration Act of 1864—Lease in this case therefore did not require registration.)
('72) 4 N W P H C R 164 (164) (DB), *Mt. Moona* v. *Jey Mungul Singh.*
('70) 2 N W P H C R 12 (13) (DB), *Rampershad* v. *Mewa Kooer.*]

4. *See also* ('14) 1 A I R 1914 All 120 (121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshilal* v. *Gopi Ballabh.* (For registration, provisions of the Registration Act and present section considered and registration held necessary.)

5. ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*
('68) 5 Bom H C R (A C) 92 (94) (DB), *Moro Vithal* v. *Tukuram Malharji.* (Lease for six months created by unregistered document.)
('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhsh* v. *Sheo Din.*

6. See Note 9.

7. See Note 9.

Note 2

1. ('33) 20 AIR 1933 Lah 61 (63) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sundar Singh* v. *Ram Saran Das.*

2. ('16) 3 AIR 1916 Lah 353 (354) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.*
('22) 66 Ind Cas 904 (905) (Lah), *Firm Karim Baksh* v. *Natha Singh.* (A lease of a house — Unregistered document not admitted in evidence.)
[*See also* ('22) 9 AIR 1922 Lah 329 (332) : 72 Ind Cas 177 (DB), *Moti Sagar* v. *Dhanna Mal.* (Lease of a house—Unregistered lease deed not admitted to prove the terms of the lease.)]

3. ('39) 26 AIR 1939 Lah 423 (424) : ILR (1940) Lah 70 : 186 Ind Cas 426 (DB), *Taj Din* v. *Abdul Rahim.*

Note 3

1. ('35) 22 AIR 1935 All 492 (493) : 154 Ind Cas 305 (DB), *Muhammad Ismail* v. *Jawahir Lal.*
('29) 118 Ind Cas 702 (703) (Bom), *Pandu Mahipat* v. *Shivshankardas.*

Section 107 Note 3

of lease for the purpose of registration must be understood to mean that period during which the lessee is entitled to continue in possession, provided he himself fulfils all the conditions stipulated in the deed.[2] Thus, if a lessee is entitled to remain in possession so long as he continues to pay the agreed rent it will be a permanent lease,[3] while, on the other hand, if lessee agrees to vacate the land whenever the lessor wants it, it will only be a tenancy-at-will.[4]

Where a period is fixed and there are words indicating the continuance of it further, the lease is only for the period fixed and the words indicating further continuance thereof simply appertain to the future consent of the parties and cannot affect the actual fixed period or create a fresh right in favour of any party.[5] Thus, where a house was let at an annual rent of three rupees for a period of one year and the lessee declared "I shall continue to pay the annual rent every year and if I fail to pay the rent in any year, the owner of the house should be at liberty to recover the rent through Court" it was held that the lease was for one year only and that the above clause did not create any rights between the parties beyond that term.[6] See also the undermentioned cases.[7]

Where no period is fixed and there is nothing in the document or the transaction to indicate it, the period will be determined under S. 106 according to the purpose of the lease.

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2. ('14) 1 AIR 1914 All 120 (121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshi Lal* v. *Gopi Ballabh.*

3. ('26) 13 A I R 1926 Bom 374 (374) : 95 Ind Cas 524 (D B), *Sona Bai* v. *Bai Hiragavri.* (Lease held permanent.)

4. ('32) 19 AIR 1932 Bom 493 (495) : 139 Ind Cas 258, *Narayan* v. *Shivshanker-das.*

5. ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*

6. ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*

7. ('77) 26 Suth W R 98 (98) (DB), *Mohunto Southo Pursad Dass* v. *Parasu Padhan.* (Lease for one year—Lessee agreeing to hold further if the lessor agrees — *Held* lease was for one year only.)

('79) 3 Bom 21 (22) (DB), *Apu Budgavda* v. *Narhari.* (Do.)

('06) 8 Bom L R 580 (583) (DB), *Benin Menahim Yousaf* v. *John Poleologo.* (Lease for one year—Lessor agreeing to continue the lease if lessee desires—*Held*, lease was for one year only.)

('90) 17 Cal 548 (556), *A. C. Boyd* v. *A. Kreig* (Do.)

('23) 10 AIR 1923 Cal 670 (672) : 70 Ind Cas 570 (DB), *Faijuddin* v. *Asrab Ali.* (Do).

('69) 5 Bom H C R (A C) 92 (94) (DB), *Moro Vithal* v. *Tukaram.* (It was provided in the lease deed that the lessee should continue in possession after the fixed term till the lessor asks him to vacate—Lease held only for the fixed period.)

('32) 19 A I R 1932 Sind 217 (218) : 26 Sind L R 377 : 140 Ind Cas 681 (D B), *Devidas* v. *Aluwalla Bros.*

('39) 26 AIR 1939 Pat 296 (303) : 182 Ind Cas 618, *Ram Lal Sahu* v. *Mt. Bibi Zohra.* (Lease of a house—Kabuliat not admissible being unregistered— No patta —Relationship of landlord and tenant not denied— Lease held from month to month.)

('27) 14 A I R 1927 Nag 353 (353) : 102 Ind Cas 305, *Rao Saheb* v. *Umrao.* (Lease of *sir* land—Kabuliat not admissible being unregistered —No patta—Relationship of landlord and tenant admitted—Tenancy held from year to year.)

Section 107 Notes 4-5

4. "From year to year." — A tenancy "from year to year" is a tenancy continuing so long as the parties desire to continue it and though terminable at the option of either party at the end of any year, it is not *ipso facto* terminated at the end of every year.[1]

Where the period of lease is not specified in the deed, the provision for the annual payment of rent does not necessarily imply that the lease is from year to year. In such cases the period of lease is to be determined under S. 106 according to the purpose of the lease.[2]

Where a lease deed was executed for a year and it was provided therein, 'this is to remain in force until another patta is granted' it was held that the lease was not for one year only, as the said words expressed an intention to create or regulate the tenancy beyond the year and from year to year.[3]

As to the meaning of "year" see Note 5.

5. For any term exceeding one year. — The term 'year' has not been defined in this Act. It is defined in S. 3, cl. 59 of the General Clauses Act, 1897, as 'a year reckoned according to the British calendar.' By virtue of S. 4 of that Act that definition is to be adopted in this Act also. In *Motiram* v. *Seth Laxmichand*[1] where a lease was for a Sambat year i. e., from Kartik Badi 12 Sambat 1976 to Kartik Badi 12 Sambat 1977 corresponding to 20th October 1919 to 7th November 1920, a period which exceeded one year according to the British calendar, and it was argued that the lease must be held to be for a term exceeding one year for the purpose of this section, Baker, J. C., observed: "I am not aware of any law by which a year calculated according to the Sambat calendar amongst Hindi speaking parties should be considered to mean a year according to the British calendar. The intention of the parties was obviously to let the house for a year only and I agree with the lower appellate Court in holding that the lease is not for a term exceeding a year." Subsequently, however, in a case[2] where the facts were exactly

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Note 4

1. ('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Saudagor* v. *Hazi Mal Gani.*
('70) 13 Suth W R 190 (190) (DB), *Malodee Noshyo* v. *Bullubee Kant.*
2. ('21) 8 AIR 1921 Pat 307 (308) : 61 Ind Cal 976 (DB), *Sanker Ram* v. *Tulsi Bhagat.*
('17) 4 AIR 1917 Pat 46 (46) : 2 Pat L Jour 180 : 39 Ind Cas 658 (DB), *Parshan Kuer* v. *Tulsi Kuer.*
('35) 22 AIR 1935 Oudh 90 (90) : 10 Luck 490 : 153 Ind Cas 609 (DB), *Narain Singh* v. *Jagat Jit Singh.*
('20) 7 AIR 1920 Cal 858 (858): 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*
('19) 6 AIR 1919 Cal 400 (400) : 51 Ind Cas 44, *Biseswar* v. *Pitamber Nath.*
('19) 6 AIR 1919 Cal 65 (66) : 50 Ind Cas 918 (DB), *Mohendra Nath* v. *Nagendra Narain.*
('20) 7 AIR 1920 Cal 581 (583) : 57 Ind Cas 798 (800) (DB), *Jogendra Chandra* v. *Syam Sunder.*
3. ('81) 3 Mad 358 (359) (DB), *Venkatachellam Chetti* v. *Audian.*

Note 5

1. ('24) 11 AIR 1924 Nag 216 (216) : 76 Ind Cas 44.
2. ('28) 15 AIR 1928 Nag 27 (28) : 23 Nag L R 152 : 105 Ind Cas 43, *Tribeni Prasad* v. *Ramdas.*

Section 107 Note 5

similar the lease was held to be for a term exceeding one year both for the purposes of the Registration Act and for the purposes of this section.

Where a tenant is entitled to hold on so long as he pays the stipulated rent or renders the stipulated service, the tenancy is for a term exceeding one year.[3] But where in a lease there is an express term that the lessee shall vacate the property in case he fails to pay the rent or *whenever the lessor requires him to do so*, the lease is not for a term exceeding one year though a period exceeding one year is mentioned therein as a period of the lease, inasmuch as the lessor can ask the lessee to vacate even the next day and the lessee cannot insist on retaining possession till the expiry of the period fixed.[4]

A lease for the *life* of a lessee is a lease for a term exceeding one year as it entitles him to hold for more than that period if he lives so long.[5]

Illustrations.

(1) A lease was described as a yearly lease, but no period was fixed and the lessor had the option to terminate the tenancy only if he found out a fraud or deceit on the part of the lessee. It was held that the lease was for a term exceeding one year.[6]

(2) Under the terms of a lease, the lessee was to pay eight annas a year as rent. If the rent was not paid any year or the lessee did not behave properly towards the lessor, the lease was to come to an end automatically. No period was fixed in the lease. It was held that though the lease might continue for an indefinite number of years there was no certainty that it would last beyond the term of one year, and that therefore the lease was not one for a term exceeding one year.[7]

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3. (1900) 2 Bom L R 488 (489) (DB), *Pagi Mania* v, *Lallubhai Dwarkadas.*
[*See also* ('30) 17 AIR 1930 Sind 178 (179) : 123 Ind Cas 293, *Devidas Zaukiram* v. *Aluwalia Brothers.* (Case under Registration Act.)
('28) 12 R D 191 (191) (DB), *Maha Narayan* v. *Jaduber Singh.* (Case under Registration Act. NOTE—There is a mistake in the judgment where it says that the lease is not for a term exceeding one year. This mistake becomes obvious when the decision upon which this judgment is based is referred.]

4. ('23) 10 AIR 1923 All 382 (383) : 75 Ind Cas 603, *Ghasi Ram* v. *Malomy Club.* (Period of lease fixed in the document was thirty years.)
('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankardas.* (Period not fixed.)

5. ('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Prayag.*

6. ('17) 4 AIR 1917 Bom 274 (275) : 41 Bom 458 : 39 Ind Cas 625 (DB), *Dhura Bhai Bhuldas* v. *Mohan Lal Maganlal.*

7. ('22) 9 AIR 1922 All 54 (54) : 65 Ind Cas 836 (DB), *Kashi Nath* v. *Abdur Rahman.*
[*See also* ('84) 8 Bom 493 (494) (DB), *Jagjivandas* v. *Narayan.* (The tenancy was for one year certain and the lessee had agreed to continue to pay the rent if the landlord allowed the land to be with him—The tenancy was held to be for one year only.)
('91) 14 Mad 271 (273) (DB), *Ratnasabapati* v. *Venkatachalam.* (Where lease provides that tenancy is determinable at any moment at the option of lessor it is not compulsorily registrable.)]

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Notes 5-6

(3) A lease deed provided : "I have taken the land from K.H. and am building a shop on it. I promise and give it in writing that I shall pay K.H. every month a rent of annas three per month. In any month in which I fail to pay the rent K.H. will be competent to have the shop vacated by me." It was held that as the lease contained an express condition for the payment of rent every month and as it was liable to be determined in any month in which a default might be made, it could not be called a lease from year to year or for a term exceeding one year.[8]

(4) A lease deed provided : 'I have taken the house on lease on a monthly rent for my personal use. If the owner deems it necessary to have the building vacated he shall give me fifteen days' prior notice whereupon I shall vacate the premises forthwith.' It was held that as there was no period fixed and as it could be determined by a fifteen days' notice it was not a lease for a term exceeding one year.[9]

(5) A lease deed provided for the payment of a monthly rent and did not specify any period. It could be terminated on non-payment of rent. But there was no clause to show that it would continue so long as the rent was paid. It was held that, in the absence of such a clause, it could not be said that it will not terminate before the end of the year, and that therefore it was not one for a term exceeding one year.[10]

6. Reserving a yearly rent. — The words 'reserving a yearly rent' show that the lease is not limited to one year only.[1] A lease reserving a yearly rent, therefore, is one for more than a year and is really a lease from year to year.[2]

A lease for an indefinite period reserving a yearly rent will not cease to be one 'reserving a yearly rent' merely because the rent is to be paid in two six monthly instalments.[3] On the other hand a lease which is terminable at the option of the lessor and which, therefore, can end even before the expiry of a year cannot be called a lease 'reserving a yearly rent' merely because a yearly rent is mentioned in

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8. ('97) 1897 All W N 69 (70), *Khairat Hussain* v. *Maheshri Prasad.*

9. ('86) 1886 All W N 115 (117) (F B), *Hanso* v. *Har Narain.*

10. ('22) 9 AIR 1922 Lah 43 (43) : 2 Lah 300 : 65 Ind Cas 254 (DB), *Attra* v. *Mangal Singh.* (L. P. A. from A I R 1921 Lah 96 (1) confirming it.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*

Note 6

1. ('34) 21 AIR 1934 All 902 (902) : 152 Ind Cas 757, *Nathu Lal* v. *Dal Chand.* (Case under Registration Act.)

2. ('96) 9 C P L R 57 (58), *Chiman Boo* v. *Hyderali.* (Case under S. 17 (d), Registration Act.)
('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram.* (Case under Registration Act.)
('34) 21 AIR 1934 All 902 (902) : 152 Ind Cas 757, *Nathu Lal* v. *Dal Chand.* (Do.)

3. ('25) 12 AIR 1925 Lah 491 (492) : 6 Lah 319 : 88 Ind Cas 872 (DB), *Ata Muhammad* v. *Shankar Das.* (Case under Registration Act.)

it.[4] So also a lease which is for a period of one year only cannot be called a lease reserving a yearly rent though there is a mention of an annual rent in the deed.[5]

7. **Effect of non-registration.** — All leases coming within the first paragraph of this section, namely, leases from year to year, or for any term exceeding one year, or reserving a yearly rent can be made *only* by a registered instrument.[1] Where such a lease is evidenced by more documents than one, all such documents must be registered.[2] Where a lease is effected by a registered instrument, an agreement which affects the incidents of the tenure created by the lease and thus forms a part of the lease, must also be registered.[3]

An unregistered document of lease, in cases where the lease is required to be registered conveys no title and creates no rights in the lessee[4] and cannot be used in evidence to prove the transac-

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4. ('26) 92 Ind Cas 526 (527) (Lah), *Aishan* v. *Municipal Committee.* (Case under Registration Act.)
[*See also* ('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.*]

5. ('40) 42 Pun L R 75 (76), *Kishori Lal* v. *Udhoram.* (Case under Registration Act.)
('17) 4 AIR 1917 Low Bur 133 (134) : 36 Ind Cas 378, *Aung Hmin Maung* v. *R. Moniandy Servai.* (Do.)

Note 7

1. ('25) 12 AIR 1925 Pat 216 (224) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya Singh* v. *Kamakhya Narain.*
('27) 14 AIR 1927 Sind 206 (207) : 102 Ind Cas 277 (DB), *Bhagwati Bai* v. *Bhagwandas.*
('42) 29 AIR 1942 Pat 397 (399) : 200 Ind Cas 769 (DB), *Ram Ranbijaya Prasad Singh* v. *Ramjiwan Ram.*

2. *See* ('17) 4 AIR 1917 Mad 274 (276) : 33 Ind Cas 439 (DB), *Morgan & Son* v. *N. P. Fernandez.* (Case under Registration Act — Letter of proposal and reply of its acceptance—Both must be registered.)

3. ('09) 4 Ind Cas 713 (716) : 37 Cal 293 (DB), *Durga Prosad Singh* v. *Rajendra Narain.* (Agreement reducing rent.)
('34) 21 AIR 1934 Lah 743 (743) : 148 Ind Cas 558, *Mohammad Din* v. *Sarada.* (Document not only varying rent but prescribing changes in terms of holding is lease compulsorily registrable—If not registered it is not admissible.)
('38) 25 AIR 1938 Cal 795 (797) : 179 Ind Cas 475, *Mohendra Narayan* v. *Profulla Kumar.*
('38) 25 AIR 1938 Cal 172 (175): 174 Ind Cas 790 (DB), *Bibhuti Bhusan* v. *Maya Deby.* (Document varying amount of rent.)
('37) 24 AIR 1937 Cal 499 (500) : 173 Ind Cas 996, *Haladhar Pathak* v. *Madan Mohan.* (Agreement varying the rent requires registration if the lease is registered.)
('36) 23 AIR 1936 Cal 155 (156) : 162 Ind Cas 33, *Parbati Charan* v. *Bandeali Akon.* (Agreement increasing rent.)
('11) 12 Ind Cas 723 (727) : 39 Cal 284 (FB), *Lalit Mohan* v. *Gopali Chauk Coal Co., Ltd.* (Agreement embodying reduction of rent and also incidents of payment and consequences of default of payment.)
('29) 16 AIR 1929 Lah 291 (292) : 10 Lah 685 : 117 Ind Cas 240 (DB), *Attar Chand* v. *Chandu Lal.*

4. ('05) 27 All 462 (463) : 2 All L Jour 208 (DB), *Sikandar* v. *Bahadur.*
('20) 7 AIR 1920 Pat 803 (804) : 59 Ind Cas 893, *Wazir Nonian* v. *Ram Prasad.* (Lease for life.)
('15) 2 AIR 1915 Oudh 165 (166) : 30 Ind Cas 258, *Ram Sarup* v. *Suraj Din.*

Section 107 Note 7

tion[5] or any term of the transaction[6] though it may be used for collateral purposes[7] or for the other purposes mentioned in the proviso

('13) 18 Ind Cas 844 (845) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality.*
('12) 15 Ind Cas 830 (831) : 36 Bom 500 (DB), *Ramchandra* v. *Tama.*
('37) 24 AIR 1937 Mad 656 (657) : 169 Ind Cas 865, *Udaya Pratapa* v. *Gourachendra Dyano.*
('16) 3 AIR 1916 Mad 517 (517) : 31 Ind Cas 604, *Govindasami Pillai* v. *Ramasami Aiyar.*
('29) 16 AIR 1929 All 831 (833) : 122 Ind Cas 671, *Baij Nath* v. *Kundanlal.*
('30) 17 AIR 1930 All 678 (680) : 130 I.C. 8 (DB), *Safdar Ali* v. *Ambika Prasad.*
('36) 23 AIR 1936 Nag 295 (295) : 168 Ind Cas 338, *Ramjiwan* v. *Mt. Maharani.*
('33) 20 AIR 1933 Cal 612(613):145 I.C. 892, *Badal Chandra* v. *Debendra Nath.*
('32) 19 AIR 1932 Cal 83 (84): 59 Cal 396: 135 Ind Cas 725 (DB), *Haran Chandra* v. *Kaliprasanna.*
('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346 (DB), *Basdeo Rai* v. *Dwarka Ram.*
('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud* v. *Paomocha.*
('09) 4 Ind Cas 804 (806) : 33 Bom 610 (DB), *Ardesir* v. *Sirdar Ali.* (If parties conduct themselves towards each other as landlord and tenant and money passes from one to the other on the understanding that it should be returned in certain event, this section is no bar to the recovery of such money—The right to recovery arises not upon the unregistered lease deed but upon an equity based upon the conduct of the parties and arises independently of the lease.)
('42) 29 AIR 1942 Pat 397 (399) : 200 Ind Cas 769 (DB), *Ram Ranbijaya Prasad Singh* v. *Ramjivan Ram.*

[*See also* ('16) 3 AIR 1916 Cal 108 (108) : 29 Ind Cas 806 (DB), *Behary Lal* v. *Kedar Nath.* (Decision on facts—Defendant's acts on the property were condoned on the ground that he did them as a sort of licensee.)
('22) L R 3 All 537 (538) (Rev), *Jasoda Nandan* v. *Mt. Ram Kuar.*]

5. ('16) 3 AIR 1916 Mad 534 (535) : 31 Ind Cas 279, *Annamalai Chetty* v. *Poosari Suppia Thevan.*
('17) 4 AIR 1917 Mad 735 (736) : 34 Ind Cas 6 (DB), *Govindaswami Pillai* v. *Ramaswami Aiyar.*
('41) 28 AIR 1941 Rang 117 (117) : 194 Ind Cas 31 (DB), *U Min Sin* v. *Ko Kye.* (Suit for rent—Lessor could not claim rent on the basis of his unregistered lease.)
('14) 1 AIR 1914 Mad 359 (360) : 23 Ind Cas 336 (DB), *Vasudeva Reddy* v. *Nalappa.* (A lessee could not prove that he had acquired certain rights under the unregistered deed.)
('41) 28 AIR 1941 Mad 602 (603) : 198 Ind Cas 606, *Nagaraja Rao* v. *Koothappan.* (Terms of letting, etc., cannot be proved by the unregistered document.)

6. ('15) 2 AIR 1915 Mad 76 (76) : 25 Ind Cas 661 (DB), *Venkata Seshayya* v. *Adam Saib.*
('21) 63 Ind Cas 90 (90) (DB) (Lah), *Niadar Mal* v. *J. Rank.*
('18) 5 AIR 1918 Nag 74 (75) : 15 Nag L R 31 : 48 Ind Cas 923, *Kalicharan* v. *Lal Indar Shah.*
('16) 3 AIR 1916 Mad 517 (517) : 31 Ind Cas 604, *Govindasami Pillai* v. *Ramasami Aiyar.*
('16) 3 AIR 1916 Mad 534 (535) : 31 Ind Cas 279, *Annamalai Chetty* v. *Poosari Suppia Thevan.*

7. ('24) 11 AIR 1924 Nag 199 (200) : 75 Ind Cas 622, *Annaji* v. *Laxman.* (Evidence of ownership.)
('31) 18 AIR 1931 Lah 501 (502) : 134 Ind Cas 289, *Kidar Nath* v. *Dungar Mal & Sons.* (Where rent is mentioned in a lease which is inadmissible in evidence on account of its being unregistered though the figure as to the rent mentioned in the lease cannot be looked at in order to establish the rent fixed, it might be looked at to establish what damages the landlord suing for arrears of rent was entitled to by way of rent.)

to S. 49 of the Registration Act, 1908.[8]

('25) 12 AIR 1925 Lah 500 (500) : 86 Ind Cas 733, *Asa Nand* v. *Dona Ram.* (For the purpose of proving the lessor's title and the nature and character of the lessee's possession.)

('25) 12 AIR 1925 Lah 491 (492) : 6 Lah 319 : 88 Ind Cas 872 (DB), *Ata Mohammad* v. *Shankar Das.* (Admissible to show the character of the possession held by a person.)

('31) 134 Ind Cas 1106 (1106) (Lah), *Kishori Lal* v. *Ranumal.* (To see the nature of possession.)

('21) 61 Ind Cas 328 (329) (DB) (Lah), *Devi Dayal* v. *Wazir Chand.* (An unregistered deed of lease for more than a year although inadmissible in evidence as a lease, or for proving title, may be admitted for proving an admission contained therein.)

('28) 108 Ind Cas 161 (161) (Lah), *Bhaga* v. *Budha.* (Can be looked at to ascertain the nature of the possession of the lessee.)

('15) 2 AIR 1915 Oudh 165 (166) : 30 Ind Cas 258, *Ram Sarup* v. *Suraj Din.* (To explain the circumstances under which the lessee got into possession.)

('30) 17 AIR 1930 Lah 915 (916) : 129 Ind Cas 30, *Jawahri Mal* v. *Jagan Nath.* (Although the figure as to rent mentioned in an unregistered lease cannot be looked into to establish the rent fixed, it may be looked at to establish what damage the landlord suing for arrears of rent is entitled to by way of rent.)

('32) 19 AIR 1932 Lah 655 (656) : 142 Ind Cas 424, *Bahawal* v. *Amrik Singh.*

('36) 23 AIR 1936 Nag 174 (176) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Sayed.*

('18) 5 AIR 1918 Nag 74 (75) : 15 Nag L R 31 : 48 Ind Cas 923, *Kalicharan* v. *Lal Indar Shah.*

('26) 13 AIR 1926 Nag 255 (256) : 91 Ind Cas 1044, *Pirbax* v. *Mt. Nanhebi.*

('36) 23 AIR 1936 Nag 295 (295, 296) : 168 Ind Cas 338, *Ramjiwan* v. *Mt. Maharani.* (In a suit for rent on basis of a perpetual lease, if the deed is unregistered it is not admissible in evidence as the purpose cannot be described as collateral—The object is to establish the plaintiffs' right to recover a specific sum of money as rent by the landlord that is to establish the very title and terms which the law says can be effected only by a registered instrument.)

('24) 11 AIR 1924 Pat 641 (644) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan Ojha.*

('30) 17 AIR 1930 Pat 110 (111, 112) : 124 Ind Cas 92, *Banamali Bauli* v. *Gayaram Mahto.* (The unregistered lease may be taken in evidence not as proof of title but for the collateral purpose of explaining the present possession.)

('30) 17 AIR 1930 Pat 530 (532) : 122 Ind Cas 158 (DB), *Khodaijatul Kubra* v. *Krishna Pershad.* (The document is admissible to prove the nature of defendant's possession.)

('32) 19 AIR 1932 Pat 97 (101) : 11 Pat 98 : 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjash Agarwalla.* (Where a lease created by a compromise and embodied in a decree of Court is inadmissible for want of registration, a clause in the deed creating a first charge on the demised land as security for rent due is also not admissible, though standing by itself it may not amount to a lease.)

('32) 19 AIR 1932 Sind 60 (61) : 25 Sind L R 451 : 137 Ind Cas 136 (DB), *Kodu Lal* v. *Beharilal.* (Unregistered lease is admissible to calculate compensation for use and occupation.)

[But see ('14) 1 AIR 1914 Mad 638 (638) : 23 Ind Cas 376 (DB), *Yuruva Venkata* v. *Madi Veeramma.* (A lease compulsorily registrable is inadmissible without registration to prove the nature of the possession—No longer good law.)

('05) 1 Nag L R 147 (149), *Narayan Bisnoi* v. *Jaswant Singh.* (Not good law.)]

8. But see ('42) 29 AIR 1942 Oudh 231 (236) : 17 Luck 530 : 199 Ind Cas 35 (DB), *Qamar Jahan Begam* v. *Bansi Dhar.* (For purposes of S. 53A of the Act.)

Section 107 Notes 7–8

If the lessee has entered into possession the lessor cannot sue him for *rent* on the basis of the unregistered lease deed.[9] But he can claim damages from the lessee for use and occupation of the property.[10]

8. **Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph.** — The word 'only' in the first paragraph makes it clear that leases coming within its scope cannot be created otherwise than by a registered instrument,[1] e. g., by oral agreement accompanied by delivery of possession.[2] But all other leases can, under the second

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9. ('36) 23 AIR 1936 Cal 628 (629) : 62 Cal 294 : 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate Ltd.* (Even S. 53A cannot enable a lessor to claim rent under the unregistered deed.)

10. ('09) 2 Ind Cas 211 (212) : 31 All 276 (FB), *Sheo Karan Singh* v. *Parbhu Narain Singh.*
('24) 11 AIR 1924 Oudh 97 (98) : 74 Ind Cas 582, *Ajodhya Singh* v. *Khusro Begum.*
('28) 15 AIR 1928 Oudh 479 (480) : 110 Ind Cas 875 (DB), *Raghubar Dayal* v. *Sheo Bakhsh Singh.*
('37) 24 AIR 1937 Mad 656 (657, 658) : 169 Ind Cas 865, *Udaya Pratapa* v. *Gourachindra Dyano.*
('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap Narain.*
('30) 17 AIR 1930 Lah 915 (916) : 129 Ind Cas 30, *Jawahri Mal* v. *Jagan Nath.*
('11) 11 Ind Cas 23 (23) (DB) (Mad), *Swaminatha Mudali* v. *Sivagami Achi.*
('25) 12 AIR 1925 All 100 (101) : 82 Ind Cas 296 (DB), *Nand Ram Singh* v. *Harisaran Das.*
('35) 22 AIR 1935 All 785 (785) : 158 Ind Cas 50, *Bakhtawar* v. *Lila Pat.*
('09) 2 Ind Cas 920 (921) : 12 Oudh Cas 140 (DB), *Udit Narayan Singh* v. *Rampal Singh.* (Decree for damages for use and occupation granted on basis of possession and kabuliat.)
('06) 9 Oudh Cas 296 (299, 300) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.*
('42) 29 AIR 1942 Oudh 408 (409) : 200 Ind Cas 593, *Md. Farooq* v. *Masjidi Begam.*
[*See also* (1801) 102 E R 95 (96) : 1 East 244 : 6 R R 268, *Graham* v. *Peat.*]

Note 8

1. ('31) 18 AIR 1931 PC 79 (80) : 58 Cal 1235 : 58 Ind App 91 : 131 Ind Cas 762 (PC), *G. H. C. Ariff* v. *Jadunath.*
('09) 4 Ind Cas 804 (806): 33 Bom 610 (DB), *Ardesir* v. *Sirdar Ali.*
('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap Narain Singh.* (Fishery rights constitute immovable property and the provisions of S. 107 exclude the possibility of an oral lease of such rights for a term exceeding one year. To be valid it must be in writing registered.)

2. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.* (Lease for more than one year and continuing in perpetuity requires registration—Mere possession by lessee is not enough to give him perpetual lease.)
('95) 22 Cal 752 (755) (DB), *Surendra Narain Singh* v. *Bhai Lal Thakur.* (A *hat* is a benefit arising out of land, and, therefore, within the definition of immovable property as given in S. 2, cl. (5) of the General Clauses Act (1868). The lease of a "*hat*," consequently, comes within S. 107 of the Transfer of Property Act, and can be effected only by a registered instrument.)
('36) 23 AIR 1936 Bom 246 (248) : 163 Ind Cas 579, *Chandulal Damodardas* v. *Keshavlal Kuberdas.*
('34) 21 AIR 1934 Mad 418 (419, 420): 57 Mad 760: 152 Ind Cas 538 (DB), *Mopurappa* v. *Ramaswami Gramani.*

paragraph of the section, be created by oral agreement accompanied by delivery of possession. The question arises whether a lease falling within the first paragraph of the section but made only by oral agreement accompanied by delivery of possession, can be treated as a valid lease of the kind referred to in the second paragraph. It has been held that it can be so treated. Thus, a lease for more than a year, by oral agreement and delivery of possession was treated as a lease for one year.[3]

Before the year 1904 a lease for one year could be made by an unregistered instrument. Hence, where a lease for fifteen years was granted by an unregistered instrument it was held that though the lease was inoperative for the term of fifteen years it was valid for the first year under the second paragraph of the section and the lessee's possession thereafter was held to be as a tenant holding over with the consent of the lessor.[4]

9. Paragraph 2. — The preceding paragraph deals with leases "from year to year," or for a "term exceeding one year," or "reserving a yearly rent." All these expressions denote a lease for more than a year. This paragraph deals with all "other" leases, i. e., with leases for a term of *one* year or less. A lease for one year means a lease for a

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('30) 17 AIR 1930 Mad 272 (276): 126 Ind Cas 284 (DB), *Malabar Timber Co., Ltd.* v. *Prapravan Moidoo.* (Original lease terminated by forfeiture—Subsequently parties entered into an oral contract agreeing that the old lease should continue—*Held*, this contract could not revive the old lease as a registered document was required.)

('17) 4 AIR 1917 Mad 787 (788): 34 Ind Cas 539 (DB), *Devaraja Naicken* v. *Ammani Ammal.* (A lease for planting casuarina trees is not one for an agricultural purpose and must be in writing and registered.)

('36) 63 Cal 31 (39), *Battersby* v. *DeCruze.* (Oral lease cannot be made.)

('14) 1 AIR 1914 Mad 84 (85): 24 Ind Cas 790 (DB), *Gopala Krishna* v. *Sukirtha Theenthara.*

('37) 24 AIR 1937 Rang 180 (181, 182) : 171 Ind Cas 643 (DB), *Bashir Ahmad* v. *N. H. Maatschappij.*

[*See also* ('97) 1 Cal W N 142 (143) (DB), *Sheo Charan Lal* v. *Purbhu Dayal.* (Trespasser granting lease — Real owner accepting rent from the lessee — *Held*, there being no contract of lease between real owner and the lessee as required by S. 107 mere acceptance did not create relationship of landlord and tenant.)]

3. ('13) 20 Ind Cas 715 (716) (DB) (Cal), *Mohammad Mossa* v. *Jagannund Singh.* (Section 107 of the Act does not prevent the creation of a verbal lease for one year by the lessor giving possession to, and accepting rent from, the lessee for that year.)

('40) 27 AIR 1940 Cal 89 (90, 91): ILR (1939) 2 Cal 254: 186 Ind Cas 625, *Anwar-ali Bepari* v. *Jamini Lal.*

('33) 20 AIR 1933 Pat 485 (488) : 144 Ind Cas 788, *Aziz Ahmad* v. *Alauddin Ahmad.* (Section 107 only prescribes the mode of creation of a lease. The effect of its non-compliance will be that the lease will be of no effect for the period. The statute does not say about the rights of the parties under the invalid lease. Confirmed in Letters Patent Appeal reported in AIR 1934 Pat 369.)

('41) 28 AIR 1941 Pat 244 (245) : 191 Ind Cas 686 (687), *Naim Sahib* v. *Tata Iron & Steel Co., Ltd.*

('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian.* (After first year if the lessee is allowed to hold on it is a tenancy by sufferance.)

[*See also* ('26) 13 AIR 1926 Nag 147 (148) : 89 Ind Cas 1019, *Baliram* v. *Sadaram.* (Suit for rent for a period during which he was holding over.)]

4. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Matilal* v. *Darjeeling Municipality.*

Section 107 Note 9

term of one year *certain*. If there is a possibility of its being undetermined at the end of one year it will not be included in this paragraph but in the preceding paragraph and will have to be made by a registered document.[1]

A lease under this paragraph for a period of one year or less can be effected only in two ways —

(1) by a registered instrument,[2] or

(2) by oral agreement accompanied by delivery of possession.[3]

The word 'registered' occurring before the word 'instrument' was inserted in the section only in 1904. Until that year a lease coming within this paragraph, even when effected in writing, was not required to be registered.[4] After that year, however, if a lease coming under this paragraph is effected by an instrument, the instrument must be registered.[5] As to the effect of non-registration of such a document on the transfer, see Note 7.

As to the second mode of creating a lease referred to above, a mere oral agreement to give a lease is not enough. It must, in order to create a valid lease, be accompanied by delivery of possession.[6] "Delivery of possession" means actual delivery.[7] Where such delivery is not possible, the lease must be effected in the first mode only, i. e., by a registered instrument.[8]

Note 9

1. *See* ('86) 13 Cal 113 (114) (DB), *Bhobani* v. *Shibnath*. (Case under Registration Act.)

2. ('38) 1938 Oudh W N 1080 (1083), *J. H. Mathews* v. *Mirza Ismail Beg*. (Where a lease of a house for eight months is reduced to writing it is under S. 107 of the Transfer of Property Act compulsorily registrable.)

('36) 23 AIR 1936 Pat 372 (377) : 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime & Stone Company, Ltd.* v. *Secretary of State*.

3. ('18) 5 AIR 1918 Cal 906 (907) : 44 Cal 214 : 37 Ind Cas 956 (DB), *Sarat Chundra Dutta* v. *Jadab Chundra*. (Tenancy-at-will can be created verbally.)

('10) 5 Ind Cas 826 (826) (DB) (Mad), *Narayanah Shah* v. *Kadigar Parasurama*.

('97) 1897 All W N 69 (70), *Khairat Hussain* v. *Maheshri Prasad*.

('42) 29 AIR 1942 Oudh 408 (409) : 200 Ind Cas 593, *Md. Farooq* v. *Masjidi Begam*.

4. ('94) 17 Mad 275 (277) (DB), *Seetharama Raju* v. *Bayanna Pantulu*.

5. ('11) 11 Ind Cas 863 (863) (Low Bur), *O'Leary* v. *Maung On Gaing*.

('36) 23 AIR 1936 Nag 174 (175, 176) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Sayed*.

('31) 18 AIR 1931 Lah 501 (502) : 134 Ind Cas 289, *Kidar Nath* v. *Dungar Mal*.

6. ('11) 11 Ind Cas 849 (850) (Low Bur), *Karam Chand* v. *Hurdial*.

('41) 28 AIR 1941 Pat 577 (583) : 20 Pat 346 : 192 Ind Cas 451 (DB), *Mohammad Hanif* v. *Khairat Ali*. (Title cannot be complete without delivery of possession.)

('34) 21 AIR 1934 Pesh 81 (81): 148 Ind Cas 548, *Hari Chand* v. *H. H. Hammond*

('26) 13 AIR 1926 Oudh 609 (610) : 96 Ind Cas 410, *Gulabkhan* v. *Lal Md. Khan*.

7. ('26) 13 AIR 1926 Oudh 609(610):96 I.C. 410, *Gulab Khan* v. *Lal Md. Khan*.

('14) 1 AIR 1914 Cal 754 (754) : 23 Ind Cas 318 (DB), *Fakira Mahton* v. *Leakut Hossain*.

[*See also* ('34) 21 AIR 1934 Pesh 81 (81) : 148 Ind Cas 548, *Hari Chand* v. *H. H. Hammond*. (Delivery of the key of a vacated bungalow is sufficient delivery of possession.)]

See also Section 54 Note 22.

8. ('39) 26 AIR 1939 Lah 162 (163), *Mt. Malan* v. *Dayal Singh*.

Where the lease is effected by an oral agreement accompanied by delivery of possession and there is also an unregistered instrument evidencing it, the question arises whether the existence of the unregistered instrument prevents the passing of title by delivery. Under S. 49 of the Registration Act, 1908, before its amendment in 1929, it was held that that section applied to documents compulsorily registrable under the Registration Act only and the document of lease for one year or less, being not compulsorily registrable under the Registration Act, could be admitted in evidence to prove the oral agreement embodied in it which, when accompanied by delivery of possession would create a valid lease.[9] The words "or by any provision of the Transfer of Property Act, 1882" were inserted in 1929 in S. 49 of the Registration Act and it is now clear that the ground that was available for the admissibility of such documents before 1929 is now no longer available.[10] In the undermentioned Madras case,[11] however, decided after the above amendment in S. 49 of the Registration Act, an unregistered document of a lease for one year was admitted in evidence to prove the oral agreement. The amendment was not adverted to and the Court merely followed a Full Bench decision given before the amendment.

When a lease is effected by oral agreement accompanied by delivery of possession and there is a kabuliat executed by the lessee, it can be admitted in evidence to prove the oral agreement.[12]

See also Note 21 on section 54.

10. Paragraph 3. — This paragraph was added in 1929 by S. 55 of the Transfer of Property (Amendment) Act, 1929. Prior thereto, there was a difference of opinion on the question whether a *kabuliat* or other document signed by the lessee only could be called a lease-deed within the meaning of this section. One view was that a lease being a transfer under the Act, it could not be effected by a document not signed by the transferor and that consequently a *kabuliat* being signed by only the lessee could not be called a lease within the meaning of this section.[1]

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9. ('31) 18 AIR 1931 Lah 501 (502) : 134 I. C. 289, *Kidar Nath* v. *Dungar Mal.*
('21) 8 AIR 1921 Mad 337 (340) : 44 Mad 55 : 59 Ind Cas 350 (FB), *Rama Sahu* v. *Gowro Ratho.*
('31) 18 AIR 1931 Mad 352 (352) : 131 Ind Cas 621, *Gnanaprakasan* v. *Vaz.*
[*See also* ('28) 15 AIR 1928 All 726 (730) : 50 All 986 : 118 Ind Cas 177 (FB), *Sohan Lal* v. *Mohan Lal.* (Case under S. 54 of the Transfer of Property Act.)

10. ('38) 1938 Oudh W N 1080 (1083), *J. H. Mathews* v. *Mirza Ismail Beg.* (A lease for eight months.)

11. ('36) 23 AIR 1936 Mad 301 (303) : 59 Mad 779 : 164 Ind Cas 645 (DB), *Md. Gosukani* v. *Md. Sekka Marakayar.*

12. ('10) 5 Ind Cas 826 (826) (DB) (Mad), *Narayanah Shah* v. *Kadigar Parasurama.*
('10) 6 Ind Cas 201 (203) (DB) (Mad), *Thambi* v. *Avayambal.*
('22) 9 AIR 1922 All 54 (54): 65 Ind Cas 836 (DB), *Kashinath* v. *Abdur Rahaman.*

Note 10

1. ('24) 11 AIR 1924 All 514 (518) : 78 Ind Cas 934 : 46 All 303 (DB), *Kedar Nath* v. *Shankar Lal.*

Section 107 Note 10

According to the contrary view, a *kabuliat*, although signed by the lessee, was sufficient to operate as a lease under this section if it was accepted by the lessor.[2]

The third paragraph of the section has now set the conflict at rest and it is now clear that a document signed only by the lessee[3] or only

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('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *S. Safdar Ali* v. *Ambika Prasad.*
('04) 26 All 368 (369) : 1904 All W N 46 (DB), *Nandlal* v. *Hanuman Das.* (Per Blair J.)
('05) 27 All 190 (191) : 1904 All W N 212 (DB), *Beni* v. *Puran Das.*
('25) 12 AIR 1925 Nag 121 (122) : 80 Ind Cas 736, *Ahmed Khan* v. *Sadasheo.*
('35) 22 AIR 1935 Pat 291 (293, 303) : 14 Pat 672 : 157 Ind Cas 98 (FB), *Ramkrishna Jha* v. *Jainandan.*
('09) 2 Ind Cas 994 (994, 995) (DB) (Cal), *Nilmamud Sarkar* v. *Bowl Chandra Das.*
('10) 5 Ind Cas 350 (351) (All), *Bhagwan Das* v. *Hari Ram.*
('27) 14 AIR 1927 Rang 169 (169) : 5 Rang 95 : 102 Ind Cas 105, *Mg. Ba* v. *Htoon.* (Document executed by lessee alone agreeing to pay rent and occupy the premises.)
('25) 12 AIR 1925 Rang 273 (274) : 90 Ind Cas 693 : 3 Rang 379, *U Tha Nyo* v. *Mg Kyaw Tha.* (Obiter.)
('37) 24 AIR 1937 All 36 (37, 38) : 166 Ind Cas 897 (DB), *Bagchi* v *Mrs. Morgan.*
('05) 27 All 136 (137), *Kashi Gir* v. *Jogendra Nath Ghose.*
('27) 14 AIR 1927 All 729 (729) : 104 Ind Cas 410 (DB), *Bhagwati* v. *Nandu Mal.*
('26) 13 AIR 1926 Nag 389 (392) : 95 Ind Cas 183 : 24 Nag L R 68, *Birdichand Lalchand* v. *Popatlal.*
('38) 25 AIR 1938 All 32 (33) : 172 Ind Cas 973, *Mirza Md. Hasan* v. *Buddhu.*
('06) 9 Oudh Cas 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.*
('09) 2 Ind Cas 920 (920) : 12 Oudh Cas 140 (DB), *Udit Narayan Singh* v. *Rampal Singh.*
('25) 12 AIR 1925 Bom 512 (512) : 88 Ind Cas 648 (DB), *Ramsingh Harisingh* v. *Bai Dyanba.*
('39) 26 AIR 1939 Lah 423 (425) : ILR (1940) Lah 70 : 186 Ind Cas 426 (DB), *Taj Din* v. *Abdul Rahim.*
('40) 42 Pun L R 75 (76), *Kishori Lal* v. *Udhoram.* (A rent deed does not fall within the purview of S. 107 of the Transfer of Property Act, in view of the definition of lease in S. 105 of the Transfer of Property Act.)

2. ('12) 14 Ind Cas 540 (542) : 39 Cal 1016 (DB), *Rai Moni Dassi* v. *Mathura Mohan.*
('38) 42 Cal W N 771 (773), *Udoytara Saha* v. *Habibar Rahaman.* (Presumed.)
('28) 15 AIR 1928 Cal 392 (396) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath* v. *Janki Nath.*
('26) 13 AIR 1926 Bom 374 (374) : 95 Ind Cas 424 (DB), *Sona Bai* v. *Bai Hiragavri.* (NOTE — Point not decided but seems to have been assumed.)
('10) 8 Ind Cas 668 (670, 672) : 35 Mad 95 (F B), *Syed Ajam* v. *Ananthanarayana Aiyar.* (Overruling 30 Mad 322.)
('38) 25 AIR 1938 Mad 100 (101) : 176 Ind Cas 402 (D B), *Rathnaswami* v. *Nagaraja.* (35 Mad 95 followed. Lease of reversion.)
('14) 1 AIR 1914 Mad 96 (97) : 24 Ind Cas 784 (DB), *Somayya* v. *Khatya Begam.*
('04) 7 Oudh Cas 169 (172), *Partab Narain Singh* v. *Ragho Behari.*
('05) 8 Oudh Cas 197 (199) (D B), *Bhopal* v. *Chattar Singh.*

3. ('38) 25 AIR 1938 Mad 746 (747) : 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipal Council.*
('40) 27 AIR 1940 Nag 143 (144) : 189 Ind Cas 753, *Tulsiram Rajaram* v. *Govinda Ramji.*
('32) 19 AIR 1932 Sind 217 (219) : 26 Sind L R 377 : 140 Ind Cas 681 (D B), *Devidas Zowkiram* v. *Aluwalla Bros.*
('34) 21 AIR 1934 Pesh 81 (81) : 148 Ind Cas 548, *Hari Chand* v. *Hammond.*

by the lessor[4] will not be operative as a lease under this section.

Where there are more lessors than one or more lessees than one, *all* of them must join in the execution of the instrument, unless the executing lessors or the lessees, as the case may be, had authority to sign on behalf of the others also.[5]

11. Proviso. — The proviso deals with leases coming under the second paragraph of the section. It empowers the Provincial Government to exempt such leases from the formality of registration when they are made in writing and from delivery of possession when they are made otherwise.[1]

This power has been exercised by the Government of Bombay by a notification[2] and the result is that in the Presidency of Bombay a lease for a term of one year or less can be made either by an unregistered document or by merely an oral agreement. The present Province of Sind was a part of the Bombay Presidency at the time of the above notification and hence it applied to Sind also.[3]

12. Crown Grants Act and this section. — Section 2 of the Crown Grants Act, 1895, provides as follows :

> " Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made, by or on behalf of the Crown to, or in favour of, any person whomsoever ; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed. "

It has been held by the High Court of Allahabad that the concluding portion of the above section shows that the Courts can disregard the provisions of this Act only where a question of the construction of a grant arises[1] that those provisions which deal with the formality of a transfer do not affect the *construction* of a grant and that therefore a lease even by Government, must be made according to the provisions of

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4. ('40) 27 AIR 1940 Oudh 425 (427) : 190 Ind Cas 444 (D B), *Bithal Dass* v. *Mt. Iqbalunnisa.*
('42) 29 AIR 1942 Oudh 231 (233) : 17 Luck 530 : 199 Ind Cas 35 (D B), *Qamar Jahan Begam* v *Bansi Dhar.* (Assumed.)
('37) 24 AIR 1937 Oudh 151 (152) : 164 Ind Cas 830 : 12 Luck 514, *Shiam Sunder Lal* v. *Chootey Lal.*

5. ('08) 1908 Pun L R No. 189 (p. 611) (D B), *Jhandad Khan* v. *Abbas Khan.*

Note 11

1. ('36) 23 AIR 1936 Nag 174 (175) : 164 Ind Cas 557, *Mt. Nasiban* v. *Md. Sayed.*

2. See Government Notification No. 12501 dated 8th December 1908 published in the Bombay Gazette, 1908, Part 1 Page 2116. But it seems that later on the Province of Sind was exempted from the effect of this notification. For the present position see Note 'g' printed just below the text of the section.

3. ('32) 19 AIR 1932 Sind 217 (219) : 26 Sind L R 377 : 140 Ind Cas 681 (D B). *Devidas* v *Aluwalla Bros.*

Note 12

1. ('06) 3 All L Jour 130 (131) (DB), *Dost Mohammad Khan* v. *The Bank of Upper India.*

Section 107 Notes 12–14

this section.[2] The High Court of Patna has taken a contrary view in the undermentioned case.[3] According to the Judicial Commissioner's Court of Oudh[4] the provisions of S. 107 of the Transfer of Property Act are applicable to leases by Government but that section being supplemental to the Registration Act and leases by Government being excepted from registration by S. 90 (1) (d) of the same Act, Government leases are exempted from the provisions of S. 107 of this Act also.

13. Lease embodied in a decree or order of a Court. — When the parties to a suit enter into a compromise by which a lease is granted by one to the other and the compromise is embodied in the decree or order of the Court, the lease cannot be said to be one by operation of law or in execution of a decree or order of a Court within the meaning of S. 2 (d) and will not be exempt from the provisions of this section.

Under the Registration Act such decrees or orders are compulsorily registrable only if the lease falls within section 17 (1) (d).[1]

When a decree or order does not purport to create a lease and only recognises it, it need not be registered either under the Registration Act[2] or for the purposes of this Act.

14. Leases and the doctrine of part performance. — The doctrine of part performance embodied in S. 53A is applicable also to leases. (See Notes on that section.) That section enables the lessee to take certain defences if a suit is brought against him by the lessor to enforce rights other than those embodied in the deed. Section 27A of

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2. ('14) 1 AIR 1914 All 120 (121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshi Lal* v. *Gopi Ballabh.*

3. ('27) 14 AIR 1927 Pat 319 (322) : 6 Pat 446 : 104 Ind Cas 209 (DB), *Secretary of State* v. *Nistarini Annie Mitter.*

4. ('23) 10 AIR 1923 Oudh 114 (115) : 27 Oudh Cas 64 : 74 Ind Cas 369, *Ragho Pershad* v. *Secretary of State.*

Note 13

1. ('38) 42 Cal W N 107 (109), *Kailash Chandar* v. *Madan Mohan.*
('32) 19 AIR 1932 Pat 97 (100) : 11 Pat 98 : 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjash.*
('41) 28 AIR 1941 Pat 536 (538) : 194 Ind Cas 428, *Jagdish Chandra* v. *Biseswarlal.* (The exceptions mentioned in sub-s. (2) of S. 17, Registration Act, apply only to the classes of documents mentioned in cls. (b) and (c) of S. 17 (1) and do not apply to leases which are mentioned in cl. (d) of S. 17 (1)).
('27) 14 AIR 1927 Cal 913 (913) : 104 Ind Cas 812 (DB), *Rajani Kanta* v. *Raj Kumari.*
('30) 17 AIR 1930 Cal 94 (97) : 57 Cal 775 : 126 Ind Cas 550 (DB), *Janki Nath Roy* v. *Mohendra Narain Roy.* (The saving clause in S. 17 (2) (6) has no application to the case of a lease created by decree, compromise decree or order of a Court and it falls under S. 17 (1) (d).)
('30) 17 AIR 1930 Cal 559 (560) : 126 Ind Cas 715, *Sailash Chandra* v. *Bireswar Chatterji.*
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra.*
('37) 24 AIR 1937 Cal 499 (499, 500) : 173 Ind Cas 996, *Haladhar Pathak* v. *Madan Mohan.*

2. ('20) 57 Ind Cas 798 (800) (DB) (Cal), *Jogendra Chandra* v. *Shyam Sundar Das.*

the Specific Relief Act, 1877, which also embodies the principle of part performance goes further and allows the lessee a positive right to get the unregistered lease deed registered by a suit for the specific performance of the contract to grant the lease.[1]

15. Agreement to lease. — This is one of the sections referred to in S. 4 which must be read as supplemental to the Registration Act. 'Lease' is defined both in the Registration Act as well as in this Act. But the definition that is to be adopted for the purpose of this section is that which is given in this Act in S. 105.[1] The result is that an agreement to lease, which is not a lease according to the definition given in S. 105 of this Act, is not required to be registered for the purpose of this section, though under the Registration Act the agreement is a lease and is a registrable document under S. 17 (1) (d) of that Act when made in writing.[2]

An agreement to lease does not, of itself, create any interest in or charge on, the property agreed to be leased.[3]

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108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

Rights and liabilities of lessor and lessee.

1. Scope of the section. — This section lays down the rights and liabilities of the lessor and the lessee. All or nearly all the clauses are expressions of well settled principles familiar to the law of England.[1] The rights and liabilities are made subject to a contract or local usage to the contrary.

Note 14

1. ('37) 24 AIR 1937 Nag 74 (76) : I L R (1936) Nag 115 : 170 Ind Cas 554 (DB), *Hari Prasad* v. *Hanumant Rao.*

Note 15

1. ('10) 5 Ind Cas 562 (563) (Cal), *Nanda Lal Ghose* v. *Sarat Chandra.*
('23) 10 AIR 1923 Oudh 237 (238): 74 Ind Cas 480, *Mahomed Ali* v. *Syed Hasan Jafer.*
2. ('36) 63 Cal 31 (37), *Battersby* v. *De Cruze.*
('33) 20 AIR 1933 Rang 220 (221): 148 Ind Cas 301 (DB), *Syriam Land Co., Ltd.* v. *Rodriguez.*
3. ('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra Ghose.*
('10) 8 Ind Cas 520 (524) : 35 Mad 63 (FB), *Narayanan Chetty* v. *Muthiah Servai.*
('33) 20 AIR 1933 Rang 220 (222): 148 Ind Cas 301 (DB), *Syriam Land Co., Ltd.* *Rodgriguez.*

Section 108 — Note 1

1. ('29) 16 AIR 1929 Cal 272 (275) : 117 Ind Cas 838 (DB), *Indu Bushan* v. *Moazam Ali.*

Section 108 Note 1

The section does not in terms apply to agricultural leases but the principles underlying the various clauses have been generally applied to such leases[2] and to leases arising in provinces to which the Act does not apply.[3]

Section 73 provides for the payment of mortgage amount to the mortgagee in cases where the mortgaged property has been acquired under the Land Acquisition Act. There is no similar provision as to the lessee's right under such circumstances. On principle, however, the lessee will be entitled to claim the proportion of the compensation amount representing the value of the lease-hold interest still to run. See the undermentioned case.[4]

Section 108 Clause (a)

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover:

Synopsis

1. Duty to disclose defect.
2. Defect in property, if includes defect in title.
3. Effect of breach of obligation.
4. Breach of obligation not fraudulent.

1. Duty to disclose defect. — This clause is worded in terms similar to cl. (a) of S. 55, sub-s (1). Analogous provisions are also found in S. 150 of the Contract Act relating to the bailment of goods, and S. 57 of the Easements Act, relating to licenses.

The lessor is bound, under this clause, to disclose to the lessee all latent defects which are material and of which he is aware and the lessee is not aware. If the lessee is aware of the defect or could, with ordinary care, have discovered the defect, he cannot claim that the lessor has committed a breach of the obligation under this clause.[1]

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2. ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Perumarraju.* (Per Srinivasa Aiyangar, J.)

('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.*

('10) 5 Ind Cas 479 (480) (Mad), *Narayanasami Naidu* v. *Verramali Ram Krishnaya.* (Section 108 cl. (b)—Principle applies.)

3. ('34) 21 AIR 1934 Pesh 101 (102) : 152 Ind Cas 231, *Ganda Singh Mehr Singh* v. *Secretary of State.*

('37) 24 AIR 1937 Lah 930 (931) : I L R (1937) Lah 649 : 175 Ind Cas 840 (DB), *Kesheo Chander* v. *Sher Singh.* (Principle underlying the covenant for quiet enjoyment in cl. (c) is of universal application.)

('20) 7 AIR 1920 Lah 390 (391) : 60 Ind Cas 477, *Dharam Narain* v. *Labh Singh.*

4. ('30) 17 AIR 1930 Bom 592 (593) : 128 Ind Cas 899, *Ganu Dadu* v. *Panditrao.*

Section 108, Clause (a) — Note 1

1. ('13) 19 Ind Cas 815 (818) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer.*

The defect which the lessor is under an obligation to disclose under this clause must have reference to its *intended use*. Where there was a thatch over a chimney in the leased premises of which the lessor was aware but not the lessee, and the furniture of the lessee was destroyed by a fire arising from the chimney, it was held by the Calcutta High Court that the lessor had committed a breach of the obligation to disclose the defect and was liable in damages.[2]

But the duty to disclose a defect under this clause is not the same thing as a warranty that the premises demised are fit for the intended use. A warranty has no reference to the knowledge of the warrantor or the want of a knowledge of the warrantee, whereas the obligation under this clause arises only where the lessor is aware and the lessee is not aware of the defect. Under the English law there is no warranty of fitness in the case of a demise of a land or of unfurnished dwelling houses.[3] In the undermentioned case[4] before the Act it was held by the Punjab Court that there is a warranty of fitness in the case of a demised house. It is clear that in cases falling under this clause there is no warranty of fitness of the premises for the purpose for which they are intended to be used.[5]

2. Defect in property, if includes defect in title. — Under the English Common Law a contract for a lease implied also a contract that the lessor had a title to grant the lease.[1] By statute,[2] however, the right of the intending lessee to call for the title of the lessor has been taken away. The words "defect in property with reference to its intended use" in this clause make it clear that the obligation to disclose the defect does not include a defect in the title of a lessor. As has been pointed out by the Calcutta High Court,[3] a defect in property with reference to its intended use has a reference to the *nature and condition* of the property and not the title to the property. It may also be noted that S. 55, sub-s. (1), cl. (a) clearly makes a distinction between a defect in property and a defect in seller's title thereto.

But though the lessor is not, under this clause, bound to disclose a defect in title, as part of his obligation to disclose a defect in property, he is bound to *give* a good title to the lessee. Where the lessee discovers, before the lease is executed, that the lessor has no title to grant the lease, he may resile from the contract. In *Jothiprasad Singh* v. *H. V. Low & Co., Ltd.*,[4] Rankin, C. J., observed as follows :

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2. ('69) 12 Suth W R 145 (145) (DB), *Radha Krishna* v. *O'Flaherty*.
3. Halsbury, *Laws of England*, (Hailsham Edition) Vol. 20, paragraphs 219 and 220.
4. ('75) 1875 Pun Re No. 33, *Doyle* v. *Ross*.
5. ('17) 4 AIR 1917 Bom 34 (38) : 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshavji Meghji*. (There is no implied warranty in contracts of leasing.)

Note 2

1. Woodfall, "*Landlord and Tenant*", 22nd Edn., Pages 115, 116.
2. Law of Property Act, 1925, (15 Geo. V, ch. 20), S. 44 sub-s. (2).
3. ('13) 19 Ind Cas 815 (817) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer*.
('30) 17 AIR 1930 Cal 561 (564) : 57 Cal 1189 : 128 Ind Cas 321 (DB), *Jyoti Prosad* v. *H. V. Low & Co. Ltd.*
4. ('30) 17 AIR 1930 Cal 561 (567) : 57 Cal 1189 : 128 Ind Cas 321 (DB).

Section 108
Clause (a)
Notes 2–4

"I do not think that the Indian law makes a distinction in principle between the obligation of a lessor and of a vendor so far as regards the duty to give a good title, though the incidents of these different types of transfers may be different as regards the obligation to give *disclosure* and furnish a proof thereof."

This view was affirmed, on appeal, by their Lordships of the Privy Council.[5] In the undermentioned case[6] where the lessor was found to have no title to the land, with the result that the lessee did not get possession of the property leased, the High Court of Nagpur held, following the above view, that the lessee was entitled to recover the premium paid by him.

3. Effect of breach of obligation.—A breach of the obligation imposed by this clause will, if discovered before the lease is granted, enable the lessee to avoid the contract. The intending lessee may also defend himself against a suit for specific performance of the agreement.[1] Where the lease is executed, the effect of the breach of the obligation will, if he has suffered any damages thereby, enable the lessee to sue for damages.[2]

4. Breach of obligation, not fraudulent.—A breach of the obligation under cl. (a) of S. 55, sub-s. (1) has been declared by the last paragraph of that section as being fraudulent. There is no corresponding provision to that effect in this section.

Clause (b)

(b) the lessor is bound on the lessee's request to put him in possession of the property:

Synopsis

1. Obligation to give possession.
2. "On the lessee's request.".
3. Failure to give possession — Effect.
4. Contract to the contrary.

1. Obligation to give possession. — Under the English law he who lets, agrees to give possession; that is to say, in every lease there is an *implied contract* that the lessor will give possession of the land to the lessee.[1] This principle was applied to cases in this country even before the passing of this Act.[2] This clause imposes a *statutory obligation* to the same effect and is thus an enactment in substance of

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5. ('31) 18 AIR 1931 P C 299 (301) : 58 Ind App 392 : 59 Cal 699 : 135 Ind Cas 632 (PC), *Low & Co.* v. *Jyoti Prosad.*
6. ('42) 29 AIR 1942 Nag 103 (105) : ILR (1942) Nag 349 : 202 Ind Cas 9 (DB), *Vinayakrao* v. *Bhondu.*

Note 3

1. Woodfall "*Landlord and Tenant*" 22nd Edition, Page 116.
2. ('69) 12 Suth W R 145 (145) (DB), *Radha Krishna* v. *O'Flaherty.*

Section 108, Clause (b) — Note 1

1. (1829) 30 R R 699 (699) : 7 L J C P 162, *Coe.* v. *Clay.*
Halsbury, *Laws of England*, (Hailsham Edition) Vol. 20, Para 270.
Fawcett, *Landlord and Tenant*, 3rd Edition, p. 398.
2. ('69) 11 Suth W R 278 (279) (DB), *Munee Dutta Singh* v. *Mr. William Campbell.*

Section 108
Clause (b)
Notes 1–2

what the law was before.[3] The question as to what amounts to delivery of possession in any particular case will depend on the nature of the property leased.[4] Where the property leased is rent payable by tenants, the giving of notice to the tenant to attorn in future to the lessee amounts to a delivery of possession of the leased property to the lessee.[5] But it is necessary that the lessor himself must have possession to give to the lessee. The fact that the lessee can take legal proceedings to recover possession himself from the party in occupation will not relieve the lessor from his obligation to deliver possession.[6]

A lease by a person who is not in possession is, however, not *ipso facto* void.[7] The lessee's suit against a third person in possession on the strength of the lease cannot be dismissed on the ground that the lease was void for the reason that the lessor had no possession.[8]

The onus is on the lessor to show, in a suit for rent, that he has discharged his obligation to put the lessee in possession.[9] But where the tenant has already paid the rent under the lease[10] or where the lessee claims that certain subjects of which he has not got possession are within the subjects let,[11] the *onus* will be on the lessee to show that he did not get possession.

The question as to when the possession is to be delivered under the lease will depend upon the terms of the contract in the particular case.

2. "On the lessee's request." — The lessor is, under this clause, bound to give possession to the lessee only on the *request* of the lessee.[1] He is not bound to put an unwilling and recalcitrant lessee into possession against his will.[2] In an old case before the Act, it was held

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3. ('02) 25 Mad 587 (591) : 12 Mad L Jour 249 (DB), *Zamindar of Vizianagaram* v. *B. Suryanarayan.*

4. ('09) 3 Ind Cas 701 (706, 707) : 33 Mad 102 (DB), *Natesan Chetty* v. *Vengu Nachiar.*

5. ('09) 3 Ind Cas 701 (707) : 33 Mad 102 (DB), *Natesan Chetty* v. *Vengu Nachiar.*

6. ('18) 5 AIR 1918 Lah 238 (238, 239) : 1918 Pun Re No. 19 : 40 Ind Cas 684 (DB), *Abdul Karim* v. *Upper Indian Bank.*

7. ('75) 1 Cal 297 (301) (DB), *Lokenath Ghose* v. *Jugoobundhoo Roy.*

8. ('68) 11 Suth W R 80 (81) (SB), *Pran Kristo Dey* v. *Bissumbhur Sein.*

9. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (PC), *Jogesh Chandra* v. *Emdad Meah.*
('34) 21 AIR 1934 Pesh 101 (102) : 152 I. C. 231, *Ganda Singh* v. *Secy. of State.*

10. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (PC), *Jogesh Chandra* v. *Emdad Meah.*

11. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (P C), *Jogesh Chandra* v. *Emdad Meah.*

Note 2

1. ('22) 9 AIR 1922 Cal 348 (353) : 49 Cal 257 : 69 Ind Cas 117 (DB), *Katyani Debi* v. *Uday Kumar.*
[*See also* ('10) 5 Ind Cas 479 (480): 33 Mad 499, *Narainsawmy Naidu* v. *Yerramali Ram Krishnayya.* (This principle applies to agricultural leases also.)]

2. ('36) 23 AIR 1936 Lah 815 (816) : 165 Ind Cas 56, *Nur Mohammad* v. *Ahmad Ali Khan.* (Two lessees executing joint lease—One lessee put in possession—Other lessee not requesting lessor to be put in possession — Such other lessee not being obstructed, he is liable for rent.)

Section 108
Clause (b)
Notes 2-3

that there was no obligation on the part of the lessee to require the lessor to give possession.[3] It has also been held in some cases that a request by the lessee is not necessary in cases where, to the knowledge of both the lessor and the lessee, the property is not in the possession of the lessor,[4] but that the lessor is bound to make it possible for the lessee to take possession by removing third persons from possession.[5]

3. **Failure to give possession — Effect.** — A lessee to whom possession has not been delivered by the lessor can sue him for damages for breach of the obligation.[1] He can also sue for possession of the property demised. The lessor cannot, in answer to such a suit claim that the lessee has failed to pay the stipulated premium, unless the document provides that the lessee is not to have possession until the premium is paid.[2] Where a third party is in possession, the lessee can sue such third party for possession.[3] Thus, where A leases certain properties to B for a certain period and then leases the same properties to C for a further period after the expiry of B's lease, C can, after such expiry, sue B for possession.[4]

('09) 4 Ind Cas 63 (64) (DB) (Cal), *Gopal Chandra Maity* v. *Chowdhury Krishna.*
('23) 10 AIR 1923 Mad 459 (461) : 69 Ind Cas 517 (DB), *Suryanarayanaraju* v. *Rajah of Tekkali.* (Proportionate abatement of rent is the ordinary rule, unless the lands not delivered possession of are superior or inferior to the lands delivered.)

3. ('69) 12 Suth W R 149 (149) (DB), *Munee Dutt Singh* v. *William Campbell.*

4. ('18) 5 AIR 1918 Lah 238 (239) : 1918 Pun Re No. 19 : 40 Ind Cas 684, *Abdul Karim* v. *Upper India Bank.*

5. ('10) 5 Ind Cas 479 (480) : 33 Mad 499, *Naraianswmai Naidu* v. *Verramali Ramkrishna.*

Note 3

1. ('10) 6 Ind Cas 727 (729) : 34 Mad 108 (DB), *Pemmaraju* v. *Secy. of State.*
Halsbury, *Laws of England*, (Hailsham Edition) Vol. 20, Para. 270.
('26) 13 AIR 1926 Pat 508 (511) : 6 Pat 94 : 96 Ind Cas 558 (DB), *Razia Begum* v. *Mahammad Daud.* (The assignee of the lessee can also claim damages for non-delivery of possession.)
('67) 7 Suth W R 22 (22) (DB), *Fireenge Singh* v. *Ahmed Hossein.*
('10) 5 Ind Cas 712 (712) (DB) (Mad), *Ghanta Ramanna* v. *Narayanasami.*
('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Venkayya Garu.* (He can claim the whole value of the term as damages.)
('25) 12 AIR 1925 Lah 262 (264) : 5 Lah 527 : 85 Ind Cas 421 (DB), *Abdul Latif* v. *Ladha Ram.*
('28) 109 Ind Cas 335 (335) (Lah), *Dewa Mal* v. *Moolchand Shiv Dhan.* (Measure of damages pointed out.)
('25) 12 AIR 1925 Rang 261 (262, 263) : 90 Ind Cas 635 (DB), *Ma Huin Yi* v. *Chew Whee Shein.*
('74) 22 Suth W R 260 (261) (DB), *Ashruffunissa Begum* v. *Tosudduck Hoossein.* [*See also* ('71) 6 Ben L R (App) 44 (45, 46) (DB), *Mahomed Isa Khan* v. *Kisho Lal.*]

2. ('19) 6 AIR 1919 Mad 168 (170, 171) : 42 Mad 203 : 51 Ind Cas 507 (SB), *Kandasami Pillai* v. *Ramasami Mannadi.*

3. ('69) 11 Suth W R 80 (81) (DB), *Pran Kisto* v. *Biswambhur.*
('02) 25 Mad 587 (591) : 12 Mad L Jour 249 (DB), *Zemindar of Vizianagaram* v. *Behara Suryanarayana.*
('91) 14 Mad 269 (270) (DB), *Achayya* v. *Hanumantarayudu.*
('21) 8 AIR 1921 Mad 42 (43, 44, 46) : 44 Mad 937 : 62 Ind Cas 284 (DB), *Mohideen Rowther* v. *Jayarama Aiyar.*

4. ('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Mahomed Fazihzzaman* v. *Anwar Hussain.*

Section 108 Clause (b) Notes 3–4

The lessee may also repudiate or rescind the whole contract for failure of the lessor to give possession under S. 55 of the Contract Act,[5] though he cannot do this where he takes possession of a portion of the demised property.[6] If he rescinds the whole contract he can, if he had paid any premium or other consideration for the lease, recover it back from the lessor.[7]

As to whether the lessee can withhold payment of rent or claim abatement or suspension of the rent to any extent on the lessor's failure to give possession in whole or in part, see Notes on clause (l).

4. Contract to the contrary. — The clause is subject to a contract to the contrary. Where the lessee agrees, by the contract of tenancy, that he will himself take possession of the leased property the agreement is a "contract to the contrary" and the lessor has no duty to place the lessee in possession.[1] See also the undermentioned cases.[2]

Clause (c)

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

('31) 18 AIR 1931 All 649 (651) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*
('89) 13 Bom 294 (296) (DB), *Bhutia Dhondu* v. *Ambo.*

5. ('28) 15 AIR 1928 Nag 328 (328) : 110 Ind Cas 420, *Rajpal* v. *Municipal Committee, Arvi.*
('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai.*

6. ('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai.*

7. ('19) 6 A I R 1919 Oudh 134 (136) : 53 Ind Cas 140, *Ibad-Ullah Khan* v. *Ram Charan.*
('27) 14 A I R 1927 Lah 844 (845) : 100 Ind Cas 662 (DB), *Neki Ram* v. *Pirbhu Dayal.*
('69) 11 Suth W R 278 (279) (DB), *Munee Dutt Singh* v. *Campbell,*
('19) 6 AIR 1919 Oudh 398 (398) : 52 Ind Cas 836, *Razzaq Ali* v. *Ram Autar.*
('30) 17 A I R 1930 Cal 385 (386) : 57 Cal 114 : 125 Ind Cas 607 (DB), *Ahmadar Rahaman* v. *Jaminiranjan.* (Lessee knowing that lessor could not put him in possession of a part — Suit delayed for three years — *Held*, claim for interest on premium not justified.)
(1864) 2 Mad HCR 315(316)(DB), *Vayalil Pudia* v. *Udaya Varma.*(Kanam lease.)

Note 4

1. ('29) 16 A I R 1929 Mad 611 (615, 616) : 119 Ind Cas 169 (DB), *Krishna* v. *Subbanna.*

2. ('68) 9 Suth W R 582 (582) (DB), *Hurish Chunder* v. *Mohinee Mohun.*
('79) 4 Cal L Rep 100 (101) (DB), *Ram Kishore Lall* v. *Nand Ram.*

Section 108
Clause (c)
Note 1

Synopsis

1. Scope.
2. "Without interruption."
3. Interruption by holder of paramount title.
4. Interruption by trespasser.
5. "Shall be deemed to contract."
6. Benefit of covenant runs with the land.
7. Crown grants.
8. Effect of breach of covenant.

1. Scope. — In England an express covenant for quiet enjoyment is usually inserted in every lease. Where no covenant is inserted in the lease the law implies such a covenant from the use of the word "demise" or even from a mere contract of letting in whatever form it is expressed.[1] The express covenant may be either in a qualified form or in an unqualified form, though usually, it is in a qualified form, that is to say, it protects the lessee from interruption *by the lessor or by persons claiming under him*, but not from interruption by third persons. The implied covenant also is only a limited covenant.[2] This clause gives the lessee in India the same rights as he would have under what, in England, is a covenant for quiet enjoyment in an *unqualified form*. In other words the lessee is protected against interruption by *whomsoever* it is occasioned.[3]

But though the implied contract under this clause is for quiet possession against interruption by whomsoever caused, it has reference, where it is caused by a third party, only to a *lawful* eviction. It does not extend to maintaining the lessee's possession against unlawful or tortious evictions by third parties.[4] The reason is that against such acts

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Section 108, Clause (c) — Note 1

1. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 265 to 270.
Woodfall, *Landlord and Tenant*, 22nd Edition, p. 207.
(1858) 115 R R 854 (859) : 27 L J Ex 253 : 6 W R (Eng) 327 : 30 L T (O S) 352. *Shaw* v. *Stenton*. (Lease of mine— Lessor cannot use surface in such a way as to disturb the lessee in his occupation.)
[*See also* (1895) 64 L J Q B 787 (790) : (1895) 2 Q B 610 : 73 L T 250 : 44 W R (Eng) 328, *Baynes & Co.* v. *Lloyd & Sons*.]

2. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 265 to 270.

3. ('20) 7 AIR 1920 Lah 390 (391) : 60 Ind Cas 477, *Dharam Narain* v. *Labh Singh*.
('23) 10 AIR 1923 Cal 41 (43) : 50 Cal 68 : 70 Ind Cas 161 (DB), *Naorang Singh* v. *A. J. Meik*.
('29) 16 AIR 1929 Cal 272 (275): 117 I.C. 838(DB), *Indu Bhusan* v. *Moazam Ali*.
('35) 22 AIR 1935 Mad 973 (975) : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi*.
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas 394, *Gajadhar* v. *Rambhau*.
('01) 25 Bom 269 (273) : 2 Bom L R 1070 (DB), *Tayawa* v. *Girshidappa*.
('17) 4 AIR 1917 Pat 549 (550) : 2 Pat L Jour 713 : 42 Ind Cas 111 (DB), *Kadir Bakhsh* v. *Sheo Prasad*. (The lessors are not entitled to intrude upon the property of the lessees by inducting any person thereupon.)
[*See also* (1864) 1 Suth W R 1 (2), *Bishen Dyal* v. *Probhoo Dass*.
('13) 19 Ind Cas 815 (816) (DB) (Cal), *Muktar Akmad* v. *Sundar Koer*.]
[But see ('05) 7 Bom L R 713 (722, 723), *Bomanji* v. *Mahomadali*. (To constitute a breach of the covenant for quiet enjoyment on the landlord's part there must be some act of interruption by him or those claiming under him.)]

4. ('38) 25 AIR 1938 Cal 690 (691, 692) : 177 Ind Cas 996, *Surendra Nath* v. *Bhudar Chandra*.

the lessee has his proper remedy against the wrong doers.[5] As pointed out by Rankin, C. J., in *Indubhusan* v. *Mozan Ali*[6]:

> "No lessor can guarantee that his lessee will not be subject to trespass or wrongful acts on the part of a third party. What he does covenant is that his title is such that no lawful entry or eviction or interruption will occur."

The words "if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee" do not make the payment of rent and the performance of the contracts *conditions precedent* to the enforceability of the obligation to secure quiet enjoyment.[7] This is also the English law on the point. In a covenant for quiet enjoyment by the lessee the usual qualification "by paying the rent thereby reserved and performing the covenants" does not make the payment of rent, etc., a condition precedent to the performance of the covenant by the lessor.[8] The covenant, if it is express, holds good during the whole of the term expressed to be granted by the lease and not merely during the actual continuance of the estate of the lessor.[9] Where a lease is to commence in future, the lessee cannot, before his right to possession accrues, sue for breach of the covenant for quiet enjoyment.[10]

2. "Without interruption." — In order to constitute an interruption within the meaning of this clause there must be a

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('85) 11 Cal 625 (628) (DB), *Kali Prasanna* v. *Dhananji Ghose.*

('33) 20 AIR 1933 Mad 465 (466) : 144 Ind Cas 16, *Ayyanna* v. *Gangayya.* (In connexion with proceedings for the determination of mesne profits a receiver was appointed to auction the land and the respondent in the case executed a security bond to raise the second crop and give a certain amount of paddy—*Held*, whether or not there was technically a lease, the security bond had the same practical effect as a lease and though T. P. Act did not apply the principles of S. 108 applied.)

('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa Aiyangar* v. *Rangaswami Iyengar.*

('22) 9 AIR 1922 Cal 87 (90) : 49 Cal 948 : 69 Ind Cas 126 (DB), *Chandi* v. *Katyani Debi.*

('37) 24 AIR 1937 Lah 930 (931) : 171 Ind Cas 114, *Kashav Chander* v. *Sher Singh.*

('70) 14 Suth W R 273 (274) (DB), *Gobind Chunder* v. *Kristo Kanto.*

('23) 10 AIR 1923 Cal 41 (44) : 50 Cal 68 : 70 Ind Cas 161 (DB), *Noorang Singh* v. *A. J. Meik.*

('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Jamita Mal* v. *Gokal Chand.*

Woodfall, *Landlord and Tenant*, 22nd Edn., p. 875.

[*See also* ('21) 8 AIR 1921 Cal 532 (534) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan.*]

5. Woodfall, *Landlord and Tenant*, 22nd Edn., p. 868.

6. ('29) 16 AIR 1929 Cal 272 (276) : 117 Ind Cas 838 (DB).

7. ('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara* v. *Chidambaram Chetti.*

8. Woodfall, *Landlord and Tenant*, 22nd Edn., p. 875.

9. ('35) 22 AIR 1935 Mad 973 (975) : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi.*

Woodfall, *Landlord and Tenant*, 22nd Edn., p. 875.

(1862) 139 R R 730 (733) : 32 L J Q B 67 : 11 W R (Eng) 169 : 7 L T (N S) 384, *Penfold* v. *Abbot.* (Implied covenant.)

10. (1835) 42 R R 532 (539) : 2 Bing (N C) 90 : 4 L J (N S) C P 305, *Treland* v. *Bircham.*

Section 108
Clause (c)
Note 2

substantial interference with the enjoyment by the lessee of the leased property.[1] Actual dispossession is, however, not necessary.[2] Disturbance of enjoyment which is merely temporary and which does not interfere with the title or possession of the lessee is not a breach of obligation.[3]

Where there is an interruption of enjoyment under compulsion of a statute it has been held in England that there is no breach of the covenant for quiet enjoyment.[4] Where the lessee was evicted by the Plague Authorities under the powers vested in them by law, it was held by the Bombay High Court that there was no breach on the part of the lessor of the covenant for quiet enjoyment.[5] In the undermentioned case,[6] however, where land was leased for being used for sale of firewood, but the municipality refused permission for such sale, it was held by the Oudh Chief Court that the lessor did not secure the lessee possession with reference to its intended use, and that there was a breach of the obligation to secure quiet enjoyment. It is submitted that this view does not seem to be correct.

A covenant for quiet enjoyment does not include a covenant for title.[7]

Note 2

1. ('97) 24 Cal 296 (304) (DB), *Dhunput Singh* v. *Mahomed Kazim Ispahain.*
('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.* (Agricultural lease—Third person taking away the crops harvested by the lessee, and delivering it subsequently to the lessor, constitutes disturbance.)
('01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee.*
Halsbury, *Laws af England* (Hailsham Edition), Vol. 20, Para. 271.

2. ('12) 17 Ind Cas 238 (241) (DB) (Cal), *Kalanand Singh* v. *Jarao Kumari.*
('01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee.*
('23) 10 AIR 1923 Nag 31 (32) : 69 Ind Cas 234, *Deboo* v. *Jiwan Rao.* (Plaintiff repudiated the kabuliyat granting the lease—He also took forcible possession of a certain amount of juari harvested in the field and put it in the possession of another person — *Held*, the plaintiff's action in repudiating the lease and the seizure of juari grown by the tenant showed eviction in the eye of the law.)
('26) 13 AIR 1926 Cal 906 (907) : 96 Ind Cas 11 (DB), *Ram Rajan* v. *Jayanti.*
('22) 9 AIR 1922 Cal 237 (242) : 63 Ind Cas 754 (DB), *Ramchandra Chatterjee* v. *Pramatha Nath.* (Interference with receipt of rent.)
('21) 8 AIR 1921 Cal 532 (533) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan.* (Interference with collection of rent.)
('35) 22 AIR 1935 Cal 464 (465) : 157 Ind Cas 353 (DB), *Wazuddin Gazi* v. *Sayeb Ahamad.* (Property X leased to *A* and property *Y* leased to *B* for purposes which interfered with the enjoyment by *A*—*Held*, there was an interruption.)
[*See also* ('20) 7 AIR 1920 Pat 258 (258) : 57 Ind Cas 69, *Surendra Mohan* v. *Sarba Lal.* (Wrongful accumulation of water by landlord on his tenant's land amounts to an interference with the tenant's possession.)]

3. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 274.
(1888) 58 L J Ch 124 (126): 40 Ch D 71: 60 L T 105 : 37 W R (Eng) 253, *Jenkins* v. *Jackson.* (A nuisance committed on adjoining land by the lessor or his tenant is not a breach of the covenant for quiet enjoyment.)

4. Woodfall, "*Landlord and Tenant*" 22nd Edition, page 880.

5. ('99) 23 Bom 510 (512, 513) : 1 Bom L R 267, *Merwanji* v. *Syed Sirdar.*

6. ('19) 6 AIR 1919 Oudh 398 (398) : 52 Ind Cas 836, *Razzak Ali* v. *Ram Autar.*

7. ('17) 4 AIR 1917 Mad 465 (467) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Pemmaraju.*
('30) 17 AIR 1930 Cal 561 (564): 57 Cal 1189: 128 Ind Cas 321 (DB), *Jyoti Prasad* v. *H. V. Low & Co.*

3. Interruption by holder of paramount title. — An interruption of the lessee's enjoyment by the holder of a paramount title is an 'interruption' within the meaning of this clause.[1] This follows from the principle stated in Note 1 that the covenant for quiet possession under this clause extends to all lawful evictions by third parties. A title paramount means a title superior to that of the lessor, i.e., a title against which a lessor cannot make a valid defence.[2] Where a third person files a suit against the lessee without making the lessor a party, and, in execution of the decree, dispossesses the lessee it cannot be said that such dispossession is necessarily by a person with paramount title.[3] But where a lessor is made a party the dispossession will be by the owner of the paramount title.[4]

4. Interruption by trespasser. — As seen in Note 1, the covenant under this clause does not extend to *tortious* acts of third parties. Where, therefore, the lessee is evicted or interrupted in his enjoyment of his property by a trespasser, the lessor cannot be said to have committed any breach of his obligation under this clause. In such cases the lessee can himself sue the trespasser for ejectment. There is a difference of opinion on the question whether the lessor himself can sue the trespasser for possession in such cases. In *Ramanathan* v. *Pulikutty*[1] it was held by the Madras High Court that the lessor, not being entitled to possession himself after the execution of the lease, was not entitled to sue the trespasser for possession. This view has not been followed by that Court in later cases. It has been held that a lessor, although he has granted lease to another is entitled for the purpose of putting the lessee in possession, to maintain a suit to eject the trespasser.[2] It has also been held that if the lessor's right to the reversion is affected by the trespass he will be entitled to a declaration of title and to the delivery of "formal" possession by proclamation of his reversionary

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('34) 21 AIR 1934 Cal 437 (438) : 149 Ind Cas 1027 (DB), *Hiralal Ray* v. *Satyapriya Ghosal.*
[But see (1864) 1 Suth W R 1 (2) (DB), *Bsihen Dyal* v. *Probhoo Das.* (Case before the Act.)]

Note 3

1. ('02) 25 Bom 269 (273, 274) : 2 Bom L R 1070 (DB), *Tayawa* v. *Girshidapa.*
('13) 19 Ind Cas 815 (816) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer.*
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas 394, *Gajadhar* v. *Rambhau.*
('35) 22 AIR 1935 Mad 973 (975) : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi.*
('20) 7 AIR 1920 Lah 390 (391) : 60 Ind Cas 477, *Dharm Narain* v. *Labh Singh.*
2. ('21) 8 AIR 1921 Cal 532 (533) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan.*
('29) 16 AIR 1929 Cal 22 (25) : 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*
3. ('21) 8 AIR 1921 Cal 532 (533) : 68 I.C. 477 (DB), *Banka Behari* v. *Madan Mohan.*
4. ('22) 9 AIR 1922 Cal 237 (242) : 63 Ind Cas 754 (DB), *Ramchandra Chatterji* v. *Pramatha Nath Chatterji.*
('29) 16 AIR 1929 Mad 195 (196) : 113 Ind Cas 289, *Kunhammad* v. *Etakarati Ammad.*

Note 4

1. ('98) 21 Mad 288 (290) : 8 Mad L Jour 121 (DB).
2. ('15) 2 AIR 1915 Mad 358 (360) : 26 Ind Cas 347 (DB), *Somai Ammal* v. *Vellayya.* (21 Mad 288 not followed.)

Section 108
Clause (c)
Notes 4–6

right.[3] The same view, namely, that the lessor is entitled to sue to eject the trespasser for the purpose of putting the lessee in possession has been taken by the Calcutta and Patna High Courts also.[4]

There is also a difference of opinion as to whether a lessor can maintain a suit for ejectment under S. 9 of the Specific Relief Act. According to one view he is not entitled to maintain such a suit.[5] A contrary view is that he can maintain such a suit.[6] It is submitted that the latter view is to be preferred.

5. "Shall be deemed to contract."—The covenant for quiet enjoyment in this clause is deemed to be a part of the contract and to be read into the contract. The other clauses of this section are merely *statutory obligations* and are not deemed to be part of the contract itself.[1]

6. Benefit of covenant runs with the land.—The paragraph following this clause applies only to this clause and not to clauses (a) or (b). Consequently, it is only the benefit of a covenant for quiet enjoyment that runs with the land and not the benefit of the obligations under clauses (a) or (b).[1]

As will be seen in the Notes on S. 111, the right of a lessee in the lease is a heritable right.[2] By virtue of clause (j) of this section it is also a transferable right. The legal representatives of the lessee or the assignee of the lessee will therefore be entitled to enforce the covenant for quiet enjoyment given by this clause.[3]

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3. ('17) 4 AIR 1917 Mad 760 (761) : 39 Mad 1042 : 32 Ind Cas 198 (DB), *Tiruvengada* v. *Venkatachala.* (8 All 440 followed.)

4. ('23) 10 AIR 1923 Cal 192 (193) : 70 Ind Cas 792 (DB), *Raj Kumar* v. *Ali Mia.*
('84) 10 Cal 1076 (1079) : 9 Ind Jur 226 (DB), *Bissesuri Dabea* v. *Barada Kanta.*
('28) 15 AIR 1928 Pat 354 (355) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad.*
('28) 112 Ind Cas 314 (315) (DB) (Pat), *Basoo Mahton* v. *Bhagwan Das.*

5. ('26) 13 AIR 1926 Mad 18 (20) : 92 Ind Cas 20, *Veeraswami* v. *Venkata Chala.*
('02) 6 Cal W N 616 (617) (DB), *Sonaton* v. *Sheikh Helim.* (Lessor cannot bring a suit for possession against trespasser even where, subsequent to such dispossession the tenant in collusion with the trespasser refused to bring a suit.)

6. ('05) 28 Mad 238 (239) (DB), *Jagannath* v. *Rama Rayar.*
('11) 12 Ind Cas 190 (191) : 5 Sind L R 42 (DB), *Sahibrakhio* v. *Jamromal.*
('09) 1 Ind Cas 150 (150) (DB) (Cal), *Bindubashini* v. *Shrimati Jahnavi.*
('09) 3 Ind Cas 466 (467) (DB) (Cal), *Shyama Churn* v. *Mohamed Ali.*
('10) 7 Ind Cas 924 (926) (DB) (Cal), *Nobin Das* v. *Kailash Chandra.*
('29) 16 AIR 1929 Bom 467 (468) : 53 Bom 777 : 122 Ind Cas 54 (DB), *Ratanlal Ghelabhai* v. *Amarsingh Rupsing.*
('11) 10 Ind Cas 455 (455) (DB) (Cal), *Akhil Chandra* v. *Akhil Chandra.*

Note 5

1. ('37) 24 AIR 1937 Pat 44 (47) : 166 Ind Cas 599 (DB), *Ramparikha Pandey* v. *Mt. Ramjhari Kuer.*

Note 6

1. ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Pemmaraju.*

2. ('37) 24 AIR 1937 Nag 321 (322) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.*

3. ('29) 16 AIR 1929 Mad 195 (196): 113 Ind Cas 289, *Kunhtammad* v. *Etakarai.*

7. Crown grants. — This Act does not apply to Crown grants by virtue of the provisions of the Crown Grants Act, XV of 1895. But it has been held that the provisions of this section may be referred to in order to determine the nature of the ordinary covenants by which the lessor and the lessee are bound.[1]

8. Effect of breach of covenant. — Where, after the lease is executed the covenant for quiet enjoyment is broken by the lessor, the lessee is entitled to sue the lessor for damages as on breach of a contract.[1] The measure of damages in such a case will, as in the case of any other contract, have to be determined by reference to S. 73 of the Contract Act. But a claim for damages is not the only remedy of the lessee. He can sue the lessor for specific performance of the contract by putting him in possession.[2] He can also treat the contract of lease as rescinded and deliver to the lessor the properties in his possession.[3] As to abatement or suspension of rent on disturbance of possession, see Notes on clause (l).

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:

Note 7

1. ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Venkayya Garu.*

Note 8

1. ('13) 19 Ind Cas 815 (817) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer.*
('97) 1897 Bom P J 372 (DB), *Giriappa* v. *Anandrao.*
(1864) 1 Suth W R 49 (49) (DB), *Ram Manikchand Sircar* v. *Meer Mahomed Gunnial Hossein.*
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas 394, *Gajadhar* v. *Rambhau.* (Lease of theatre—Measure of damages stated.)
[*See also* ('35) 22 AIR 1935 Cal 464 (465) : 157 Ind Cas 353 (DB), *Wazuddin Gazi* v. *Sayeb Ahamad.*
('23) 10 AIR 1923 Mad 392 (395) : 74 Ind Cas 416 (DB), *Gopala Iyenger* v. *Mummachi Reddiar.*
('09) 4 Ind Cas 1142 (1142)(DB) (Mad), *Ramaswami* v. *Thiruvenkatam Pillai.*
('70) 14 Suth W R 43 (44) (DB), *Gobind Chand Juttee* v. *Mun Mohun Jha.*
('95) 21 Bom 175 (183) (DB), *Nagardas Saubhagyadas* v. *Ahmedkhan.*]

2. ('04) 31 Cal 647 (656) : 8 Cal W N 446 (FB), *Tamizuddin* v. *Ashrub Ali.* (A suit under S. 9 of the Specific Relief Act is not the only remedy.)
(1864) 1 Suth W R 49 (49) (DB), *Ram Manikchand* v. *Meer Mahomed.*
('82) 11 Cal L R 387 (388) (DB), *Chundra Kumar Guha* v. *Mongul Mollah.*
(1864) 10 Moo Ind App 386 (395) (PC), *Kamala Naicken* v. *Pitchacooty Chetty.*

3. ('76) 25 Suth W R 492 (492) (DB), *Mt. Lali Konwar* v. *Phillip Willim Carter.*
('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara* v. *Chidambaram Chetty.*
('27) 14 AIR 1927 Lah 880 (880) : 109 Ind Cas 799, *Kundan Lal* v. *Lekh Raj.* (If the tenant does not deliver possession, he may be liable in damages.)

Section 108
Clause (d)
Notes 1–2

Synopsis

1. Accession.
2. Accretion to land by alluvion.
3. Encroachment by tenant.
4. "Shall be deemed to be comprised in the lease."

1. Accession. — A lessee is under this clause entitled to any accessions made to the demised property during the continuance of the lease.[1] As to the meaning of the word "accession" see generally Note 1 on S. 63 and Note 2 on S. 70. The question whether a particular addition to the demised property is an "accession" must be decided, as seen in the said Notes, in the light of various facts—upon the intention of the parties, upon the law applicable to the particular case and in some cases upon both these things.

2. Accretion to land by alluvion. — Under the English law where there is an acquisition of land from the sea or a river by *gradual, slow and imperceptible* means then, from the supposed necessity of the case and the difficulty of having to determine year by year to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land.[1] This principle was applied by their Lordships of the Privy Council in the case of *Felix Lopez* v. *Muddun Mohun*[2] and by the Allahabad High Court in *Narendra* v. *Achhaibar*.[3] In *Raja Srinath Roy* v. *Dinabandhu Sen*[4] their Lordships of the Privy Council, however, observed as follows :

> "It is to be observed that here too Indian law doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to 'imperceptible' alterations, Regulation XI of 1825 (Bengal), Arts. 1 and 4, speak of 'gradual accession.' The

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Section 108, Clause (d) — Note 1

1. ('08) 2 Sind L R 1 (6) (DB), *Seth Asandas* v. *Mir Hassan Khan*.
('27) 14 AIR 1927 Cal 902 (904) : 104 Ind Cas 655 : 55 Cal 201 (DB), *Lalifa Khatun* v. *Tofer Ali*. (Accretion by alluvion.)
('25) 12 AIR 1925 Cal 758 (759) : 87 Ind Cas 442 (DB), *Dhirendra Chandra Rai* v. *Khaja Habibullah*.
[*See also* (1864) 1 Suth W R 113 (114) (DB), *Narain Doss Bepary* v. *Soobul Bepary*.
('80) 5 Cal L R 192 (193) (DB), *Mutura Kanto Shaha Chowdhry* v. *Meajan Mundul*.]

Note 2

1. (1828) 5 Bing 163 (166) : 27 R R 292 (308) : 2 Bligh (N S) 147, *Gifford* v. *Yarborough (Lord)*.
(1824) 107 E R 668 (674) : 3 B & C 91 : 2 L J K B 196 : 4 Dowl & Ry 790, *R.* v. *Yarborough (Lord)*.
('15) 2 AIR 1915 P C 131 (137) : 84 L J P C 98 (104) : 1915 App Cas 599 : 112 L T 955 (PC), *A. G. of South Nigeria* v. *Holt & Co.* (Where an addition is caused artificially by execution of works of reclamation, acquisition cannot be said to be slow and therefore doctrine of natural accretion will not apply.)
2. ('70) 13 Moo Ind App 467 (473) : 14 Suth W R 11 (PC).
3. ('06) 28 All 647 (649) : 3 All L Jour 453 : 1906 All W N 169 (DB).
4. ('14) 1 AIR 1914 P C 48 (59) : 25 Ind Cas 467 : 42 Cal 489 : 10 Nag L R 108 : 41 Ind App 221 (PC).

analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the *Indian rule is established now beyond question*, it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for, that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole."

The decision of *Srinath Roy's case* has been regarded as settling the view, so far as this country is concerned, that an accretion need not be *imperceptible*.[5] See also the undermentioned cases[6] under Bengal Regulation XI of 1825 under which an accretion is required only to be gradual and not imperceptible.

Where the accretion to land is *sudden* and not gradual it cannot be said to become part and parcel of the land to which it is added and so does not constitute an 'accession'. If a land is submerged and is again re-formed and can be identified as forming part of a particular estate the owner of that estate is entitled to it.[7]

It was held in *Secretary of State* v. *Kadirkutti*[8] that even though an accretion has been brought about artificially and not by natural causes, the party bringing it about may become entitled to it, but that the rule will not apply where it is brought about intentionally with the motive of getting the benefit of accretion. This view was rested on the decision in *Attorney-General* v. *Chambers*.[9] The view expressed in the last mentioned case appears, however, to be no longer good law in view of the decision of the House of Lords in *The Mayor of Bradford Corporation* v. *Pickles*[10] where it has been held that, provided that an act is done lawfully, the party cannot be deprived of any benefit that may be derived from such act by reason merely of the fact that his motive is bad.

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5. ('18) 5 AIR 1918 Mad 1083 (1084) : 40 Mad 1083 : 40 Ind Cas 896 (DB), *Secretary of State* v. *Rajah of Vizianagaram*. (AIR 1914 P C 48 : 42 Cal 489 : 10 Nag L R 108 : 41 Ind App 221 (PC) referred to.)
('20) 7 AIR 1920 Pat 330 (331) : 5 Pat L Jour 1 : 52 Ind Cas 147 (DB), *Lachmi Narayan* v. *Kesho Prasad*.

6. (1900) 4 Cal W N 508 (511) (DB), *Khondkar Abdul Hamid* v. *Mohini Mant Saha Choudhuri*.
('09) 4 Ind Cas 511 (512) (DB) (Cal), *Ahmud Bepari* v. *Tohi Mahomed*.
('09) 4 Ind Cas 518 (519) (DB) (Cal), *Amjad Ali* v. *Kaderjan*.
(1864) 2 Bom H C R 345 (347) (DB), *Nasarvanji Pestamji* v. *Nasarvanji Darasha*.

7. ('06) 3 Cal L Jour 316 (333) (DB), *Ananda Hari Basak* v. *Secretary of State*.
('74) 21 Suth W R 115 (116) (DB), *Gunga Narain Chowdhry* v. *Radhika Mohun Roy*.
[*See also* ('06) 3 Cal L Jour 560 (562) (PC), *Rani Hemanta Kumari* v. *Secretary of State*.]

8. ('90) 13 Mad 369 (377) (DB).

9. 45 E R 22 (27).

10. (1895) 64 L J Ch 759 (762).

Section 108
Clause (d)
Note 3

3. Encroachment by tenant.—A tenant encroaching upon other property of the landlord does not, merely by reason of such encroachment, become a tenant of such property also. His possession will be really adverse to the landlord. To what extent it would be adverse would, however, depend upon the nature of the right in assertion of which the adverse possession was held. Where the tenant is in adverse possession claiming an absolute right in the land he would acquire by prescription an absolute title to the land. But where he claims to be a tenant of the land he will acquire a tenant right in the land. The *presumption* is, however, that he only claims the additional land as part of the land. "The true presumption," said Markby, J., in *Gooroo Doss Roy* v. *Issur Chunder*[1] "as to encroachments made by the tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appeared by some act done at the time that the tenant made encroachments for his own benefit."[2]

Before the tenant acquires by prescription an absolute title, or the tenancy right, the landlord can eject the lessee from the portion encroached upon.[3] Where the lessor treats the lessee as a tenant in respect of the encroachment while the latter professes to hold it as part and parcel of the leased property, the two plots constitute one tenancy and stand on the same footing.[4] After a title for prescription has been acquired by the lessee of the tenancy rights, the lessor cannot eject the lessee before the termination of the lease.[5] If the lessee has acquired a

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Note 3

1. ('74) 22 Suth W R 246 (247) (DB).

2. Also see the following cases :
(1895) 64 L J Q B 245 (247), *Tabor* v. *Godfrey.*
('11) 10 Ind Cas 575 (576) : 35 Mad 618 (DB), *Muthurakku Thevan* v. *R. G. Orr.*
('05) 2 Cal L Jour 125 (133, 134) (DB), *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty.* (Per Mookerjee, J.)
('25) 12 AIR 1925 Cal 193 (194) : 84 Ind Cas 657 (DB), *Golam Nazar* v. *Abbas Molla.*

3. ('12) 14 Ind Cas 212 (212) (DB) (Cal); *Gopal Krishna Jana* v. *Lakhiram Sardar.*
('17) 4 AIR 1917 Pat 471 (473) : 2 Pat L Jour 506 : 41 Ind Cas 114 (DB), *Midnapur Zamindari Co.* v. *Pandey Sardar.*
('97) 25 Cal 302 (305) (DB), *Pohlad Teor* v. *Kedar Nath.*
('05) 2 Cal L Jour 125 (135) (DB), *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty.*
(1900) 4 Cal W N 508 (511) (DB), *Khondkar Abdul Hamid* v. *Mohini Mant Saha Choudhuri.* (But when the landlord has once exercised his option and treated the person as tenant he cannot subsequently treat him as trespasser.)
('97) 25 Cal 302 (304) (DB), *Prohlad Teor* v. *Kedar Nath.*
('21) 8 AIR 1921 Cal 83 (83) : 67 Ind Cas 639 (DB), *Abdul Hossin* v. *Afsaruddin.*
('84) 10 Cal 820 (822) (DB), *Nuddyarchand* v. *Mea Jan.*
('18) 5 AIR 1918 Cal 639 (641) : 41 Ind Cas 530 (DB), *Sarada Kripa Lala* v. *Akhil Chandra Biswas.*
('11) 11 Ind Cas 30 (30) (DB) (Cal), *Taran Chandra* v. *Ganendra Nath.*
('03) 16 C P L R 36 (40), *Gadi Kunbi* v. *Ram Lal.*

4. ('18) 5 AIR 1918 Cal 639 (641, 642) : 41 Ind Cas 530 (DB), *Sarada Kripa Lala* v. *Akhil Chandra.*

5. ('12) 14 Ind Cas 212 (212) (DB) (Cal), *Gopal Krishna* v. *Lakhiram.*

full title by prescription the landlord's title will be extinguished.[5a]

Where the tenant encroaches on land which adjoins his holding but which belongs to a person *other than the landlord* the possession of such land may be adverse to the owner thereof. But the presumption in this case also is that he has made the encroachment, not for his own benefit, but for that of his landlord,[6] and the burden of proof is on the tenant to show that the encroachment was for his own benefit.[7] A subsequent severance of the encroached portion from the demised property is sufficient to rebut the said presumption.[8]

Where the lessor is entitled to the benefit of an encroachment on the principles stated above, he will be entitled to claim, and the tenant will be bound to pay, additional rent for the excess area.[9] After the termination of the lease, the lessee would also be bound to hand over the excess area to the landlord along with the property originally demised.[10]

('09) 4 Ind Cas 526 (528) (DB) (Cal), *Krishna Govinda* v. *Banka Behari.*
[*See also* ('29) 16 AIR 1929 Lah 469 (470):117 I C 810, *Amar Nath* v. *Thakru.*]

5a. ('26) 13 AIR 1926 Cal 883 (885) : 95 Ind Cas 622 (DB), *Devendra Narayan* v. *Jhumur Pramanik.*

6. ('84) 10 Cal 820 (821) (DB), *Nuddyarchand Shaha* v. *Meajan.*
('35) 22 AIR 1935 Cal 771(772):159 I.C.685(DB), *Saroj Kumar* v. *Surjya Kanta.*
('16) 3 AIR 1916 Cal 596 (597) : 29 Ind Cas 216 (DB), *Tepu* v. *Tetayit.*
('19) 6 AIR 1919 Cal 378 (379): 51 Ind Cas 797 (DB), *Rakhal Chandra* v. *Mohendra Narain.*
('28) 15 AIR 1928 Lah 351 (352) : 107 Ind Cas 386, *Nanak Chand* v. *Gaman.*
('18) 5 AIR 1918 Mad 278 (279) : 43 Ind Cas 677 (DB), *Ammu Ammal* v. *Puthiaparambath.*
[*See also* ('14) 1 AIR 1914 Low Bur 194 (196) : 8 Low Bur Rul 71 : 29 Ind Cas 872 (DB), *Sit Yin* v. *Ma Shin.*]

7. ('18) 5 AIR 1918 Mad 278 (279) : 43 Ind Cas 677 (DB), *Ammu Ammal* v. *Puthiaparambath.*
[*See also* ('28) 15 AIR 1928 Lah 351 (352) : 107 Ind Cas 386, *Nanak Chand* v. *Gaman.*
('84) 10 Cal 820 (822) (DB), *Nuddyarchand* v. *Mea Jan.*]

8. ('15) 2 AIR 1915 Cal 386 (387) : 30 Ind Cas 896 (DB), *Birendra Kishore* v. *Lakshmi.*

9. ('35) 22 AIR 1935 Cal 771 (773) : 159 Ind Cas 685 (DB), *Saroj Kumar* v. *Surjya Kanta.*
('74) 22 Suth W R 246 (247) (DB), *Gooroo Doss* v. *Issur Chunder.*
('26) 13 AIR 1926 Cal 883 (885-886) : 95 Ind Cas 622 (DB). *Devendra Narayan* v. *Jhumer Pramanik.*
('99) 26 Cal 739 (744-745) (DB), *Assanullah Bahadur* v. *Mohini Mohan Das.* (Bengal Tenancy Act.)
('36) 23 AIR 1936 Cal 454 (455) : 168 Ind Cas 375 (DB), *Khaje Habibulla* v. *Bepin Chandra.* (Do.)
(1911) 11 Ind Cas 30 (31) (DB) (Cal), *Taran Chandra* v. *Ganendra Nath.* (Do.)
('82) 8 Cal 706 (707) : 4 Shome L R 272 (DB), *Brojendra Coomar* v. *Wopendra Narain.* (Alluvion Regulation (Bengal) 11 of 1825.)
('81) 7 Cal 479 (481) : 8 Cal L R 517 (DB), *Golam Ali* v. *Kali Krishna.*

10. ('25) 12 A I R 1925 Cal 1114 (1116) : 87 Ind Cas 630 (DB), *Indu Bhusan* v. *Atul Chandra.*
Fawcett, *Landlord and Tenant*, 3rd Edn., page 564.
See also Notes on clause (q).

Section 108 Clause (d) Note 4

4. "Shall be deemed to be comprised in the lease."—The accession becomes under this clause a part of the leased property. According to the English law the covenants to repair, etc., in the lease extend also by implication to the encroachments and the buildings thereon.[1]

Clause (e)

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision:

Synopsis

1. Scope.
2. "Flood."
3. "Substantially and permanently unfit."
4. "At the option of the lessee."
5. Proviso.
6. Effect of repudiation.

1. Scope. — This clause enacts a rule which appears to be somewhat different from the English law. Under that law, the fact that the demised property is destroyed by flood or fire or lightning or by the violence of an army is not a ground for the tenant to free himself from the liabilities under the lease unless there is an express contract or covenant to that effect.[1] Under this clause the fact that the demised property is destroyed or substantially and permanently rendered unfit will, apart from any contract, enable the lessee, at his option, to put an end to the lease. But the clause has reference only to cases of positive actual destruction or injury by some *violent force*. It has no reference to the case of the property becoming unprofitable or unfit for cultivation through the failure of its ordinary water supply or through something not happening which was expected to happen.[2] Thus, the failure of rain is not a ground under this clause for avoiding the lease.[3]

Note 4

1. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 926.

Section 108, Clause (e) — Note 1

1. ('14) 1 AIR 1914 Sind 75 (78) : 8 Sind L R 222 : 28 Ind Cas 5 (DB), *Ghulam Mahomed* v. *Saheb Singh*.

Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 196; 263.

Woodfall, *Landlord and Tenant*, 22nd Edn.; Pages 521, 522.

('36) 23 AIR 1936 Mad 664 (664) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar*.

2. ('14) 1 AIR 1914 Sind 75 (77) : 8 Sind L R 222 : 28 Ind Cas 5 (D B), *Ghulam Mahomed* v. *Sahib Singh*.

3. ('10) 8 Ind Cas 471 (473) : (1910) 1 Upp Bur Rul 2nd Qr 22, *Mi Me* v. *Nga On Gaing*.

2. **"Flood."**—It was held in *Subramania Pattar* v. *Kattambath Rama*[1] that the word "flood" in this clause must be restricted to sea-water flooding and not fresh water flooding. This view was, however, dissented from by Venkatasubba Rao, J., in the undermentioned case.[2]

3. **"Substantially and permanently unfit."** — The words "substantially and permanently unfit" imply that the damage must be so great that the land could not be rendered fit for cultivation at a reasonable expenditure during any portion of the remaining period of the lease.[1] The burden of proof will be on the lessee to establish that the demised property was rendered substantially and permanently unfit.[2] Where a part of a house was rendered dangerous for habitation by reason of an earthquake shock, it was held by the Allahabad High Court that that cannot be said to render the house "substantially and permanently unfit" for residence.[3] Where a godown was burnt down so badly that it could not be repaired within three months it was held by the Bombay High Court that it was rendered substantially and permanently unfit for use.[4] In another Bombay case it was held that an eviction of the tenant from the demised premises by the Plague Authorities acting under the Epidemic Diseases Act (III of 1897) could not be said to render the premises permanently unfit within the meaning of this clause.[5] It is submitted that such an eviction cannot, even otherwise, be regarded as falling within any of the categories of fire, tempest, flood, violence of an army or mob or other irresistible force.

The inability of the lessee of salt works to carry on his work owing to the strike of the workers cannot be said to have rendered the leased property substantially unfit by reason of any of the causes mentioned in this clause.[6] In the undermentioned case[7] the lease was one for agricultural purposes not governed in terms by this clause. The lands leased were silted up by floods, but it was possible to put them right by means of certain expenditure. It was held that the tenancy cannot be put an end to.

4. **"At the option of the lessee."** — The lease does not *ipso facto* become void on the destruction, etc., of the premises; only the exercise of the option by the lessee will render it void from the moment

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Note 2

1. ('20) 7 AIR 1920 Mad 584 (584) : 43 Mad 132 : 53 Ind Cas 397 (DB).
2. ('36) 23 AIR 1936 Mad 664 (665) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar*.

Note 3

1. ('28) 109 Ind Cas 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai*.
2. ('28) 109 Ind Cas 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai*.
3. ('10) 7 Ind Cas 201 (202) (DB) (All), *J. O. Brian Donaghey* v. *George Weatherdon*.
4. ('99) 23 Bom 15 (19), *Dhuramsey* v. *Ahmedbhai*.
5. ('99) 1 Bom L R 739 (742) (DB), *Mahomadally* v. *Campbell*.
6. ('28) 15 AIR 1928 Bom 61 (63) : 52 Bom 142 : 108 Ind Cas 19 (DB), *Hari Laxman* v. *Secretary of State*.
7. ('29) 16 AIR 1929 Mad 575 (576) : 118 Ind Cas 79, *Sinnappa Pillai* v. *Ramaswami Ayyar*.

Section 108
Clause (e)
Notes 4–5

of such exercise.[1] The exercise of the option need not be by any written notice; nor need such notice, if given, require any length of time for its operation.[2] The option must, however, be exercised within a reasonable time of the occurrence.[3] Otherwise the lessee cannot be allowed to repudiate the lease.[4] The question as to what is reasonable time will depend upon the facts and circumstances of the case.[5] In the undermentioned case[6] it was held that there was no valid exercise of option until the lessee delivered possession of the property to the lessor. It is submitted that this view is not correct.

But the fact that the lessee has not exercised his option to avoid the lease under this clause will not render him liable, in the absence of a contract to the contrary, to restore the property to the lessor in its original state by repairing or re-building the premises[7] though he would continue to be liable for the rent until the determination of the lease.[8]

5. Proviso. — If the injury is caused by the wrongful act or default of the lessee himself he cannot get the benefit of this clause. The reason is that no person can derive any advantage from his own wrong. On the other hand, the lessee may be liable to pay damages to the lessor.[1] Where, owing to the neglect of the lessee himself for failure to give intimation as required by the rules, he was evicted by the Plague Authorities, it was held that he was not thereby absolved from the liabilities under the lease.[2] A rented certain premises in which he had stored a large number of bales of piece-goods, and put a watchman in

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Note 4

1. ('99) 23 Bom 15 (19), *Dhuramsey* v. *Ahmedbhai.*
('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Firm Jamita Mal* v. *Gokal Chand.*
('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.*
('33) 20 AIR 1933 Lah 517 (519) : 150 Ind Cas 682, *Banarsi Das* v. *Cantonment Authority, Ambala Cantonment.*
('14) 1 AIR 1914 Sind 75 (76) : 8 Sind L R 222 : 28 Ind Cas 5 (DB), *Ghulam Mahomed* v. *Sahebsing.*
[*See* ('28) 109 Ind Cal 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai.* (Up to the date of avoidance liability for rent continues.)]
2. ('16) 3 AIR 1916 Cal 707 (707) : 31 Ind Cas 697 (DB), *Damoda Coal Co.* v. *Hurmook Marwari.*
3. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.*
4. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co* v. *Haji Siddick Haji Ibrahim.*
5. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.*
6. ('10) 8 Ind Cas 1049 (1050) (DB) (Bom), *Siddick Haji Hoosein* v. *Bruel & Co.* (Affirming 6 Ind Cas 906.)
7. ('28) 15 AIR 1928 Mad 1140 (1141, 1142) : 51 Mad 994 : 114 Ind Cas 234 (DB), *East India Distilleries & Factories Ltd.* v. *P. F. Mathias.*
8. (1811) 13 R R 556 (557) : 4 Taunt 45 : 128 E R 244, *Baker* v. *Holtpzaffel.*

Note 5

1. ('26) 13 AIR 1926 All 695 (697) : 48 All 404 : 94 Ind Cas 425 (DB), *Mulchand Nemi Chand* v. *Basdeo Ram Sarup.*
[*See also* ('10) 8 Ind Cas 716 (717) (DB) (All), *Mathura Das* v. *Mohan Lal.* (Where injury is not due to his fault he is not liable to pay damages.)]
2. ('99) 1 Bom L R 739 (742) (DB), *Mahomadaly* v. *Campbell.*

charge, who, one night, lit a hanging light in close proximity to the goods, locked up the premises and went away. The premises were destroyed by fire. It was held that the fire was caused through A's default within the meaning of this clause.[3]

Section 108 Clause (e) Notes 5–6

6. Effect of repudiation.—Where the lessee validly repudiates the lease by exercising the option given to him by this clause, he can refuse to pay future rent in respect of the premises.[1] He can also sue the lessor to recover, under section 65 of the Contract Act, any rent or premium which he had paid already for the period after the repudiation.[2] But the lessee is bound after repudiation to restore vacant possession to the lessor under cl. (q). If he fails to do so he will be liable to the lessor for damages.[3] If, however, the lessor accepts rent from the lessee, the latter will become, under S. 116, a tenant from year to year or from month to month according to the purpose for which the property was leased.[4]

Clause (f)

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

Synopsis

1. Scope.
2. Remedy of the lessee.
3. Contract to the contrary.

1. Scope. — There is no general rule of law that a lessor is bound to keep the demised property in good repair or to expend any money on the property.[1] Nor is the lessor liable to compensate the lessee for any

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3. ('20) 7 AIR 1920 Mad 493 (495) : 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponnu.*

Note 6

1. ('94) 17 Mad 98 (99) : 4 Mad L Jour 21 (DB), *Kunhayen Haji* v. *Mavan.*

2. ('33) 20 AIR 1933 Lah 517 (519) : 150 Ind Cas 682, *Banarsi Das* v. *Cantonment Authority, Ambala Cantonment.*

('35) 22 AIR 1935 Nag 208 (209) : 31 Nag L R 368 : 158 Ind Cas 358, *Shrawan* v. *Sheoratan.*

('99) 23 Bom 15 (21), *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy.* (The lessee will not be entitled to interest.)

3. ('10) 8 Ind Cas 1049 (1050) (DB) (Bom), *Sidick Hazi Hoosain* v. *Bruel & Co.* (Affirming 6 Ind Cas 906.)

4. ('10) 8 Ind Cas 1049 (1050) (DB) (Bom), *Sidick Haji Hoosein* v. *Bruel & Co.*

Section 108, Clause (f) — Note 1

1. ('98) 2 Cal W N 34 (36), *Charles Stuart* v. *Patrick Playfair.*

('23) 10 A I R 1923 Cal 524 (525) : 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railwag Co., Ltd.*

('27) 14 AIR 1927 Bom 115 (118) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakhmichand* v. *Ratanbai.*

Woodfall, *Landlord and Tenant*, 22nd Edition, page 760.

Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, para 219.

Fawcett, *Landlord and Tenant*, 3rd Edition, pp. 333-334.

Section 108
Clause (f)
Notes 1–2

loss sustained by him by reason of want of repair.[2] The lessee himself is under a qualified obligation in that respect under clause (m).[3]

But the parties may enter into a contract that the lessor should make certain repairs. In such cases the lessor would be bound on notice being given to that effect,[4] to effect such repairs. This clause applies to such cases. The failure of the lessor to effect the repair will not entitle the lessee to *terminate* the lease.[5] It will only enable him to effect such repairs himself and deduct the expense of such repairs from the rent or otherwise recover it from the lessor.[6]

2. Remedy of the lessee. — The clause provides that the lessee who himself makes the repairs which, under the contract of lease, the lessor is bound to make, may deduct such expense from the rent or otherwise may recover it from the lessor. It has been held that he can also claim damages against the lessor for breach of his obligation.[1] He can, in a suit for rent by the lessor, claim to set off such damages against the rent.[2] Where he has himself carried out the repairs he can, in a suit for rent, counter-claim for the money so spent.[3] But he cannot claim specific performance against the lessor by compelling him to carry out the repairs.[4]

The words "or otherwise recover it from the lessor" give a right of reimbursement to the lessee apart from his right of deduction of the expense from rent.[5] It has been held in the undermentioned case[6] that the claim to reimbursement would be under S. 70 of the Contract Act.

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2. ('98) 2 Cal W N 34 (37), *Stuart* v. *Playfair.*

3. ('27) 14 A I R 1927 Bom 115 (118) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakhmichand* v. *Ratanbai.*

4. Woodfall, *Landlord and Tenant*, 22nd Edition, page 761.

5. Woodfall, *Landlord and Tenant*, 22nd Edition, Page 762.

('26) 13 A I R 1926 Cal 546 (549) : 93 Ind Cas 81, *Gopiram Bhotica* v. *Bisseswar Dutt.* (Unless the failure constitutes such a substantial interference with the right of the lessee as to constitute an eviction.)

('36) 23 AIR 1936 Mad 564 (566):59 Mad 942:163 Ind Cas 384 (DB), *Zeebunnissa Begum* v. *Mrs. Danagher.*

('23) 10 AIR 1923 Cal 524 (526) : 72 Ind Cas 98 (DB), *Bejoy Chandra Sinha* v. *Howrah Amta Light Railway Co. Ltd.*

6. ('26) 13 AIR 1926 Cal 546(549): 93 I.C. 81,*Gopiram Botica* v. *Bisseswar Dutt.*

('10) 6 I.C. 131(132)(DB)(Cal), *Katic Graham* v.*Colonial Govt. of British Guiana.*

[*See also* ('36) 23 A I R 1936 All 522 (523) : 163 Ind Cas 872 (DB), *Kamal Devi* v. *Khudadad.*]

Note 2

1. ('36) 23 AIR 1936 Mad 564 (568): 59 Mad 942: 163 Ind Cas 384 (DB), *Zeebunnissa Begum* v. *Mrs. Danagher.*

(1924) 93 L J K B 729 (732), *Hewitt* v. *Rowlands.* (It is not necessary that tenant should have actually expended money on the repairs.)

2. ('14) 1 AIR 1914 Lah 186 (186) : 23 Ind Cas 358 (DB), *Nidar Mal* v. *B. Borrooah and Co.*

3. Woodfall, *Landlord and Tenant*, 22nd Edn., page 763.

4. ('36) 23 AIR 1936 Mad 564 (568) : 59 Mad 942 : 163 Ind Cas 384 (DB), *Zeebunnissa Begam* v. *Mrs. Danagher.*

5. ('10) 6 Ind Cas 131 (133) (DB) (Cal), *Katie Graham* v. *Colonial Government of British Guiana.*

6. ('42) 29 AIR 1942 Oudh 231 (237) : 17 Luck 530: 199 Ind Cas 35 (DB), *Qamar Jahan Begam* v. *Bansi Dhar.*

Section 108 Clause (f) Note 3

3. Contract to the contrary. — Where under the terms of tenancy, the lessee is himself bound to make the repairs at his own expense, he cannot claim anything from the lessor on that account,[1] or deduct the value of the repairs from the rent due.[2] Where the contract provides that it is the lessor that must make the repairs and that the lessee should have no right to do so, the latter, if he effects the repair, cannot deduct the expenditure from the rent.[3] Where the contract expressly provides that if the lessor does not make the repair, the lessee should make it *and deduct the costs from the rent*, he cannot claim damages against the lessor for non-repair.[4]

Clause (g)

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

Synopsis

1. Scope.
2. "Which he is bound to make."
3. Right to damages and reimbursement.
4. Contract to the contrary.

1. Scope. — Under the English law, a lessee who, under actual or implied compulsion, has paid any rate or tax which the landlord is liable to pay, may deduct the amount from his rent unless there is an express covenant or stipulation to the contrary.[1] This is the principle which is found enacted in this clause. This clause is, however, in some respects, wider than the English law. It is not limited to the payment of rates and taxes. Further, unlike the English law, it is not necessary that the deduction should be made only from the rent of the current year and not afterwards.[2] A lessee claiming the benefit of this clause must show —

(a) that the lessor is bound to make the payment,
(b) that he neglected to do so,
(c) that the amount was recoverable from the lessee or against the property leased, and
(d) that he made such payment himself.

Note 3

1. *See also* ('15) 2 AIR 1915 Mad 659 (659): 27 Ind Cas 361 (DB), *Mangalaswami Thevar* v. *Raja Rajeswara Dorai.*
2. ('06) 3 All L Jour 134 (135) (DB), *Bolton* v. *Donald.*
3. ('66) 6 Suth W R Civ. Ref. 26 (27) (DB), *Mt. Zummeerunnissa* v. *Mr. E. Gayer.*
4. ('68) 1868 Pun Re No. 14, *Roopa* v. *Baness.*

Section 108, Clause (g) — Note 1

1. Woodfall, *Landlord and Tenant*, 22nd Edition, page 698.
2. Woodfall, *Landlord and Tenant*, 22nd Edition, page 698.
(1817) 18 R R 444 (446) : 1 B & Ald 123, *Denby* v. *Moore.* (If the deduction is not made, the tenant cannot recover it.)

Section 108
Clause (g)
Notes 1–2

It may be noted that the lessee is not bound, as he is required under clause (f), to give any notice to the lessor before making the payment himself.

This clause does not apply in terms to agricultural leases. But the principle underlying it is of general applicability[3] and is applicable to agricultural leases also as being in consonance with justice, equity and good conscience.[4]

2. "Which he is bound to make." — In order that the lessee may take advantage of this clause he must show that the lessor was bound to make the payment which he (the lessee) has made. Where, in execution of a decree against the lessor his interest was sold in auction and the lessee thereafter deposited the decree amount under O. 21, R. 89 of the Civil Procedure Code and claimed to recover the same from the lessor, it was held by the Calcutta High Court that, after the sale, the lessor could not be said to be bound to make any payment and that, consequently, the payment by the lessee would not come within this clause.[1]

Where property which was subject to a maintenance charge payable by A was leased by him to B and, on failure of A to pay the maintenance, B paid it, it was held that, inasmuch as the maintenance might have been collected by the sale of the leased property, B can deduct the amount so paid from the rent due.[2] Where the property leased is subject to a mortgage, the lessor, in view of the covenant for quiet enjoyment, may be said to be bound to pay the mortgage, as between himself and the lessee. Consequently, if the lessee pays off the mortgage he can invoke the benefit of this clause.[3]

The general rule is that the lessor is bound to pay the Government revenue of the leased property. If the lessor fails to pay it the lessee may make the payment and recover it from the lessor.[4] It has been held that even if the Government assessment is increased after the lease is granted it is the lessor that is bound to make the increased

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3. ('71) 15 Suth W R 545 (547) (DB), *Hills* v. *Wooma Moyee*. (Case before the Act.)

4. ('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami*.

Note 2

1. ('02) 6 Cal W N 336 (337) (DB), *Bepin Behary Sarnokar* v. *Kalidas Chaterjee*.

2. ('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Goundan*.

3. ('34) 21 AIR 1934 Mad 658 (660, 661) : 152 Ind Cas 201, *Iswara Shetty* v. *Ramappa Shetty*.

('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Goundan*.

('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai*.

(1888) 20 Q B D 209 (219, 220) : 57 L J Q B 129 : 58 L T 457 : 36 W R (Eng) 298, *Underhay* v. *Read*.

(1839) 9 A & E 809 (813) : 112 E R 1421 : 8 L J (N S) Q B 124, *Johnson* v. *Jones*.

4. ('27) 14 AIR 1927 Oudh 609 (609) : 104 Ind Cas 358, *Mt. Faiyazunnisa* v. *Bajrang Bahadur*.

('86) 12 Cal 213 (216) (DB), *Smith* v. *Dina Nath Mukherjea*.

Section 108 Clause (g) Notes 2–4

payment also.[5] But where the rent fixed was Rs. 19, and the Government assessment which was originally Re. 0-15-3 was raised to Rs. 59-8-6, it was held that the implication of the contract of lease must be taken to be, that up to the rent amount of Rs. 19 the landlord is liable for the Government assessment and that the lessee is responsible beyond that amount.[6]

See also the undermentioned case.[7]

3. Right to damages and reimbursement. — A lessee making a payment under this clause may not only deduct the amount so paid from the rent, but may also be entitled to claim damages against the lessor for breach of the obligation to make the payment.[1] He can also recover the amount so paid from the lessor under Ss. 69 and 70 of the Contract Act.[2]

4. Contract to the contrary. — Where the lessee has himself undertaken to make a payment which the lessor was bound to pay, there is a contract to the contrary and the lessee cannot get the benefit of this clause. On the other hand, if the lessor himself pays it he can recover it from the lessee.[1] If his property is sold owing to the failure of the lessee to make the payment, the lessor will be entitled to damages against the lessee.[2]

Clause (h)

(h) the lessee may [a][even after the determination of the lease] remove at any time [b][whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth: provided he leaves the property in the state in which he received it:

a. These words were inserted by S. 56 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

b. These words were substituted *ibid*, for the words "during the continuance of the lease."

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5. ('10) 7 Ind Cas 321 (326) (FB) (Mad), *Vidyapurna* v. *Uggannu.*
('25) 12 AIR 1925 Bom 168 (170) : 86 Ind Cas 96 (DB), *Ladhuram Manormal* v. *Sale Mohammad.*

6. ('25) 12 AIR 1925 Bom 168 (170) : 86 Ind Cas 96 (DB), *Ladhuram Manormal* v. *Sale Mohammad.*

7. ('09) 3 Ind Cas 464 (464) (DB) (Mad), *Venkatapayya* v. *Rukku Hengsu.*

Note 3

1. ('31) 18 AIR 1931 Cal 129 (130) : 130 Ind Cas 140 (DB), *Mt. Kshirodamoyi Dasi* v. *Kashi Lal Seal.*

2. ('27) 14 AIR 1927 Oudh 609 (609) : 104 Ind Cas 358, *Mt. Faiyazunnisa* v. *Bajrang Bahadur.*
('86) 12 Cal 213 (216) (DB), *Smith* v. *Dinonath Mookerjee.*
('34) 21 AIR 1934 Cal 667 (668) : 152 Ind Cas 167, *Abdul Aziz* v. *Rahimullah.*

Note 4

1. ('22) 9 AIR 1922 Pat 75 (76) (DB), *Raja Nilkanth* v. *Niharan Chandra.*

2. ('15) 2 AIR 1915 Cal 601 (604) : 26 Ind Cas 466 (DB), *Rahim Baksh Mandal* v. *Sajjad Ahmad Choudhuri.*
[*See also* ('08) 35 Cal 683 (689) : 9 Cal L Jour 1 (DB), *Girishchandra Das Mazumdar* v. *Kunjo Behari Malo.*]

Section 108
Clause (h)
Notes 1–2

Synopsis

1. Legislative changes.
2. Scope of the clause.
3. Time for removal.
4. Right to compensation.
5. "Attached to the earth."
6. Void lease.
7. Property acquired under the Land Acquisition Act.
8. Contract to the contrary.

1. Legislative changes.

(1) The words 'even after the determination of the lease' are new and were inserted by the amending Act of 1929.

(2) The words "whilst he is in possession of the property leased but not afterwards" were substituted for the words "during the continuance of the lease." As to the reason for this amendment, see the Report of the Special Committee.

2. Scope of the clause. — Under the Roman Civil law a tenant was entitled to remove all fixtures which he had attached to the leasehold property where it could be effected without material injury to the property. Under the English law the maxim adopted was *quic quid plantatur solo solo cedit* (whatever is affixed to the soil becomes part of it), the rule being relaxed only in respect of certain kinds of tenant's fixtures and not generally.[1]

The strict rule of English law was never applied in this country.[2] In *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee*,[3] Sir Barnes Peacock observed as follows:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."[4]

Section 108, clause (h) — Note 2

1. (1801) 6 R R 376 (378, 379) : 2 East 88 : 4 Esp 33, *Penton* v. *Robert*. (Trade fixtures—Removable during term.)
(1743) 26 E R 811 (812) : 3 Atk 13, *Lawton* v. *Lawton*.
(1802) 102 E R 510 (516, 518) : 3 East 38 : 6 R R 523, *Elwes* v. *Maw*.
2. ('99) 21 All 496 (503) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal*.
See also the cases under Note 1 on Section 51.
[But see ('14) 1 AIR 1914 Oudh 212 (213) : 23 Ind Cas 957 (DB), *Sardar Singh* v. *Gaja Singh*.]
3. ('66) 6 Suth W R 228 (229, 230) (FB).
4. *Also see* ('75) 14 Beng L R 201 (208), *Parbutty Bewah* v. *Woomatara Debee*.

Section 108
Clause (h)
Note 2

There was a difference of opinion as to whether trees planted by the tenant could be removed by him.[5]

This clause enacts in substance the principles of the Roman Civil law as stated above and the pre-existing law of the land[6] as interpreted by the Full Bench in *Poramanick's case.*

The clause must be read with clause (o) which provides that the lessee cannot fell or sell timber, pull down or damage buildings belonging to the lessor, and, when so read, it is clear that this clause will apply only to such things that the *tenant himself* has attached to the land and not to other things. Thus, trees planted by the tenant or buildings erected by him or things attached to the earth by the tenant can be removed by the tenant under this clause, while trees already on the land or spontaneously growing there even after the commencement of the tenancy and building already on the land cannot be removed by the tenant.[7]

It has been held in the undermentioned cases[8] that, in cases not governed by the Act, trees even though planted by the tenant belong to the landlord and cannot be removed by the tenants, but the general trend of view is that trees planted by the tenant can, on the principle of this section, be removed by him.[9]

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5. ('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govinda Chandra.*
('81) 1881 Bom P J 44, *Narayan* v. *Bhik Patil.*
(1864) 1864 Suth W R 367 (367) (DB), *Abdool Rohoman* v. *Dataram.* (Tenant cannot cut timber.)
('81) 1881 All W N 20 (20) (DB), *Jhagaru* v. *Shamshere Khan.* (Where a cultivator plants trees on the lands in his possession, the trees go to the landlord after the cultivator had ceased to cultivate.)
('10) 6 Ind Cas 796 (799) : 37 Cal 815 (DB), *Mofiz Sheikh* v. *Rasik Lal.* (Tenant can remove trees planted by him.)

6. ('04) 27 Mad 211 (217) : 14 Mad L Jour 25, *Ismal Kani* v. *Nazarali.*

7. ('20) 7 AIR 1920 Lah 373 (374) : 1 Lah 210 : 56 Ind Cas 733, *Harnaman* v. *Dasondhi.*
('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govinda Chandra.*
('01) 24 Mad 47 (55) : 10 Mad L Jour 321 (FB), *Vasudevan* v. *Valia Chathu.*
('20) 7 AIR 1920 Nag 113 (115) : 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
('10) 5 Ind Cas 437 (437) : 33 Mad 253 (DB), *Gagamma* v. *Bommakka.* (Mulgeni lease.)
('15) 2 AIR 1915 Mad 891 (892) : 26 Ind Cas 271 (DB), *Latifa Bibi* v. *Narayanachari.* (Do.)
('16) 3 AIR 1916 Mad 939 (939): 31 Ind Cas 12 (DB), *Krishnacharya* v. *Anthakki.* (Do.)
('12) 14 Ind Cas 582 (583) (All), *Lachman Das* v. *Mohan Singh.*
('30) 17 AIR 1930 All 433 (433) : 121 Ind Cas 826, *Nazir Khan* v. *Faiz Mohammad.*

8. ('01) 23 All 211 (212) : 1901 All W N 52 (DB), *Janki* v. *Sheoadhar.*
('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govind Chandra.*
('10) 8 Ind Cas 151 (151) (All), *Ram Bakhsh* v. *Ram Sarup.*
('14) 1 AIR 1914 Oudh 212 (213) : 23 Ind Cas 957 (DB), *Sardar Singh* v. *Gaja Singh.*

9. ('20) 7 AIR 1920 Nag 113 (115) : 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
('01) 24 Mad 47 (58) : 10 Mad L Jour 321 (FB), *Vasudevan* v. *Valia Chathu.* (Kanam tenure.)

Section 108
Clause (h)
Notes 3–4

3. **Time for removal.** — Under the clause as it stood before the amendment of 1929, a tenant could remove the things he had attached to the earth only "during the continuance of the lease."[1] But notwithstanding this, it was held in some cases[2] that a tenant could, on equitable grounds, or on the ground of local usage, be granted a reasonable time for removing the fixtures even after the determination of the tenancy. This uncertainty regarding the tenant's right of removal has now been removed by the amendment of the clause, allowing the tenant a right to remove his fixtures so long as he is in possession of the property even though the tenancy has come to an end. If once the tenant quits possession, however, the fixtures become the property of the lessor. The tenant loses all right, title and interest in the structures[3] and cannot return and remove them.[4]

4. **Right to compensation.**—This clause does not say anything as to the rights of the parties if the tenant has handed over the property with the thing he has attached to the land. In *Poramanick's case*[1] the observations of Sir Barnes Peacock, C. J., lent some colour to the view that the lessor was liable to pay *compensation* to the lessee for the things attached to the land which were taken over by him. It was consequently held, on the strength of the said case, that the tenant would be entitled to claim compensation from the lessor even after he

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('14) 1 AIR 1914 Bom 312 (312) : 38 Bom 716 : 28 Ind Cas 140 (DB), *Sitabai* v. *Shambhu.*
('09) 4 Ind Cas 1119 (1119) (Mad), *Narayanasawmi* v. *Sitaramayya.* (Trees falling down from natural causes belong to the ryot and not to the zemindar.)
('03) 26 Mad 252 (256, 257) : 12 Mad L Jour 449 (DB), *Narayana* v. *Orr.*
('06) 29 Mad 24 (25) : 16 Mad L Jour 8 (DB), *Kakarla* v. *Raja Venkata.*
('23) 10 AIR 1923 All 417 (418) : 72 Ind Cas 108, *Ram Nath* v. *Mata Sahai.*
('16) 3 AIR 1916 Mad 939 (939): 31 Ind Cas 12 (DB), *Krishnacharya* v. *Anthakki.*
('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
('22) 9 AIR 1922 Oudh 249 (249) : 25 Oudh Cas 181 :77 Ind Cas 592, *Chatur* v. *Rukmangad Singh.*

Note 3

1. ('80) 2 All 896 (897) (DB),*Ram Baran Ram* v. *Salig Ram Singh.* (Case before the Act.)
('96) 20 Bom 439 (449), *Sarafali Tyabali* v. *Subraya Bateraya.*
2. ('14) 1 AIR 1914 Cal 896 (898) : 23 Ind Cas 762 (DB), *Kanaiya Lal* v. *Rasik Lal.*
('22) 9 AIR 1922 Mad 349 (349) : 66 Ind Cas 48 (DB), *Thacharkavil Manavikraman* v. *Noor Mahomed Sait.*
[*See also* ('33) 20 AIR 1933 Cal 875 (878) : 60 Cal 1042 : 147 Ind Cas 1238 (DB), *Govinda Prosad* v. *Charusila Dassi.*]
3. ('41) 28 AIR 1941 Bom 337 (339) : 197 Ind Cas 253, *Khimjee Thakarsee* v. *Pioneer Fibre Co.*
('20) 7 AIR 1920 Bom 87 (87) : 58 Ind Cas 323 : 44 Bom 950 (DB), *Ramachandra* v. *Vishnu.*
('36) 164 Ind Cas 837 (841) (Cal), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*
4. ('41) 28 AIR 1941 Bom 337 (338) : 197 Ind Cas 253, *Khimjee Thakarsee* v. *Pioneer Fibre Co.*

Note 4

1. ('66) 6 Suth W R 228 (229, 230) (FB), *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee.*

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Clause (h)
Note 4

had parted with the lease-hold interest after termination of the lease.[2] A contrary view has been held in a number of cases on the ground that a lessee who erects permanent structures or attaches other things to the earth, does so at his own risk and that his only right is to remove the things so attached and not claim compensation[3] or resist ejectment at the end of the term.[4] It is submitted that whatever might have been the view before the amendment, the clause, as amended, seems to make it clear that after delivery of possession to the lessor, the lessee cannot claim any compensation. Of course, if a structure had been erected by the tenant with the consent of the landlord or by his acquiescence, different considerations will apply and the lessee may be entitled to claim compensation.[5]

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2. ('14) 1 AIR 1914 Upp Bur 2 (3) : 2 Upp Bur Rul 11 : 24 Ind Cas 708, *Mi Hmat Tok* v. *Nga Kywe Hla.*
('16) 3 AIR 1916 Mad 220 (221) : 38 Mad 710 : 21 Ind Cas 583 (FB), *Angammal* v. *Syed Aslami Sahib.* (Affirming 11 Ind Cas 745 : 1 Upp Bur Rul 86.)
('80) 5 Cal 688 (691, 692) : 5 Cal L R 492, *Russick Loll Mudduck* v. *Lokenath Kurmokar.*
[*See also* ('71) 15 Suth W R 363 (363) (DB), *Gopal Mullick* v. *Anundo Chunder Chatterjee.*]

3. ('94) 16 All 328 (332) : 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar Bhagat.*
('14) 1 AIR 1914 Mad 564 (569) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Raja of Venkatagiri* v. *Narasayya.*
('30) 17 AIR 1930 Mad 16 (18) : 53 Mad 54 : 120 Ind Cas 561, *Sabju Sahib* v. *Malabar District Board.*
('16) 3 AIR 1916 Low Bur 81 (84) : 8 Low Bur Rul 433 : 35 Ind Cas 735 (DB), *Moola Mahamad* v. *P. K. Ebrahim.*
('36) 164 Ind Cas 837 (841) (Cal), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*
('15) 2 AIR 1915 Lah 235 (236) : 26 Ind Cas 936 (DB), *Kishen Singh* v. *Church Missionary Trust Association.*
('96) 20 Bom 1 (6) (DB), *Shaik Hussain* v. *Govardhandas Parmanandas.*
('01) 5 Cal W N 846 (858) (DB), *Ismail Khan Mahomed* v. *L. P. D. Broughton.* (Especially where there is an express covenant not to build.)
(1900) 27 Cal 570 (572): 4 Cal W N 210, *Ismail Khan Mahomed* v. *Jaigun Bibi.*
('94) 16 All 328 (330) : 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar Bhagat.*
('36) 164 Ind Cas 837 (841) (Cal), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*
('19) 6 AIR 1919 Nag 144 (147) : 51 Ind Cas 380, *Buneshwar* v. *Lal Bahadur.*
('33) 20 AIR 1933 Cal 875 (878) : 60 Cal 1042 : 147 Ind Cas 1238 (DB), *Govinda Prosad* v. *Charusila Dassi.*
[*See also* ('66) 1866 Pun Re No. 48, *Kay Mahomed* v. *Mt. Ruhmoon.*]

4. ('99) 21 All 496 (503) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lall.*
('04) 27 Mad 211 (216): 14 Mad L Jour 25 (DB), *Ismal Kani Bowthen* v. *Nazarali Sahib.*
[*See also* ('99) 1 Bom L R 191 (194) (DB), *Narayan* v. *Daji.*]

5. ('15) 2 AIR 1915 Lah 235 (236): 26 Ind Cas 936 (DB), *Kishen Singh* v. *Church Missionary Trust Association.*
('94) 16 All 328 (330): 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar Bhagat.*
('42) 29 AIR 1942 Pesh 74 (75) (DB), *Abdul Ghafur* v. *Jeta Mal.*
('16) 3 AIR 1916 Mad 502 (502) : 28 Ind Cas 840 (DB), *Perumal Gramany* v. *Mahamad Kasim Sahib.*
('20) 7 AIR 1920 Bom 87 (87) : 44 Bom 950 : 58 Ind Cas 323 (DB), *Ramchandra* v. *Vishnu.*
('01) 6 Cal W N 134 (140) (DB), *Ismail Khan Mahomed* v. *Kali Krishna Mondol.*
('37) 24 AIR 1937 All 512 (513) : 170 Ind Cas 944, *Secy. of State* v. *Itwari.*
See also Section 51, Notes 22 to 25.

Section 108
Clause (h)
Notes 5–8

5. "Attached to the earth." — As to the meaning of the expression "attached to the earth," see Note 6 on S. 3.

A well sunk by the tenant cannot be said to be a thing which he has attached to the earth and there is no question of any removal thereof.[1]

6. Void lease.—This clause does not apply in terms to a lease which is void. But the principle has been held applicable and the lessee who has erected a structure on the land has been held entitled to remove the same, but not to any compensation.[1]

7. Property acquired under the Land Acquisition Act.—Where the property leased was acquired before the expiry of the lease under the Land Acquisition Act and compensation was awarded for both the land and the thing attached thereto by the lessee, it was held that the tenant was entitled to a share in the compensation amount for the thing he had so attached.[1]

8. Contract to the contrary.—The right of a tenant to remove the thing he has attached to the demised property is subject to a contract[1] or local usage[2] to the contrary. In South Canara there is a usage that the tenant can either remove the structure erected by him on the land or claim compensation for the value thereof. This usage will prevail over the provisions of this Act.[3]

Clause (i)

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:

Synopsis

1. Scope.
2. "Uncertain duration."
3. Lessee in fault.

Note 5

1. ('87) 10 Mad 112 (113) (DB), *Venkatavaradappa* v. *Thirumalai.*

Note 6

1. ('17) 4 AIR 1917 Mad 333 (334) : 34 Ind Cas 1 (DB), *Govindaswami* v. *Ethirajammal.*
('09) 4 Ind Cas 1129 (1129) (DB) (Mad), *Mahomed Meera* v. *Nizur Ali.*

Note 7

1. ('95) 22 Cal 820 (826) (DB), *Dunia Lal Seal* v. *Gopi Nath.*

Note 8

1. ('41) 28 AIR 1941 Bom 337 (339) : 197 Ind Cas 253, *Khimjee Thakarsee* v. *Pioneer Fibre Co., Ltd.*
('31) 18 AIR 1931 Cal 133 (134) : 130 Ind Cas 222 (DB), *Cook & Co.* v. *Phillips.*
('25) 12 AIR 1925 Mad 732 (734) : 87 Ind Cas 433, *Rama Rao* v. *Thimmappa.*
2. ('14) 1 AIR 1914 Cal 896 (898) : 23 Ind Cas 762 (DB), *Kanai Lal* v. *Rasik Lal.*
3. ('21) 8 AIR 1921 Mad 284 (284):69 Ind Cas 282 (DB), *Rammappa* v. *Abdullah.*

1. Scope. — Growing crops are, as has been seen in S. 3, not included in the definition of 'immoveable property'. They, however, constitute a legal incident of immovable property within the meaning of S. 8. It would follow from this that if a person is lawfully evicted from land he cannot lay claim to the growing crops on the land at the time of eviction. There are, however, some exceptions to the rule. Under S. 51 a transferee of immovable property who is evicted by a person having a better title is entitled, under certain circumstances, to crops planted or sown by him and growing at the time of eviction.

Under the Common law of England a tenant for an uncertain period has, under the name of *emblements*, the benefit of growing crops of such species as ordinarily repay the labour by which they are produced within the year in which that labour is bestowed.[1] In other words, a right is given, by law, in certain cases to the tenant of an estate of uncertain duration which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased.[2] This clause enacts in substance the principles of the Common law as stated above[3] and of what was also the Common law of India[4] and furnishes another exception to the general rule stated above. The right to growing crops involves, as an incident thereto, a right to free ingress and egress to gather and carry them.[5] A, the lessor, sued B the lessee for possession. A decree was passed for possession on condition of A depositing a certain amount on a date specified. A failed to do so and B continued to be in possession and raised crops on the land; it was held by the High Court of Madras that B was entitled to the benefit of this clause and that A could not get the crops by subsequently depositing the amount.[6]

The principle of this clause will apply to agricultural leases. It was applied in the undermentioned case[7] to a *kanom* mortgage.

2. "Uncertain duration."—This clause will apply only to leases of uncertain duration. For example, a lease from year to year or from month to month or a lease in which the period is limited conditionally on the happening of some event is a lease of uncertain duration. Where the tenant *knows* when his term is to cease, he can have no equity in

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Section 108, Clause (i) — Note 1

1. ('14) 1 AIR 1914 Mad 225 (225, 226) : 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar*.
Halsbury, *Laws of England*, (Hailsham Edn.), Vol. 20, Para 362.
2. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 934.
3. ('14) 1 AIR 1914 Mad 225 (226) : 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar*.
4. ('14) 1 AIR 1914 Mad 225 (225) : 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar*.
('90) 13 Mad 15 (16), *Ramalinga* v. *Samiappa*.
5. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 935.
6. ('37) 24 AIR 1937 Mad 879 (882) : 176 Ind Cas 920, *Gangamma* v. *Mahabala Bhatta*.
7. ('14) 1 AIR 1914 Mad 225 (226) : 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar*.

Section 108 Clause (i) Notes 2–3

his favour and will not be entitled to the benefit of this rule.[1]

3. **Lessee in fault.** — The equity of the rule in this clause cannot obviously apply to cases where the determination of the tenancy is brought about by the lessee's own negligence or misconduct.[1] Thus, where the tenancy is determined by forfeiture under cl. (g) of S. 111 the tenant cannot claim the benefit of this rule.[2] It has been held in England that where a tenancy is determined by the tenant's own act, such as by the marriage of a female tenant who held during widowhood, the claim to emblements does not arise.[3]

Clause (j)

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

Synopsis

1. Scope.
2. Absolute transfer.
3. Rights of assignee.
4. Liabilities of assignee.
5. Mortgage or sub-lease by lessee.
6. Lessee continues liable.
7. Rights of lessee against assignee or sub-lessee.
8. Last paragraph.
9. Agricultural leases.
10. Clause not retrospective.

1. **Scope.** — As has been seen in S. 6, Note 1, it is the general principle of law that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. This general principle is applicable to lease-hold interest as well.[1] Even

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Note 2

1. ('90) 13 Mad 15 (16), *Ramalinga* v. *Samiappa.*

Note 3

1. ('90) 13 Mad 15 (16), *Ramalinga* v. *Samiappa.*
2. (1830) 33 R R 408 (414): 7 Bing 154: 9 L J C P 44, *Davis* v. *Eyton.*
3. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 936.
(1819) 21 R R 358 (360): 2 B & Ald 470, *Bulwer* v. *Bulwer.*

Section 108, Clause (j) — Note 1

1. ('27) 14 AIR 1927 Cal 220 (223) : 100 Ind Cas 302 (DB), *Bhagban Das* v. *Bisweswar Nath.* (Non-permanent agricultural lease.)

Section 108
Clause (j)
Note 1

before the Act this general rule was followed in this country as to tenancies[1a] except in certain classes of tenancies which were held as non-transferable in the absence of a contract or custom to the contrary.[2]

('37) 24 AIR 1937 Lah 360 (362) : 173 Ind Cas 198 (DB), *Rahmat-Ullah* v. *Atta Mohammad.*

[*See also* (1808) 10 R R 74 (76) : 15 Ves 258 : 33 E R 752, *Church* v. *Brown.*]

1a. ('69-70) 5 Mad H C R 227 (247) (DB), *Venkatasamy* v. *Kulundapuri.* (*Held*, on the construction of a lease that the language did not evidence a contract purely personal to the lessee and his heir so as to exclude the right to assign.)

('90) 13 Mad 60 (62) (DB), *Appa Rau* v. *Subbanna.*

('89) 14 Bom 384 (387) (DB), *Vishnu* v. *Anant.* (A lessee, who is not restrained by his lease from subletting, may demise for any less term than he himself has. It is only in case the lessee has incurred a forfeiture that the original lessor may evict the sub-lessee.)

2. ('32) 19 AIR 1932 Cal 431 (432) : 138 Ind Cas 72 (DB), *Kamala Mayee* v. *Nibaran Chandra.*

('37) 24 AIR 1937 Cal 373 (374) : 173 Ind Cas 498, *Kumud Behari* v. *Himanshu Kumar.*

('06) 7 Cal L Jour 309 (310, 311) (DB), *Hanuman Prasad* v. *Deo Charan.* (Previous to the passing of the Transfer of Property Act tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage.)

('06) 7 Cal L Jour 107 (108) (DB), *Ram Charan* v. *Hari Charan.*

('06) 7 Cal L Jour 106 (107) (DB), *Ishwardhari Singh* v. *Ram Brich.*

('21) 8 AIR 1921 Cal 582 (584): 60 I.C. 826 (DB), *Sulin Mohan* v. *Raj Krishna.* (The only recognised exception to this rule was that one man granted a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary was assignable.)

('17) 4 A I R 1917 Cal 798 (799) : 37 Ind Cas 939 (DB), *Ramada Sundari* v. *Syhama Kanta.* (Tenancies from year to year of homestead lands were not transferable except by custom previous to the passing of the T. P. Act.)

('15) 2 AIR 1915 Cal 711 (711) : 27 Ind Cas 500 (DB), *Kaluram* v. *Puranchand.* (Tenancies from year to year of homestead lands.)

('27) 14 AIR 1927 Cal 39 (40) : 54 Cal 333 : 97 I. C. 817 (DB), *Sarada* v. *Nabin.*

('16) 3 AIR 1916 Cal 827 (829): 33 Ind Cas 565 (DB), *Ananda Mohan* v. *Gobinda.*

('27) 14 AIR 1927 Cal 373 (373) : 100 I. C. 167 (DB), *Adhar Chandra* v. *Bipin Chandra.* (A tenancy of homestead land created for the purpose of habitation.)

('24) 11 A I R 1924 Cal 1012 (1013) : 84 Ind Cas 28 (DB), *Safar Ali* v. *Abdul Rasid.* (A permanent tenancy created before the passing of the Transfer of Property Act for the purpose of habitation.)

('38) 25 AIR 1938 Pat 569 (572) : 17 Pat 358 : 179 Ind Cas 566 (DB), *Bansi Singh* v. *Chakradhar Prasad.*

('16) 3 AIR 1916 Pat 194 (195) : 1 Pat L Jour 253 : 36 Ind Cas 126 (DB), *Ambica Prasad* v. *Baldeo Lal.*

(1900) 4 Cal W N 574 (575, 576) (DB), *Madhab Chandra* v. *Bejoy Chand.*

('98) 25 Cal 896 (907) : 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullick.* (Homestead.)

('40) 27 AIR 1940 Pat 516 (527) : 19 Pat 433 : 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon.* (A I R 1939 P C 14 : I L R (1939) 1 Cal 283 : I L R (1939) Kar (P C) 78 : 66 Ind App 50 (P C) followed.)

('95) 21 Bom 311 (314) (DB), *Timmappa* v. *Rama Venkanna.*

('25) 12 AIR 1925 Bom 330(330):88 I.C. 79, *Ardeshar Cowasji* v. *K.D. and Bros.*

('20) 7 AIR 1920 Pat 383 (401, 402) : 55 Ind Cas 113, *Lodna Colliery Co. Ltd.* v. *Bipin Behari.* (When the question is raised as to whether a transaction amounts to an assignment or to an under-lease the proper test is to see whether the lessee under the headlease has passed with his whole interest or with a greater interest than he himself possessed. If he has, then the instrument of transfer, or whatever name it may be called by, is in reality an assignment.)

Section 108 Clause (j) Note 1

This clause merely enacts the pre-existing law[3] and applies to all kinds of leases governed by the Act.[4] The lessee is entitled, under this clause to transfer absolutely, or by way of mortgage or sub-lease, the whole, or any part of his interest in the property unless the right is clearly not transferable.[5]

Covenant against alienation:

The mere fact that there is a covenant against alienation does not render an alienation by the lessee of his interest *ipso facto* void, unless there is a condition for re-entry by the lessor on breach of the

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('05) 29 Bom 391 (396) : 7 Bom L R 313 (DB), *Vithal* v. *Shriram.* (The view in this case that there is privity of estate was overruled in AIR 1934 Bom 134. The view in the latter case is itself no longer good law in view of AIR 1939 P C 14.)

('05) 32 Cal 1023 (1030) : 9 Cal W N 895 (DB), *Madhu Sudan* v. *Kamini Kanta.* (The incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands.)

[*See also* ('09) 1 Ind Cas 362 (364) (DB) (Cal), *Kailash Chandra* v. *Hari Mohan.*]

[But see ('17) 4 AIR 1917 Cal 574 (575) : 33 Ind Cas 502 (DB), *Madhu Mati* v. *Harendra Lal.* (Permanent tenancy of homestead land created before T. P. Act held transferable under general law.)]

3. ('32) 19 AIR 1932 All 473 (474) : 139 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*

('90) 13 Mad 60 (62) (DB), *Appa Rau* v. *Subbanna.*

4. ('08) 12 Cal W N 724 (726) (DB), *Bhola Nath* v. *Raja Durga Prosad.*

('18) 5 AIR 1918 Cal 182 (183) : 46 Ind Cas 656 (DB), *Mohendra Lal* v. *Krishna Kumari.*

5. ('26) 13 AIR 1926 All 432 (434) : 48 All 385 : 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain.* (*Held*, the lease must be treated as not an agricultural lease, so as to be exempted from the operation of S. 108, T. P. Act, and to be governed by the Agra Tenancy Act.)

('71) 15 Suth W R 274 (275) (DB), *Durga Prasad* v. *Brindaban.*

('19) 6 AIR 1919 Cal 251 (251) : 51 Ind Cas 953 (DB), *Hemaprova Mozumdar* v. *Debendra Nath.* (In the District of Noakhali and its neighbourhood, there is local usage or custom prohibiting the transfer of an osat raiyati holding granted for the purpose of erecting houses without the consent of the landlord.)

('14) 1 AIR 1914 Lah 472 (472) : 1914 Pun Re No. 33 : 23 Ind Cas 395, *Allah Ditta* v. *Mt. Farz Bibi.*

('15) 2 AIR 1915 All 35 (38) : 37 All 144 : 26 Ind Cas 446 (DB), *Abdul Haq* v. *Datti Lal.*

('30) 17 AIR 1930 All 315 (317) : 127 Ind Cas 516, *Raghunath* v. *Buddhu Ram.*

('32) 19 AIR 1932 Lah 518 (519) : 139 Ind Cas 680, *Yaqub Khan* v. *Mohan Lal.* (In the absence of a prohibition by law, custom or agreement every right is transferable.)

('98) 2 Cal W N 122 (124), *Hari Nath* v. *Raj Chandra.*

('32) 19 AIR 1932 All 473 (474):139 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*

('24) 11 AIR 1924 Pat 324 (326) : 72 Ind Cas 662, *Mahadeo Saran* v. *Dharamnath Sahay.* (Where the defendants deny the fact that the holding came into existence before the Transfer of Property Act, it is for the plaintiff to prove that the tenancy came into existence before the Transfer of Property Act.)

('69) 7 Beng L R 152 (158) : 12 Suth W R 495 (FB), *Beni Madhab* v. *Jai Krishna.*

('15) 2 AIR 1915 Cal 154 (154) : 25 Ind Cas 530 (DB), *Khitish Chunder* v. *Bhikan Mamud.* (A lease for a definite term for general purposes is heritable, and when the conduct of the parties shows it to be transferable, it must be treated as such.)

('95) 8 C P L R 33 (35), *Bisni Ram* v. *Ram Pershad.* (In the absence of any local usage or law forbidding it, a lease would be capable of transfer.)

(1900) 5 Cal L Jour 205 (207) (DB), *Habul* v. *Kashimani Debi.* (Sale of homestead land.)

covenant.[5a] Even where there is a proviso for re-entry, the lease does not *ipso facto* cease to be operative unless the lessor exercises his option to forfeit it.[6] But the lessor can, when a transfer is made in contravention of the covenant against alienation, sue the lessee for damages[7] or, if the lessee threatens to make an alienation, for an injunction restraining the lessee from making it.[8]

Where the covenant is that the lessee should not alienate without the consent of the lessor it has been held that the consent cannot be withheld arbitrarily, unreasonably or vexatiously.[9]

A lessor contracting for a right of re-purchase of the lessee's right does not in any way derogate from the transferable quality of the lessee's right.[10]

As will be seen in the Notes on S. 111, a lessee cannot make a transfer to last beyond his own interest. The determination of the lease will put an end to the interests transferred by him.[11]

5a. ('94) 18 Bom 603 (606) (DB), *Narayan Dasapa* v. *Ali Saiba.*
('06) 28 All 400 (401) : 3 All L Jour 196 : 1906 All W N 60 (DB), *Netrapal Singh* v. *Kalyan Das.*
('15) 2 AIR 1915 Cal 209 (210) : 26 Ind Cas 23 (DB), *Promode Ranjan* v. *Aswin-Kumar.*
('97) 21 Bom 195 (197) (DB), *Madar Saheb* v. *Sannabawa.*

6. ('20) 7 AIR 1920 Mad 1006 (1008):61 Ind Cas 658:43 Mad 503 (DB), *Seshagiri* v. *Seshama.*
('19) 6 A I R 1919 Cal 132 (133) : 53 Ind Cas 545, *Brojabashi Rudrapal* v. *Sarat Chandra.*
('09) 2 Ind Cas 416 (416) : 36 Cal 745 (DB), *Basarat Ali Khan* v. *Manirulla.*
('25) 12 AIR 1925 Pat 68 (92) : 93 Ind Cas 454 (FB), *Harihar Prasad* v. *Kesho Prasad.*
('03) 26 Mad 156 (161), *Abdulla* v. *Mammod.*
(1910) 79 L J K B 921 (923, 924) : (1910) 2 K B 32 : 102 L T 685 : 26 T L R 453, *Parker* v. *Jones.*

7. ('09) 2 Ind Cas 416 (416) : 36 Cal 745 (DB), *Basarat Ali Khan* v. *Manirulla.*
('21) 8 AIR 1921 Bom 27 (27) : 45 Bom 1197 : 63 Ind Cas 240 (DB), *Gurushantappa* v. *Mallava Sangappa.* (Damages must be actually caused.)
('03) 26 Mad 156 (161), *Abdulla* v. *Mammod.*
[*See also* (1868) 37 L J Q B 231 (232):(1868) 3 Q B 739:19 L T 238:16 W R (Eng) 1041, *Williams* v. *Earle.* (Action against assignee who had come in under an assignment made with lessor's licence, but who had himself assigned over without licence.)]

8. ('70) 7 Bom H C R A C 69 (70) (DB), *Mohana* v. *Shekh Sadodin.*

9. ('28) 15 AIR 1928 Sind 137 (140) : 109 Ind Cas 13 : 23 Sind L R 325, *Bombay Telephone Co.* v. *Karachi Municipality.*
(1921) 90 L J Ch 417 (419, 420) : (1921) 2 Ch 7 : 125 L T 159, *In re Winfrey & Chatterton's Agreement.*
(1896) 65 L J Q B 578 (582) : (1896) 2 Q B 241 : 74 L T 751 : 44 W R (Eng) 659, *Bates* v. *Donaldson.*
(1933) 102 L J Ch 353 (358) : 1933 Ch 904 : 149 L T 479 : 77 S J 523, *Premier Confectionary Co.* v. *London Commercial Sale Rooms, Ltd.*
[*See* (1907) 76 L J Ch 507 (510) : (1907) 2 Ch 229, *Jenkins* v. *Price.*]

10. ('23) 10 AIR 1923 Oudh 47 (48) : 66 Ind Cas 106 (DB), *Shaikh Rutap Ali* v. *Md. Zaman Beg.*

11. ('74) 22 Suth W R 274 (275) (DB), *Hurish Chunder Roy* v. *Sree Kalee Mookerjee.*
('74) 25 Suth W R 347 (350) (DB), *Ranee Shoorut Soondry* v. *Charles Binny.*

Section 108
Clause (j)
Notes 2–4

2. **Absolute transfer.** — A lessee can transfer his interest absolutely, for example, by sale.[1] Such a transfer creates a *privity of estate* between the lessor and the transferee, but not a *privity of contract*.[2] The consequence of this is that the assignee is liable to the lessor for all the burdens of the lease, burdens which are imposed upon him by the mere assignment, whether he enters into possession or not,[3] but not for personal contracts of the lessee.[4]

3. **Rights of assignee.** — The assignee is entitled to the option of the lessee to purchase the leased property.[1] On the principles stated in Notes 1 and 25 on S. 40 the benefit of all covenants between the lessor and the lessee will run with the land if they touch and concern the land and will therefore pass to the assignee of the lessee's interest. In the case noted below[2] it was held that an assignee from the lessee, to whom possession had not been given by the lessor, could sue the lessor for damages for breach of the obligation.

4. **Liabilities of assignee.** — There is no provision in the Act dealing with the liability of the transferee of the lessee.[1] But, as has been seen already, the assignee will be liable to perform all the burdens of the lease by reason of the privity of estate that comes into existence

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('26) 13 AIR 1926 Nag 62 (62): 89 Ind Cas 872, *Govindrao* v. *Sarjabai.*
('99) 12 C P L R 158 (159), *Saiyad Noor* v. *Ramji Patil.* (Mortgage.)
('26) 13 AIR 1926 Nag 184 (186): 90 Ind Cas 364, *Sheobux* v. *Jagannath.* (Do.)
[*See also* ('25) 12 AIR 1925 Pat 216 (224): 84 Ind Cas 586: 4 Pat 139 (DB), *Ram Rachhya* v. *Kamakhya Narain.*]

Note 2

1.. ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithu Lal.*
('32) 19 AIR 1932 All 473 (474) : 139 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*
(1900) 5 Cal L Jour 205 (206) (SB), *Habul* v. *Kashimani Debi.*

2. ('39) 26 AIR 1939 P C 14 (16) : ILR (1939) 1 Cal 283 : ILR (1939) Kar (PC) 78: 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Sattya Charan.*
[But see ('34) 21 AIR 1934 Bom 134 (135) : 58 Bom 327 : 148 Ind Cas 993 (FB), *Keshavlal* v. *Maganlal.* (Doctrine of privity of estate does not apply to India — This view is no longer good law in view of the Privy Council decision in AIR 1939 P C 14.)]

3. ('39) 26 AIR 1939 P C 14 (16) : I L R (1939) 1 Cal 283 : I L R (1939) Kar (PC) 78 : 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Sattya Charan.*
('40) 27 AIR 1940 Pat 516 (527, 528) : 19 Pat 433 : 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon.*
Woodfall, *Landlord and Tenant*, 22nd Edn., pages 316, 317.

4. Woodfall, *Landlord and Tenant*, 22nd Edn., page 316.

Note 3

1. ('17) 4 AIR 1917 Bom 111 (113) : 42 Bom 103 : 42 Ind Cas 882, *Ladhabai* v. *Sir Jamsetji.*

2. ('26) 13 AIR 1926 Pat 508 (511) : 6 Pat 94 : 96 Ind Cas 558 (DB), *Mt. Razia Begum* v. *Md. Daud.* (The assumption in this case that a sub-lease for the residue of the term operates as an assignment is however not correct.)

Note 4

1. ('25) 12 AIR 1925 Bom 330 (330) : 88 Ind Cas 79, *Ardeshar* v. *K. D. & Brothers.*
('34) 21 AIR 1934 Bom 134 (135) : 58 Bom 327 : 148 Ind Cas 993 (FB), *Keshavlal* v. *Maganlal.*

between himself and the lessor.[2] Thus, a covenant to pay rent runs with the land and will be binding upon the assignee,[3] though the liability does not extend to rents accrued due before the date of assignment.[4] The assignment must, of course, be a valid one. Where there has been no assignment or where the assignee has accepted the assignment but never executed it or entered into possession of the premises, he will not be liable to the lessor for the rent.[5] Where the assignment is not valid but the assignee enters into possession he may be liable to the lessor for damages for use and occupation.[6]

The liability of the assignee to the lessor being founded upon privity of estate it obtains only so long as the estate lasts and no longer; consequently, on the one hand, his liability on the covenants dates only from the date of the assignment[7] and on the other hand

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2. ('39) 26 AIR 1939 P C 14 (16) : ILR (1939) 1 Cal 283 : ILR (1939) Kar (PC) 78 : 66 Ind App 50 : 179 Ind Cas 328 (P C), *Ram Kinkar* v. *Sattya Charan.*
('22) 9 AIR 1922 Nag 224 (225) : 56 Ind Cas 268, *Sitaram Maharaj* v. *Narain.* (Covenant not to alienate would run with the land if there is an assignment by the lessee and the assignee would be bound by the covenant.)
('31) 18 AIR 1931 Cal 790 (790) : 133 Ind Cas 102 (DB), *Fate Chand* v. *Nagendra.*
('96) 20 Bom 439 (448), *Sarafali* v. *Subraya.*
('40) 27 AIR 1940 Bom 154 (155) : ILR (1940) Bom 328 : 187 Ind Cas 680 (DB), *Virbhadrayya* v. *Basangowda.*
('36) 23 AIR 1936 Pat 493 (494) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Thakur Dayal Singh* v. *Promatha Natha.* (An express covenant in a lease not to transfer the demised property without the consent of the landlord is a covenant running with the land and therefore binds a purchaser of the lessee's interest.)

3. ('92) 14 All 176 (177) : 1892 All W N 25 (DB), *Gaya Prasad* v. *Baji Nath.*
('37) 24 AIR 1937 Cal 373 (374), *Kumud Behari Basu* v. *Himanshu.*
('27) 14 AIR 1927 Mad 931 (931) : 105 Ind Cas 179, *Musafkanni Ravuthar* v. *Doraisingam.* (The liability of the assignee of a lease to pay rent is by reason of privity of estate.)
('35) 22 AIR 1935 Mad 669 (669) : 157 Ind Cas 1005 (DB), *Suryaprakasa* v. *Venkata.*
('86) 12 Cal 185 (189) (DB), *Lala Bharub Chandra Karpur* v. *Lalit Mohan Singh.* (Where leasehold property is mortgaged with possession under circumstances so as to amount to an assignment the mortgagee becomes liable for rent.)
('94) 17 Mad 296 (297), *Kunhanujan* v. *Anjelu.*
('05) 3 Low Bur Rul 90 (90), *Hossain Ismail Atcha* v. *Ebrahim Mahomad Makda.*
('10) 6 Ind Cas 766 (773) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*
('35) 22 AIR 1935 Cal 368 (388) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Kumar Raj* v. *Barabani Coal Concern, Ltd.*
(1802) 6 R R 511 (515) : 2 East 575, *Stevenson* v. *Lambard.*
(1823) 107 E R 152 (154) : 1 L J (OS) K B 138 : 25 R R 437, *Vyiyan* v. *Arthur.*
[*See also* ('78) 2 Cal L R 323 (324, 325) (DB), *Macnaghten* v. *Bheekaree Singh.*
('11) 10 Ind Cas 885 (885) (Lah), *Mrs. Grose Jones* v. *Mr. A. Cumper.*]

4. ('75) 1875 Bom P J 308 (DB), *Rupchand* v. *Govind.*
('78) 3 Cal L Rep 285 (286) (DB), *E. R. Macnaghten* v. *Lalla Mewa Lall.*
[*See also* (1900) 4 Cal W N 590 (592) (DB), *Sreemutty Jogemaya Dassi* v. *Girindra Nath.*]

5. Woodfall, *Landlord and Tenant*, 22nd Edn., page 316.

6. ('92) 14 All 176 (178) : 1892 All W N 25 (DB), *Gaya Prasad* v. *Baij Nath.*

7. ('21) 8 AIR 1921 Pat 76 (76) : 60 Ind Cas 297, *Bhupendra Nath Bose* v. *Ami Prasad Singh.* (Breaches of covenant happening before assignment — Assignee is not liable.)
('96) 9 C P L R 113 (116), *Nathoo Ram* v. *Raja Bijaya Bahadur Singh.* (Do.)

Section 108
Clause (j)
Notes 4–5

ceases upon the transfer of his interest to another.[8]

Where a lessee, M, assigns a share of his interest to X and both M and X are in possession of the whole of the leased property as tenants-in-common[9] or where the lessee assigns the whole of his interest to X and Y who are in possession of the whole of the property as tenants-in-common,[10] M and X in the one case, and X and Y in the other will be each liable to the lessor to perform the whole of the covenants in the lease, including the payment of rent. But where M and X, in the one case, or X and Y in the other sever their interests and hold their shares in *physical severalty*, the privity of estate between the lessor and any of the said persons extends only to that portion of the property which is in his possession with the result that he will be liable on the covenants in the lease in so far as the covenants affect the portion in his possession, provided that the obligation under the covenants can be divided, for example, a covenant to pay rent.[11]

See also the undermentioned cases.[12]

5. Mortgage or sub-lease by lessee. — A mortgage or a sub-lease by the lessee of his interests creates neither a privity of estate nor a privity of contract between the lessor and the transferee.[1] Even

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('93) 3 Mad L Jour 292 (293), *Srimanavedan* v. *Anjela*. (The assignee of a lease is liable to the lessor for rent from the date on which he purchased the lessee's interest, and not from the date of possession.)

('16) 3 AIR 1916 Mad 768 (768, 769): 38 Mad 86 : 17 Ind Cas 933 (DB), *Kunhisow Karnavan* v. *Mulloli Chathu*. (Do.)

8. ('10) 7 Ind Cas 198 (199) (DB) (Cal), *R. D. Mehta* v. *Gajadhar Rai*.
('13) 18 Ind Cas 479 (480) (DB) (Cal), *Ram Dhan Dhar* v. *Sharup Chandra*.
Halsbury, *Laws of England*, (Hailsham Edition), Vol. 20, Para. 442.
Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
(1828) 32 R R 456 (459) : 7 L J K B 12, *Paul* v. *Nurse*.
[*See also* ('10) 6 Ind Cas 766 (773) (DB) (Mad), *Chengiah* v. *Thimma Nayanim*.]

9. ('40) 27 AIR 1940 Pat 516 (528, 540) : 19 Pat 433 : 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon*.
('25) 12 AIR 1925 Cal 1056 (1059, 1060) : 90 Ind Cas 211 (FB), *Kailash Chandra Mitra* v. *B. K. Chakraverti*. (Transfer by some of lessee's heirs to others.)

10. ('27) 14 AIR 1927 Mad 931 (932):105 Ind Cas 179 (DB), *Musofkanni Ravuthar* v. *Doraisingam*.

11. ('27) 14 A I R 1927 Mad 931 (932) : 105 Ind Cas 179 (DB), *Musafkanni Ravuthar* v. *Doraisingam*.
('38) 42 Cal W N 1088 (1090), *Lakshminarayan* v. *Girja Sankar*. (A suit for rent cannot be decreed against some only of the heirs of a deceased lessee, when the plaintiff lessor admits an assignment of the lease in favour of another and does not prove that the heirs continue to be in possession.)

12. ('30) 17 AIR 1930 Lah 515 (518) : 11 Lah 427 : 127 Ind Cas 1 (FB), *Moti Lal* v. *Kartar Singh*.
('75) 1875 Bom P J 273 (274) (DB), *Guna* v. *Parashram*. (By accepting rent from the assignee of a lessee the lessor recognizes the assignee as his tenant and the assignment as valid. But this does not amount to a new lease to the assignee, but merely to an admission that he has legitimately become the assignee of the original lessee's interest, and does not confer any better position or higher right on the assignee than his assignor had.)

Note 5

1. ('34) 21 A I R 1934 Mad 563 (564) : 154 Ind Cas 541, *Modin Kutty* v. *Puthia Pureyil Manna*. (Transfer by usufructuary mortgage.)

Section 108
Clause (j)
Note 5

an absolute demise for the unexpired residue of the term, by way of sub-lease does not operate as an assignment in this country and does not create any privity of estate or of contract between the lessor and the sub-lessee.[2] In this respect the English law is different. Under that law a sub-lease of the residue of the whole term operates as an assignment, if it be by deed.[3] In this country the mortgagee or the sub-lessee, therefore, is not liable to perform the covenants of the lease.[4] The

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('96) 1896 Pun Re No. 14 (DB), *Ramsingh* v. *Santokh Singh*. (Sub-lease.)
('41) 28 A I R 1941 P C 36 (37, 38) : 20 Pat 521 : I L R (1941) Kar P C 66 : 68 IndA pp 67 : 193 I. C. 890 (PC), *Jagadamba Loan Co.* v. *Shiba Prasad*. (Lessee mortgaging leasehold interest.)
('39) 26 AIR 1939 P C 14 (19) : ILR (1939) 1 Cal 283 : ILR (1939) Kar P C 78:66 Ind App 50 : 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Satya Charan*. (Grantee of lease transferring whole of his term to sub-grantee — Transfer operates by way of sub-demise and not of assignment.)
('24) 11 AIR 1924 Cal 1012 (1013, 1014) : 84 Ind Cas 28 (DB), *Safar Ali* v. *Rasid Khan*.
(1906) 76 L J Ch 78 (81) : (1906) 2 Ch 631:76 L T 48, *South of England Dairies Ltd.* v. *Baker*.
('22) 9 AIR 1922 Nag 224 (225) : 18 Nag L R 89 : 56 Ind Cas 268, *Sitaram Maharaj* v. *Narain*. (Sub-lease.)
('18) 5 AIR 1918 Mad 425 (426) : 40 Mad 1111 : 40 Ind Cas 841 (DB), *Thithalan* v. *Eralpod Rajah*. (Mortgage with possession.)
('95) 21 Bom 311 (313) : 1895 Bom P J 441 (DB), *Timmappa* v. *Rama Venkanna*. (Sub-lease.)
('31) 18 AIR 1931 Lah 614 (614) : 131 Ind Cas 121, *Jethanand* v. *Udhodas*. (Do.)
('14) 1 AIR 1914 Low Bur 45 (46) : 24 Ind Cas 51, *Arachan* v. *Maung Po Win*. (Sub-lessee not liable to pay rent.)
('28) 15 AIR 1928 Nag 147 (148) : 113 Ind Cas 111, *Ramchandra* v. *Seth Bhawaniram*. (Mortgage from tenant.)
[*See also* ('36) 23 A I R 1936 Cal 727 (731) : 170 Ind Cas 690 (DB), *Mati Lal* v. *Iswar Radha*. (Sub-lease of coal mines.)]

2. ('30) 17 AIR 1930 P C 59 (60) : 57 Ind App 110 : 57 Cal 1176 : 122 Ind Cas 20 (PC), *Hunsraj* v. *Bejoy Lal Seal*.
('39) 26 AIR 1939 P C 14 (15) : I L R (1939) 1 Cal 283 : I L R (1939) Kar P C 78: 66 Ind App 50 : 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Satya Charan*.
('14) 1 AIR 1914 Low Bur 45 (46) : 24 Ind Cas 51, *Arachan* v. *Maung Po Win*.
('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Goundan*.
[See however ('26) 13 AIR 1926 Pat 508 (511) : 96 Ind Cas 558 : 6 Pat 94 (DB), *Razia Begam* v. *Muhammad Daud*.]

3. Woodfall, *Landlord and Tenant*, 22nd Edition, page 322.
[*See also* (1898) 67 L J Q B 507 (509) : (1898) 1 Q B 716 : 78 L T 397 : 46 W R (Eng) 386 : 62 J P 324, *Bryant* v. *Hancock*.
(1779) 99 E R 119 (122) : 1 Doug 183, *Hal Ford* v, *Hatch*.]

4. ('34) 21 AIR 1934 Bom 134 (136) : 58 Bom 327 : 148 Ind Cas 993 (FB), *Keshavlal Tribhuwan* v. *Maganlal Shivlal*. (Overruling 29 Bom 391 : 7 Bom L R 313.)
('96) 20 Bom 439 (448), *Sarafali Tyabali* v. *Subraya Bateraya*.
('27) 14 AIR 1927 Cal 100 (101) : 91 Ind Cas 501 (DB), *Benoy Krishna* v. *Fanindra Nath Roy*.
('34) 21 AIR 1934 Mad 563 (564) : 154 Ind Cas 541, *Modin Kutti* v. *Puthia Purayil Mannan*.
('18) 5 AIR 1918 Mad 425 (427) : 40 Mad 1111 : 40 Ind Cas 841 (DB), *Thethalan* v. *Eralpod Rajah*.
('28) 15 AIR 1928 Nag 147 (148):113 Ind Cas 111, *Ramchandra* v. *Seth Bhawaniram*. (Even a voluntary payment of rent would not make him liable for future rent.)

Section 108
Clause (j)
Notes 5–6

contrary view that has been taken in some cases[5] is no longer good law in view of the decisions of their Lordships of the Privy Council in *Ramkinkar Banerjee* v. *Satyacharan*[6] and *Jagdamba Loan Co., Ltd.* v. *Raja Siba Prasad*[7] that there is no privity of estate between the lessor and a transferee from the lessee of a *partial interest* in the lease.

But though the transferee of a partial interest in the lease such as a mortgagee or a sub-lessee has no privity of estate or of contract with the lessor and is not bound to perform, as such, the covenants in the lease, he may be liable under S. 40 on the *restrictive* covenants, if any, in the head-lease if he had taken the transfer with the notice of such covenants.[8] In the case of a sub-lease it is well settled that the sub-lessee is deemed to have constructive notice of the covenants in the head-lease.[9] It has been held in the undermentioned case[10] that a mortgagee from the lessee who has taken the mortgage with notice of the covenant to pay rent can be sued by the lessor for relief under section 27 of the Specific Relief Act, 1877, and S. 91 of the Trusts Act, 1882.

6. Lessee continues liable. — The lessee does not, under this clause cease to be liable for the rent and for the performance of the other obligations of the lease.[1] The English law is also the same on

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5. ('84) 10 Cal 443 (444) (DB), *Kannye Loll Sett* v. *Nistoriny Dossee.*
('03) 5 Bom L R 118 (119) (DB), *Govind Sesha Kamti* v. *Shamtaya Dattaya.*
('25) 12 AIR 1925 Bom 330 (331) : 88 Ind Cas 79, *Ardeshir Cowasji Patel* v. *K. D. and Brothers.*
('06) 3 Low Bur Rul 90 (90), *Hossain Ismail* v. *Ebrahim Mahomed.*

6. ('39) 26 AIR 1939 P C 14 (16, 19) : ILR (1939) 1 Cal 283 : ILR (1939) Kar P C 78 : 66 Ind App 50 : 179 Ind Cas 328 (PC).

7. ('41) 28 AIR 1941 P C 36 (38):20 Pat 521 : ILR (1941) Kar P C 66:68 Ind App 67 : 193 Ind Cas 890 (PC).

8. ('36) 23 AIR 1936 Cal 727 (732, 733) : 170 Ind Cas 690 (DB), *Mati Lal* v. *Iswar Radha Damodar.*
('20) 7 AIR 1920 Pat 383 (402) : 55 Ind Cas 113 (DB), *Lodna Colliery Co. Ltd.* v. *Bipin Behari.*
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 438.
[*See also* ('73) 20 Suth W R 230 (231) : 11 Beng L R App 40 (DB), *Monindro Chunder Sircar* v. *Moneeruddeen Biswas.* (Covenant not to excavate enforceable against sub-lessee.)]

9. Halsbury, *Laws of England* (Hailsham Edn.), Vol. 20, para 438.
Woodfall, *Landlord and Tenant*, 22nd Edition, page 323.

10. ('38) 25 AIR 1938 All 167 (169) : 174 Ind Cas 245: I L R (1938) All 288(DB), *Girendra Narain* v. *Ganga Narain.*

Note 6

1. ('10) 7 Ind Cas 210 (211) : 34 Mad 179 (DB), *Ramaswami Aiyangar* v. *Shanmugam Pillai.* (But a kudivaramdar is in a different position.)
('25) 12 AIR 1925 Bom 330 (330) : 88 Ind Cas 79, *Ardeshar* v. *K. D. and Bros.*
('35) 22 AIR 1935 Mad 669 (669) : 157 Ind Cas 1005 (DB), *Suryaprakasa* v. *Venkata.*
('94) 17 Mad 296 (298), *Kunhanujan* v. *Anjelu.*
('24) 11 AIR 1924 Cal 359 (359) : 70 Ind Cas 111, *Manmatha Nath* v. *Balai Chandra.*
('08) 12 Cal W N 724 (726) (DB), *Bhola Nath Das* v. *Raja Durga Prosad.*
[*See also* ('26) 13 AIR 1926 Cal 845 (845) : 94 Ind Cas 400 (DB), *Siataj Shaikh* v. *Bishnudas Dhar.*]

Section 108
Clause (j)
Note 6

the point.[2] The lessee cannot, by merely giving the lessor notice of transfer of the lease, get rid of his obligation to pay rent[3] and cannot plead in answer to a suit for rent that the transferee is willing to pay it.[4]

Where the lessor accepts rent from the assignee a privity of contract also will be created between the lessor and the assignee with the result that the lessee ceases to be liable for the rent.[5] Where there is, however, an express covenant to pay rent the lessee will not be absolved from payment under the covenant by reason merely of the fact that the lessor has received rent from the assignee.[6] Where rent is accepted from the assignee, not as a transferee from the lessee, but as an agent of the lessee, there is no recognition of the assignment by the lessor.[7]

Where there is no receipt of rent by the lessor from the assignee, the lessee and the assignee will both be liable on the covenants in the lease which run with the land. The lessee is, prior to the assignment, liable in a dual capacity, namely, privity of contract and privity of estate. By the assignment he divests himself of the latter capacity but

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[But see ('21) 8 AIR 1921 Bom 27 (27) : 63 Ind Cas 240 : 45 Bom 1197 (DB), *Gurushantappa* v. *Mallava Sangappa*.]

2. Woodfall, *Landlord and Tenant*, 22nd Edn., pages 315, 520.
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para 440.
('25) 12 AIR 1925 Cal 423 (423) : 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai*.
('25) 12 AIR 1925 Bom 330 (330): 88 Ind Cas 79, *Ardeshar* v. *K. D. & Bros.*
('42) 29 AIR 1942 Cal 514 (516) : 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini*.
('36) 23 AIR 1936 Bom 88 (89): 60 Bom 394: 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji*.
[*See* (1790) 2 R R 341 (341): 4 T R 94: 1 Hy Bl 433, *Mills* v. *Auriol*.]

3. ('30) 17 AIR 1930 PC 13 (15, 17) : 127 Ind Cas 749 (PC), *Satya Niranjan* v. *Surajubala Debi*.
('71) 7 Beng L R 152 (158) (FB), *Beni Madhab* v. *Jaikrishna*.
('95) 22 Cal 494 (500) (DB), *Sasi Bhushun* v. *Tara Lal*.

4. ('18) 5 AIR 1918 Cal 49 (49) : 47 Ind Cas 800 (DB), *Akrurmani* v. *Madhab Chandra*.

5. (1882) 52 L J Q B 340 (341) : 10 Q B D 48 : 47 L T 657 : 31 W R (Eng) 506, *Swan Sea Corporation* v. *Thomas*.
('18) 5 AIR 1918 Mad 425 (426): 40 Mad 1111 : 40 Ind Cas 841 (DB), *Theethalan* v. *Eralpod Rajah*.
('42) 29 AIR 1942 Cal 514 (516) : 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini*.
('19) 6 AIR 1919 Lah 304 (305) : 1919 Pun Re No. 34 : 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal*.
('36) 23 AIR 1936 Bom 88 (89) : 60 Bom 394 : 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji*.
[*See also* (1863) 1 Mad H C R 24 (26) (DB), *Kamala Nayak* v. *Ranga Rau*. (Agreement between lessor and lessee that former should accept rent from assignee.)
('38) 25 AIR 1938 All 167 (169) : I L R (1938) All 288 : 174 Ind Cas 245 (DB) *Girandra Narain* v. *Ganga Narain*. (The principle was applied to the lessor accepting rent from a mortgagee from the lessee.)]

6. ('36) 23 AIR 1936 Bom 88 (89) : 63 Bom 394 : 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji*.

7. ('12) 15 Ind Cas 156 (157) (DB) (Cal), *Digbijoy Roy* v. *Ata Rahman*.

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Notes 6–8

retains the former. The result is that the lessor may avail himself of the relation that has come into existence between him and the assignee, as well as of the contractual relation that exists between him and the lessee. Thus, he has a remedy against them both, but can take out execution against one of them only.[8]

7. **Rights of lessee against assignee or sub-lessee.** — As between the lessee and his assignee the latter is primarily liable to perform the covenants in the lease, and will be deemed to have impliedly contracted to indemnify the lessee against the claims of the lessor for breach of the obligations imposed by virtue of the contract of lease.[1] But, as seen in Note 4 the liability of the assignee to perform the covenant will cease by his assigning his interests to a second assignee, inasmuch as he is liable to the lessor only by virtue of privity of estate, and when that passes to the second assignee, his liability ceases.[2] Nevertheless, he will continue liable as to all breaches committed between the date of his taking the assignment and his transfer to the second assignee.[3] He would also continue liable on any express contract which he might have entered into with the lessee.[4] An *under-lessee* is not liable to indemnify the lessee in respect of rent which the lessee has been compelled to pay to his lessor under his covenant to pay rent.[5]

8. **Last paragraph.** — This paragraph is identical in terms with clause (i) of S. 6. As seen in Note 37 on that section, occupancy tenancies have, by various Acts of the Legislature, been declared to be not transferable. An alienation of such tenancy would, in fact, have the effect of defeating the provisions of law. It is on this ground that such tenancies have been excepted from the operation of this clause. The clause will therefore not operate so as to enable a valid transfer being made of such tenancy.[1]

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8. ('25) 12 AIR 1925 Cal 423 (423) : 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai.*
('25) 12 AIR 1925 Sind 296 (297) : 87 Ind Cas 802, *Gobindram* v. *Mohamed Hussain.* (In so far as this decision seems to assume that there is a privity of estate between a sub-tenant and the lessor, it is not correct.)
('07) 30 Mad 410 (412) : 17 Mad L Jour 258 (DB), *Monica Kitheria* v. *Subraya Hebbara.*
('05-06) 3 Low Bur Rul 90 (90), *Hossain Ismail* v. *Ebrahim Mahomed.*
('94) 17 Mad 296 (298), *Kunhanujan* v. *Anjelu.*
Halsbury, *Laws of England*, (Hailsham Edition), Vol. 20, Para. 440.
Woodfall, *Landlord and Tenant*, 22nd Edn., page 315.

Note 7

1. ('80) 5 Cal 811 (817) : 6 Cal L R 167, *Pepin* v. *Chunder Seekur.*
(1870) 39 L J Ex 69 (73) : L R 5 Ex 132 : 22 L T 343 : 18 W R (Eng) 697, *Moule* v. *Garratt.* (Lessee can recover from assignee damages paid by former to lessor for breach of covenant committed during the time of his being assignee.)
2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
3. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
4. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
5. (1899) 68 L J Q B 114 (116) : (1899) 1 Q B 161 : 79 L T 611 : 47 W R (Eng) 161, *Bonner* v. *Tottenham & Edmonton etc., Society.*

Note 8

1. ('06) 28 All 696 (697) : 3 All L Jour 476, *Madan Lal* v. *Mohammad Ali.* (Agra Tenancy Act.)

9. Agricultural leases. — This clause, in terms, does not apply to agricultural leases. But the principle underlying this clause will apply and every lessee can, under S. 6 of the Act, transfer his interest to another person unless otherwise provided by this Act or by any other law for the time being in force.[1] The lessee will continue liable notwithstanding the assignment to another.[2] Where the relationship of landlord and tenant with permanent occupancy right was not created by any contract of the parties it was held in the undermentioned case[3] that neither this clause nor the principle underlying it applied and that an occupancy tenant was not liable for rent after he had transferred his holding and had given notice of the transfer to his landlord.

10. Clause not retrospective. — This clause is not retrospective and does not apply to leases executed before the Act.[1] It will not make a tenancy which was not transferable before the Act, assignable subsequent to the Act.[2]

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest : Clause (k)

1. Scope. — This clause may be compared with S. 55, sub-s. (5) cl. (a) which is worded in similar terms. See Note 13 on that section.

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf : Clause (l)

Note 9

1. ('18) 5 AIR 1918 Nag 155 (156) : 14 Nag L R 188 : 43 Ind Cas 970, *Narayandas* v. *Krishna Rao.* (The provisions of the C. P. Tenancy Act require the consent of the landlord to transfer by a tenant only but a transfer of a sub-lease is valid without the consent of the landlord.)
('12) 17 Ind Cas 656 (656) (DB) (All), *Muhammad Ismail* v. *Mithu Lal.* (Letters Patent appeal from 14 Ind Cas 799.)
2. ('07) 30 Mad 410 (412): 17 Mad L Jour 258 (DB), *Monica Kitheria* v. *Subraya.*
('42) 29 AIR 1942 Cal 514 (516) : 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini.*
('18) 5 AIR 1918 Mad 928 (930) : 40 Ind Cas 590 (DB), *Bapiraju* v. *Narayanaswami.*
[But see ('25) 12 AIR 1925 Cal 423 (424) : 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai.* (This principle does not apply to agricultural lands or to cases under the Bengal Tenancy Act—Obiter dictum.)]
3. ('15) 2 AIR 1915 Mad 34 (35) : 25 Ind Cas 804 (DB), *Rangaramanuja Chariar* v. *Srinivasa Iyengar.*

Note 10

1. ('98) 25 Cal 896 (906) : 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullik.*
('98) 2 Cal W N 122 (124), *Hari Nath* v. *Raj Chandra.*
('09) 1 Ind Cas 362 (364) (DB) (Cal), *Kailash Chandra* v. *Hari Mohan.*
2. ('14) 1 AIR 1914 Cal 665 (666) : 23 Ind Cas 246 (DB), *Umakanta* v. *Kashiram.*

Section 108
Clause (l)
Note 1

Synopsis

1. Scope.
2. Interest on rent.
3. Rent not a charge.
4. Rent in kind.
5. Tender or payment at the proper time and place.
6. "To the lessor or his agent."
7. Payment must be by lessee.
8. Increase of rent.
9. Question of title.
10. Concurrent lease.
11. Covenant to pay rent runs with the land. See Note 25 on S. 40 and Note 4 on Clause (j).
12. Void lease.
13. Non-payment of rent.
14. Suspension, abatement and reduction of rent.

1. Scope.—A right to recover rent or the liability to pay rent involves the position that there exists a relationship of landlord and tenant between the parties.[1] Where there is no such relationship, no liability to pay rent arises.[2] But so long as the relationship of landlord and tenant continues, the tenant will be liable for the rent.[3] The fact that the tenant was not in actual occupation of the demised property is not a valid defence to a claim by the landlord for the rent.[4] If the lease is a voidable one and is avoided, the obligation to pay rent will cease.[5]

Section 108, Clause (l) — Note 1

1. ('07) 31 Bom 159 (161) : 8 Bom L R 988 (DB), *Manjappa Subaya* v. *Venkatesh Bab Prabhu.* (Assignee of lessee who has himself assigned to another is not liable for rent as there is no privity of estate or contract between the lessor and the first assignee after his assignment.)

[*See also* ('28) 15 AIR 1928 Nag 147 (148) : 113 Ind Cas 111, *Ram Chandra* v. *Seth Bhawani Rami.* (Mortgagee or sub-lessee from lessee who has no privity of estate or contract with the lessor and is not liable for rent.)]

2. ('05) 32 Cal 567 (570) : 3 Cal L Jour 141 (DB), *Girindra Chandra* v. *Sreenath.*

3. ('84) 8 Bom 160 (163) (DB), *Venkatesh Narayan* v. *Krishnaji Arjun.*
('74) 21 Suth W R 5 (6) (DB), *Mohun Mahtoo* v. *Meer Shumsool Hoda.*
('28) 110 Ind Cas 438 (439) (DB) (Cal), *Satu Pramanik* v. *Joynab Bibi.*
('02) 5 Oudh Cas 113 (115), *Gobind Prasad* v. *Asmat Ara Begam.*
('02) 15 C P L R 9 (10), *Tikaram* v. *Budhu.*
('12) 15 Ind Cas 857 (859) : 15 Oudh Cas 295, *Habibullah* v. *Surji.*
('09) 1 Ind Cas 626 (631) : 36 Cal 675 (DB), *Mathewson* v. *Sriram Kanai Singh,*

[*See* ('20) 7 AIR 1920 Cal 965 (966) : 59 Ind Cas 312 (DB), *Basanta Kumari* v. *Krishna Nalini.* (In a suit for rent if allegations of surrender and dispossession are not proved and the tenant is in possession of the holding the mere fact that the plaintiff is unable to establish the identity of the holdings is no reason for depriving him of the rent therefor.)]

[*See also* ('05) 9 Cal W N 871 (873) (DB), *Srimati Moni* v. *Kalachand Gharami.*
('29) 16 AIR 1929 Pat 440 (444) : 120 Ind Cas 776 (DB), *Deo Lal Jha* v. *Bindeshwari Narayansingh.*]

4. ('84) 8 Bom 164 (167) (DB), *Balaji* v. *Bhikaji.*
('74) 21 Suth W R 5 (6) (DB), *Mohun Mahtoo* v. *Meer Shumsool Hoda.*
('36) 23 A I R 1936 Lah 815 (816) : 165 Ind Cas 56, *Nur Mohammad* v. *Ahmad Ali Khan.*
(1884) 8 Bom 160 (163) (DB), *Venkatesh Narayan Pai* v. *Krishnaji Arjun.*
('66) 5 Suth W R Act X 78 (78) (D B), *Saroda Soonduree Debee* v. *Hazee Mahomed.*

5. ('09) 1 Ind Cas 626 (631) : 36 Cal 675 (DB), *Mathewson* v. *Sri Ram Kanai Singh Deb.*

The right to the rent is vested in the landlord and the tenant cannot contract with a third party to divest his landlord of that right.[6]

Where a lump rent is fixed for several estates leased out to a person, the landlord cannot split up or apportion it and claim a proportionate rent for a particular estate.[7]

The clause applies in terms only to cases where a 'lease' as defined in S. 105 has been executed. But even if no such lease is actually executed, if there is a relationship of landlord and tenant established between the parties in point of fact, the landlord would, on general principles, be entitled to recover the rent due as a debt.[8]

2. Interest on rent.—The word "rent" will not include interest payable on arrears of rent, as the payment of interest can neither be said to be a "consideration" for the lease nor a payment "to be rendered periodically, or on specified occasions" within the meaning of S. 105.[1] If, therefore, a sum of money is paid by the lessee to the lessor as rent and is accepted by the lessor as such, he cannot apply it towards any interest that may be due on the arrears of rent.[2] But this does not mean that interest is not recoverable on the arrears of rent where there is a stipulation for such interest.[3] Interest can also be claimed as damages on the arrears of rent in the absence of a stipulation for interest.[4]

See also the undermentioned cases.[5]

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6. ('11) 12 Ind Cas 855 (856) (Low Bur), *Maung Lon Gyi* v. *Rahman Chetty.*

7. ('73) 5 N W P H C R 42 (43) (DB), *Oosman Khan* v. *Chowdhry Sheoraj Singh.*

8. ('09) 2 Ind Cas 920 (922) : 12 Oudh Cas 140 (DB), *Udit Narayan Singh* v. *Rampal Singh.* (Where the defendant was in possession of a village under a kabuliat executed by him, undertaking to pay rent at a certain rate, but no lease had been executed, held that the undertaking contained in kabuliat could be enforced against him.)
('85) 11 Cal 221 (225) (DB), *Rutnessur Biswas* v. *Hurrish Chunder.*

Note 2

1. ('06) 5 Cal L Jour 69 (70) : 11 Cal W N 110 (DB), *Bhagabati Debya* v. *Basanta Kumari.*
('19) 6 AIR 1919 Cal 391 (391) : 50 Ind Cas 975 (DB), *Mani Lal Seal* v. *Bhola Nath Basu.*

2. ('06) 5 Cal L Jour 69 (70) : 11 Cal W N 110 (DB), *Bhagabati Debya* v. *Basanta Kumari.*
('19) 6 AIR 1919 Cal 391 (391) : 50 Ind Cas 975 (DB), *Mani Lal Seal* v. *Bhola Nath Basu.*

3. ('02) 30 Cal 213 (215) (DB), *Raj Narain* v. *Panna Chand.*

4. ('13) 21 Ind Cas 82 (82) (Oudh), *Kifayat Ullah* v. *Protab Bahadur Singh.*
('21) 8 AIR 1921 Pat 301 (302), *Shahid Hussain* v. *Jagmohan Lal.* (Court cannot reduce rate fixed in the lease as interest.)
[*See also* ('12) 14 Ind Cas 713 (714) (DB) (Cal), *Jatadhari Lal* v. *Shah Shamsul Bari.* (Damages not allowed on the facts disclosed.)]

5. ('34) 21 A I R 1934 All 115 (117) : 153 Ind Cas 432, *Madan Mohan Garg* v. *Bohra Ram Lal.* (In the absence of any contract or usage, interest on arrears of rent is not allowed.)
('19) 6 AIR 1919 Cal 159 (160) : 49 Ind Cas 1006 (DB), *Jiban Kali* v. *Manimala Dassi.* (A tender of rent without interest accrued due at the time of the tender is not a good tender.)

Section 108
Clause (1)
Notes 3–5

3. Rent not a charge.—The rent or premium payable is not a charge on the leasehold premises.[1] Nor is it a charge on the crops raised by the tenant.[2] As to whether rent is a charge under local Tenancy Acts, see Note 12 on S. 100.

4. Rent in kind. — Where rent is stipulated to be paid in kind the lessor cannot, on failure to pay such rent, claim interest either under the Interest Act, 1839, or as damages under S. 73 of the Contract Act. The Interest Act does not apply because rent in kind is not a "debt". Section 73 of the Contract Act will enable the award only of the value of the grain at the time it is due as *damages* and not as interest.[1]

The fact that the lessor might have received in previous years the value in money for the rent in kind, fixed by the contract of lease, will not disable him from claiming the payment of rent in kind for any particular year.[2] As to the lessor's rights where the rent is fixed as payable in kind or partly in kind and partly in money and a value of the rent in kind is also mentioned in the lease, see Note 62 on S. 105.

5. Tender or payment at the proper time and place. — A tender of rent must be of the exact sum due.[1] It is the duty of the lessee, where no place of payment is fixed by the contract, to apply to the lessor for a reasonable place being named for payment of the rent; where this is not done the lessee must make the payment at the place where the lessor is, on the principle that "the debtor must find his creditor."[2] The lessee may, however, prove a contract subsequent to

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Note 3

1. ('26) 13 AIR 1926 Mad 55 (56) : 48 Mad 821 : 90 Ind Cas 725 (DB), *Venkatacharyulu* v. *Venkatasubba Rao.* (English law not followed : AIR 1919 Mad 168 : 42 Mad 203 dissented from.)

('36) 23 AIR 1936 Rang 488 (490) : 167 Ind Cas 110 (DB), *Ramanuja Naidu* v. *N. K. Chettyar Firm.*

2. ('36) 23 AIR 1936 Rang 488 (490) : 167 Ind Cas 110 (DB), *Ramanuja Naidu* v. *N. K. Chettyar Firm.*

Note 4

1. ('10) 8 Ind Cas 411 (412) : 34 Bom 506 (DB), *Narayana Ramachandra* v. *Manager Nagappa.*

('69) 11 Suth W R 151 (151) : 2 Beng L R App 27 (DB), *Lachman Prasad* v. *Holas Mahtoon.*

2. ('99) 3 Cal W N 151 (152) (DB), *Sohobut Ali* v. *Abdul Ali.*

[*See also* ('99) 9 Mad L Jour 26 (27) (DB), *Venkatramayya* v. *Ganganna.* (Rent payable by usage in kind.)]

Note 5

1. ('92) 1892 All W N 217 (219) (DB), *Bakhto* v. *Raja Ram.*

2. ('33) 20 AIR 1933 All 147 (148) : 150 Ind Cas 289, *Bhagauti Shukul* v. *Chandrika Prasad Kueri.* (Decision in this case was based on implied contract to pay at lessor's place.)

('12) 14 Ind Cas 713 (714) (DB) (Cal), *Jatadhari Lal* v. *Shah Shamsul Bari.*

('29) 16 AIR 1929 Sind 13 (14) : 111 Ind Cas 530 : 23 Sind L R 29, *Allibhoy Adamji* v. *Gordhandas.*

(1900) 4 Cal W N 324 (326) (DB), *Fakir Lal* v. *W. C. Bonnerjee.*

(1853) 91 R R 705 (711) : 8 Exch 689 : 22 L J Ex 264, *Haldane* v. *Johnson.*

the lease, that the rent should be paid at a particular place.[3] There is nothing in the clause to require the landlord to make a *demand* for the rent. The lessee is bound to pay the rent without any demand.[4]

Where the lease stipulates that the rent should be paid at a particular time, the lessee is bound to pay it at the time so specified. Where no such time is specified in the deed the rent will become due at the close of the period in respect of which the rent is reserved, unless there is any usage to the contrary governing the case.[5] The contrary view taken in the undermentioned case[6] that the rent becomes due as soon as the lease is granted, though payable at a future date, is, it is submitted, not correct.

6. "To the lessor or his agent." — A payment or tender of the rent must be made not only at the proper time and place, but must be made to the *lessor or his agent in this behalf*.[1] A payment to a person directed by the lessor will be a payment to the lessor himself.[2] A payment of rent after the death of the lessor to a person who is not the heir is not binding on the real legal representative of the lessor.[3] Where the lessor is a *benamidar* for another person, it has been held that a payment of the rent to the real owner by the lessee is a good discharge of his liability.[4]

Joint lessors :

It has been seen in Note 14 on S. 60 that a payment or tender to one of several co-creditors is not a valid discharge of the debt against all of them.

On this principle a payment of rent by the lessee to one of several co-lessors will not be a valid discharge of the debt against them all.[5] The contrary view taken in the undermentioned cases[6] cannot be

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3. ('25) 12 AIR 1925 Nag 281 (282) : 89 Ind Cas 273 : 23 Nag L R 26, *Onkarprasad* v. *Badridas.*

4. ('41) 28 AIR 1941 Bom 286 (287) : 196 Ind Cas 385 : I L R (1941) Bom 521, *Nasiruddin* v. *Umerji Adam & Co.*

('29) 16 AIR 1929 Sind 13 (14) : 111 Ind Cas 530 : 23 Sind L R 29, *Allibhoy Adamji* v. *Gordhandas.*

5. ('04) 27 Mad 143 (150) : 31 Ind App 17 : 8 Sar 617 (PC), *Rangayya Appa Rao* v. *Bobba Shiramulu.*

(1900) 10 Mad L Jour 26 (27) (DB), *Rama Naidu* v. *Sri Mahant Ramakissori.*

Woodfall, *Landlord and Tenant*, 22nd Edition, page 505.

('98) 8 Mad L Jour 201 (202) (DB), *Paramasiva* v. *Kandappa.*

6. ('26) 13 AIR 1926 Nag 314 (315) : 94 Ind Cas 741: 22 Nag L R 13, *Maruti* v. *Ukarda.*

Note 6

1. ('71) 16 Suth W R 79 (80) (DB), *Eshan Chunder Roy* v. *Khajah Assanoollah.*

2. (1864) 1864 Suth W R Act X Rul 112 (113) (DB), *Mt. Joykooer* v. *J. Furlong.*

3. ('03) 1903 Pun Re No. 72 : 1903 Pun L R No. 164, *Golak Nath* v. *Craddock.*

4. ('15) 2 AIR 1915 Mad 48 (48) : 25 Ind Cas 679, *Muthusami Aiyar* v. *Solai Kanan.*

5. ('98) 25 Cal 324 (330) (DB), *Azim Sirdar* v. *Ramlall.*

6. ('74) 11 Bom H C R 106 (110) (DB), *Krishnarav Ramchandra* v. *Manaji.*

('98) 22 Bom 794 (800) (DB), *Sambhu* v. *Kamalraw Vithalrao.*

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considered, in view of the discussion in S. 60, Note 14, to be good law. In any view, a payment to one of several co-lessors, will not be a good discharge of the liability against them all if such payment is made fraudulently or collusively.[6a] A payment to all the joint lessors is not invalid by reason merely of the fact that they have severed their interests, if there is no arrangement between them and the lessee for apportionment of the rent.[7] As a general rule one of several joint lessors cannot sue for his share of the rent,[8] in the absence of a special agreement between the lessee and the lessors for payment to them of their shares separately.[9] But one of the joint lessors can sue for the

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('86) 1886 Bom P J 238 (238) (DB), *Vithal* v. *Sagun.*
(1865) 2 Suth W R Act X Rul 15 (15) (DB), *Baboo Oodit Narain Singh* v. *Mr. H. Hudson.*
('68) 10 Suth W R 441 (441) (DB), *Ramnath Singh* v. *Gondee Singh.*

6a. ('16) 3 AIR 1916 Mad 208 (208) : 28 Ind Cas 141 (DB), *Chockalingam Chetti* v. *Periakarupan.*
('28) 15 AIR 1928 Bom 420 (421) : 113 Ind Cas 618 (DB), *Gendal Raju* v. *Maganlal.*
('25) 12 AIR 1925 Bom 69 (74) : 49 Bom 245 : 89 Ind Cas 553 (DB), *Hirachand* v. *Jayagopal.*

7. ('80) 5 Cal 902 (905) : 6 Cal L R 421 (FB), *Ishwar Chunder* v. *Ram Krishna.*

8. ('98) 1898 All W N 129 (130), *Girja Nand* v. *Ram Prasad.*
('34) 21 AIR 1934 P C 58 (59) : 61 Cal 313 : 61 Ind App 35 : 147 Ind Cas 884 (PC), *Baraboni Coal Concern Ltd.* v. *Gokulananda.*
('25) 12 AIR 1925 Cal 197 (197) : 83 Ind Cas 931 (DB), *Kamalesh Ray* v. *Dwarika Nath.*
('19) 6 AIR 1919 Cal 997 (998) : 45 Ind Cas 721 (DB), *Satyesh Chandra* v. *Jillar Rahman.*
('12) 16 Ind Cas 458 (458) (DB) (Mad), *Srinivasa Varadachariar* v. *Sami Reddi,*
('21) 62 Ind Cas 47 (48) (Pat), *Ram Rattan Prasad* v. *JangBahadur Singh.*
('82) 5 All 40 (41) : 1882 All W N 143 (DB), *Manohar Das* v. *Manzur Ali.*
('04) 31 Cal 707 (709) (SB), *Nepal Chundra Ghose* v. *Mohendra Nath Roy.*
('93) 20 Cal 107 (110) (DB), *Bindu Basini* v. *Peary Mohun.*
('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhouri Balgobind.*
('02) 6 Cal W N 326 (328) (DB), *Lala Ram Saran Lal* v. *Nem Narain Singh.*
('76) 25 Suth W R 221 (221), *Rakhal Chunder Roy* v. *Mahtab Khan.*
('75) 23 Suth W R 37 (37), *Brijokishore* v. *Ooma Soonduree.*
('74) 22 Suth W R 526 (528), *Bykunt Kyburto* v. *Shushee Mohun.*
('66) 5 Suth W R Act X Rul, 68 (68) (DB), *Ramjoy Singh* v. *Nagur Gazee.*
('74) 22 Suth W R 394 (395) (DB), *Tara Chunder* v. *Ameer Mundul.*
('73) 20 Suth W R 76 (77) (DB), *Mt. Lalun* v. *Hemraj Singh.*
('69) 12 Suth W R 30 (31) (DB), *Gunga Narain* v. *Shasoda Mohun.*
('69) 11 Suth W R 373 (374) (DB), *Nussurut Ali* v. *Abdool Kareem Chowdhry.*
('68) 10 Suth W R 108 (109) (DB), *Jagadamba Dasi* v. *Haran Chandra Dutt.*
('27) 14 AIR 1927 Cal 79 (80) : 97 Ind Cas 444 (DB), *Durga Mohan* v. *Ali Buksha.*
(1834) 131 E R 999 (1000) : 10 Bing 526 : 3 L J C P 198 : 4 Moo & S 400, *Decharms* v. *Horwood.*
[*See also* ('05) 9 Cal W N 34 (44) (SB), *Promoda Nath* v. *Ramoni Kant.*]
[**But see** (1864) 1 Suth W R 253 (253) (DB), *Mohammad Singh* v. *Mughy Chowdhrain.* (Case under Act X of 1859.)
(1900) 27 Cal 479 (483) : 4 Cal W N 494 (496) (DB), *Raj Narain* v. *Ekadasi.* (They can sever their interests and then sue separately for their shares.)
(1864) 1864 Suth W R Act X Rul, 63 (64) (DB), *Umrit Chowdhry* v. *Hyder Ali* (Case under X of 1859.)]

9. ('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhowri Balgobind.*

entire rent due making all the others defendants.[10] An arrangement between the lessors and the lessee for collection of rent in separate shares does not preclude the lessors from together suing for the whole rent.[11] One of several lessors can also sue the lessee for apportionment of rent making all the other lessors parties to the suit.[12]

7. Payment must be by lessee.—A lessor cannot be compelled to accept payment of rent from a person who was not established to be his tenant.[1] Nor can the lessor claim rent from a person who is not his tenant. But a *benamidar* for the lessee is in law the same person as the lessee himself and therefore the lessor can sue him for rent.[1a] Where A leases to B certain property and B happens to be one of several partners, there is a difference of opinion as to whether the lessor can sue the partners for rent. According to the Bombay High Court[2] he cannot, while according to the Madras High Court[3] he can. Where a lease is granted to several persons, each of the lessees is liable for the whole rent.[4] A suit is therefore maintainable against one of them for

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('12) 16 Ind Cas 458 (458) (DB) (Mad), *Srinivasa Varadachariar* v. *Sami Reddi.*
('04) 31 Cal 707 (709) (SB), *Nepal Chandra* v. *Mahendra Nath.*
('05) 9 Cal W N 34 (48) (SB), *Promoda Nath* v. *Ramoni Kant.*
('02) 6 Cal W N 326 (328) (DB), *Ram Saran* v. *Nem Narain.*
('66) 5 Suth W R Act X, Rul 68 (68) (DB), *Ramjoy Singh* v. *Nagur Gazee.*
('11) 14 Ind Cas 292 (292) (DB) (Cal), *Shyama Charan* v. *Jogesh Chandra.*
('69) 12 Suth W R 30 (31) (DB), *Ganga Narayan* v. *Saroda Mohan.*

10. ('97) 1 Cal W N 221 (222) (DB), *Bissesswar Ray* v. *Broja Kant.*
('27) 14 AIR 1927 Cal 79 (80) : 97 Ind Cas 444 (DB), *Durga Mohan* v. *Ali Buksha.*
('10) 7 Ind Cas 351 (351) (Lah), *Ruldu Ram* v. *Aya Ram.* (All cosharers not made parties—Suit dismissed.)
('08) 35 Cal 744 (745) : 7 Cal L Jour 425 (426) (DB), *Sashi Kumar* v. *Sitanath.*
('08) 35 Cal 331 (344) : 35 Ind App 73 (PC), *Pramada Nath* v. *Ramani Kanta.*
('26) 13 AIR 1926 Cal 333 (334): 90 Ind Cas 673 (DB), *Mohini Mohan* v. *Meajan.*
('08) 35 Cal 744 (745) : 7 Cal L Jour 425 (DB), *Sashi Kumar* v. *Sitanath.*
('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhowri Balgobind.*
('11) 14 Ind Cas 292 (293) (DB) (Cal), *Shyama Charan* v. *Jogesh Chandra.*
[But see ('21) 62 Ind Cas 47 (48) (Pat), *Ram Rattan* v. *Jang Bahadur.* (One can sue for entire rent even though others are not parties.)]

11. ('11) 10 Ind Cas 891 (892) (DB) (Cal), *Bhola Nath* v. *Belchamber.*

12. ('80) 5 Cal 902 (905) : 6 Cal L R 421 (FB), *Iswar Chunder* v. *Ram Krishna.*

Note 7

1. ('10) 6 Ind Cas 357 (357) (DB) (Cal), *Sarajendra Krishna Deb* v. *Sannyasi Charan Ghosh.* (Deposit by a person alleging to be a purchaser of the lessee.)
('29) 16 AIR 1929 Pat 440 (441) : 120 Ind Cas 776 (DB), *Deo Lal Jha* v. *Bindeshwari Narayan Singh.*

1a. ('21) 8 AIR 1921 Pat 351 (351) : 64 Ind Cas 515 (DB), *Tharat Karim* v. *Mt. Bal Kuar.*

2. ('92) 16 Bom 568 (574), *Ragoonathdas Gopal Das* v. *Morarji Jutha.*

3. ('96) 19 Mad 471 (476) : 6 Mad L Jour 115 (DB), *Chinnaramanuja Ayyangar* v. *Padmanabha Pillaiyan.*

4. ('28) 15 AIR 1928 All 534 (535): 111 Ind Cas 156, *Har Sarup* v. *Tohfa Singh.*
('12) 13 Ind Cas 423 (424) (DB) (Cal), *Attul Chandra Dutt* v. *Eson Ali.*
('74) 22 Suth W R 295 (295) (DB), *Gour Mohun Roy* v. *Anund Mundul.*
('74) 22 Suth W R 285 (285) (DB), *Jhoomuck Lall* v. *Mt. Shurfoon.*
('67) 7 Suth W R 272 (272) (DB), *Jogendra Deb Roy* v. *Kishen Bundhoo Roy.*

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the whole rent.[5] The executor of a deceased lessee is not personally liable to pay the rent accruing due after the death of the lessee unless he enters into possession, in which case his position will be that of an assignee of the term.[6]

8. **Increase of rent.** — A lessor is not entitled to increased rent merely on the ground that the prevailing rent on other land in the vicinity is higher.[1]

Where a lease stipulates that, if the tenant continues after the expiry of the period fixed, he should pay an increased rent from that date, the stipulation is not a penalty and is valid.[2] If the tenant continues in spite of the notice he will be deemed to have agreed to pay the enhanced rent.[3] The same principle will apply where the lease contains a stipulation to pay a higher rent if the tenant fails to make certain payments at specified times.[4] The view taken in the undermentioned cases[5] that notwithstanding the stipulation to pay the increased rent, the lessor was not entitled to claim it, is, it is submitted, not correct.

A stipulation for enhanced rent, if the area of the demised property is found, on measurement, to exceed that mentioned in the lease, does not enable the lessee to an abatement of the rent if the area is found to be less.[6] If the area is in excess of that mentioned in the lease, the lessor will be entitled to rent for such excess area.[7]

('68) 10 Suth W R 392 (392) (DB), *Bholanath* v. *Baharam Khan.*
[*See also* ('20) 7 AIR 1920 Mad 509 (510, 511) : 56 Ind Cas 552 (DB), *Singaraju Venkatasubramanian* v. *Rajah of Venkatagiri.* (Heirs and descendants are also jointly and severally liable.)]
[But see ('10) 7 Ind Cas 840 (840) (DB) (Cal), *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro.*]

5. ('07) 11 Cal W N 1026 (1028) (DB), *Jogendra Nath Roy* v. *Nagendra Narain Nandi.*
('10) 6 Ind Cas 387 (387) (DB) (Cal), *Rameswar Singh* v. *Jaideb Jha.*
('14) 1 AIR 1914 Lah 500 (501) : 1914 Pun Re No. 107 : 27 Ind Cas 94, *Livingstone* v. *Feroz Din.*
[But see ('68) 10 Suth W R 304 (304) (DB), *Roopnarain Singh* v. *Juggoo Singh.*]
6. (36) 165 Ind Cas 121 (122) (Cal), *Kameshwara Singh* v. *Pherozsha Merwanji.*

Note 8

1. ('14) 1 AIR 1914 Cal 775 (776):25 Ind Cas 534 (DB), *Doyal Chandra* v. *Kauri Naskar.*
('12) 14 Ind Cas 229 (230) (Cal), *Manindra Chandra Nandi* v. *Jagannath Khan.*
2. ('29) 16 A I R 1929 Pat 717 (720) : 9 Pat 487 : 124 Ind Cas 625 (DB), *Kuman Das* v. *Radhika Singh.*
3. ('25) 12 AIR 1925 Oudh 189 (190) :82 Ind Cas 585 : 28 Oudh Cas 77, *S. Burge* v. *Maulvi Md. Inamullah Khan.*
4. ('99) 22 Mad 453 (454) : 9 Mad L Jour 201 (DB), *Bal Kuraya* v. *Sankamma.*
5. ('95) 22 Cal 658 (665) (SB), *Tejendra Narain Singh* v. *Bakai Singh.* (Per Prinsep and Ghose JJ—Rampini, J., contra.)
('72-92) 1872-1892 Low Bur Rul 439 (440), *Ramzan Ali* v. *Shew Bux.* (Lessor entitled only to a fair rent.)
6. (1865) 2 Suth W R Act X Rul, 71 (71) (DB), *Ramakant Chowdry* v. *Bindabun Chunder Gopee.*
7. ('14) 1 A I R 1914 Cal 475 (476) :23 Ind Cas 967 (DB), *Jadu Nath Das* v. *Manindra Chandra Nandi.*

A stipulation to pay higher rent by the tenant in certain events has been held to be enforceable even against a court-auction purchaser of the tenant's interests.[8]

9. Question of title.—The question of the lessor's title is wholly foreign to a suit for rent against the lessee inasmuch as the tenant is estopped from denying the title of the landlord.[1] A lessor can, therefore, recover rent from the lessee even though he may have no title to the land.[2] A lessee from one joint owner cannot set up the rights of the cosharers of his lessor and refuse to pay rent to his lessor.[3]

10. Concurrent lease. — Where A leases property to B for a period of years and then grants another lease to C which is to commence before the expiry of the prior lease, the lease in favour of C would be called "a concurrent lease." Such a lease operates as an assignment of a part of the reversion during the continuance of such previous lease, and thenceforth, as a lease in possession during the residue of the term therein expressed to be granted. The landlord, having thus assigned the reversion during the concurrent period, cannot sue the first lessee for rent but can claim rent from the second lessee who, in his turn, could recover from the first lessee.[1]

11. Covenant to pay rent runs with the land. — See Note 25 on S. 40 and Note 4 on clause (j) of this section.

12. Void lease. — Where a lease is void there is no relationship of landlord and tenant created between the parties. The party in occupation under such a lease is not liable to pay any *rent* to the owner of the property.[1] He will, however, be liable to the owner for damages

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8. ('71) 15 Suth W R 448 (449) (DB), *Lalla Mitterjeet* v. *Raj Chunder.*

Note 9

1. ('06) 1906 Pun Re No. 141 (at p. 512) : 1907 Pun L R No. 96, *Bogar* v. *Karam Singh.*
2. ('15) 2 AIR 1915 Low Bur 10 (10) : 31 Ind Cas 888, *Ahamuat* v. *Kalu.* (A I R 1915 Low Bur 75 : 8 Low Bur Rul 227 : 30 Ind Cas 772 (FB), Followed.)
('89) 13 Bom 323 (325) (DB), *Jamsedji Sorabji* v. *Lakshmiram Rajaram.*
('10) 5 Ind Cas 870 (871) : 32 All 213 (DB), *Kesho Das* v. *Maksodan Das.*
3. ('89) 13 Bom 323 (325) (DB), *Jamsedji Sorabji* v. *Lakshmiram Rajaram.*
('98-99) 3 Cal W N 214 (215) (DB), *Behary Churn Sen* v. *Bhut Nath Pramanick*
('76) 1876 Bom P J 11 (11) (DB), *Dada* v. *Bhau.*
('84) 1884 Bom P J 33 (33) (DB), *Sayad Fatulla* v. *Bala Shivaya.*
('84) 1884 Bom P J 286 (286) (DB), *Jethu* v. *Ganpatrav.*
('13) 18 Ind Cas 592 (593) (Lah), *Narpat Rai* v. *Nausharia Mal.* (Lease by a Hindu father.)
[But see ('10) 7 Ind Cas 874 (874, 875) (Mad), *Chidambara Velar* v. *Velu Pillai.* (Lease by A—B also owner of share—A cannot sue for whole rent.)]

Note 10

1. ('08) 30 All 369 (370) : 5 All L Jour 423 (DB), *Rama Anant Singh* v. *Shankar Singh.*
Woodfall, *Landlord and Tenant*, 22nd Edn., page 256.
Fawcett, *Landlord and Tenant*, 3rd Edn., page 191.

Note 12

1. ('09) 1 Ind Cas 52 (53) : 31 All 58 (DB), *Chogalal* v. *Mt. Piary.*

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for use and occupation.[2]

13. Non-payment of rent. — The non-payment of rent does not determine the tenancy or constitute adverse possession so long as the relation of landlord and tenant continues.[1]

14. Suspension, abatement and reduction of rent. — This clause does not say that if the lessor fails to put the lessee in possession or if, having put him in possession, the lessee is deprived of possession in whole or in part, the lessee is not bound to pay rent.[1] But the rule is well settled that non-delivery of possession or the failure to secure possession of the property in whole or in part is a good answer to a suit for rent in respect of the property not delivered or secured and for the period the tenant is out of possession.[2] The basis of this rule is that, in

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('72) 9 Beng L R App 37 (38) : 18 Suth W R 445 (446) (DB), *Gaurinath* v. *Madhumani*. (A landlord cannot recover rent of lodgings knowingly let to a prostitute who carries on her vocation there.)

('36) 23 AIR 1936 Cal 628 (629) : 62 Cal 294 : 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate, Ltd.* (Unregistered lease.)

[*See also* ('75) 24 Suth W R 91 (91) (DB), *Kalee Doss Banerjee* v. *Nubeen Chunder Chatterjee*. (Lease set aside as granted without authority.)]

2. ('24) 11 AIR 1924 Oudh 97 (98) : 74 Ind Cas 582, *Ajodhya Singh* v. *Khusro Begum*.

('69) 12 Suth W R 289 (290) (DB), *Paroma Soondaree Dossee* v. *Prollad Chunder Doss*.

('25) 12 AIR 1925 All 100 (101) : 82 Ind Cas 296 (DB), *Nand Ram Singh* v. *Hari Saran Das*.

('98) 2 Ind Cas 211 (212) : 31 All 276 (FB), *Sheo Karan Singh* v. *Parbhu Narayan Singh*.

Note 13

1. See Note 79 on Section 105 and Note 14 on Section 111.

[*See also* ('28) 15 AIR 1928 Pat 63 (64) : 104 Ind Cas 124 (DB), *Sheonandan Singh* v. *Kesho Prasad Singh*. (Mere failure of the landlord to realise rent even for more than 12 years would not confer a rent-free title.)

('78) 4 Cal 314 (318) : 3 Cal L Rep 119 (DB), *Rangolal Mundul* v. *Abdool Guffoor*.

('12) 16 Ind Cas 911 (914) (DB) (Cal), *Raji Kumar Roy Chowdhury* v. *Alimaddi*.]

Note 14

1. ('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chettiar*.

2. ('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara Nachiar* v. *Chidamabram Chettiar*. (25 Mad 587 followed.)

('32) 19 AIR 1932 P C 28 (31) : 136 Ind Cas 398 : 59 Cal 1012 : 59 Ind App 29 (PC), *Jogesh Chandra Roy* v. *Emdad Meah*. (Lessor must deliver possession before he can enforce the tenant's obligation to pay rent.)

('09) 2 Ind Cas 484 (484) (Mad), *Gopal Naicken* v. *Suppa Pillai*. (Where a suit is for rent that had accrued due already, the subsequent eviction by the landlord before the expiry of the term of the lease is not a good defence to the suit.)

('20) 7 AIR 1920 Pat 611 (613) : 58 Ind Cas 186 (DB), *Udhab Chandra Singh* v. *Narain*.

('33) 20 AIR 1933 Pat 678 (679) : 149 Ind Cas 573, *Moheshwar Singh* v. *Jageshwar Singh*. (Substantial interference—Suspension of entire rent.)

('17) 4 AIR 1917 Pat 52 (53) : 36 Ind Cas 537 (DB), *Ram Chandra* v. *Madho Prasad*. (Co-tenant depriving the other of possession in collusion with the lessor.)

('34) 21 AIR 1934 Pesh 101 (102) : 152 Ind Cas 231, *Ganda Singh Mehr Singh* v. *Secy. of State*.

('34) 21 AIR 1934 Oudh 97 (98) : 148 Ind Cas 1079, *Raja Ram Pal Singh* v. *Abdul Hamid*.

cases of continuous relationship involving mutual rights and obligations, a party who acts in violation of his obligations cannot claim to enforce his rights against the other party.[3]

As has been seen in the Notes on clauses (b) and (c), a lessee not put in possession of any part of the demised property or not secured by the lessor in his possession of any portion thereof after delivery of possession, will be entitled to rescind the whole contract of lease, but must, in such a case, deliver to the lessor the property in his possession.[4] He can also, as has been seen in the said Notes, claim damages for breach of the obligations of the lessor. If, however, he retains possession of a part of the property, *prima facie*, it would be reasonable that he

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('31) 18 AIR 1931 Oudh 12 (13) : 129 Ind Cas 326, *Rajjab* v. *Ghulam Husain Khan.*

('69) 13 Suth W R 338 (339) (DB), *Kadumbinee Dossia* v. *Kasheenath Biswas.* (Dispossession from whole of the property.)

('15) 2 AIR 1915 Mad 717 (719) : 25 Ind Cas 812 (DB), *Srinivasa Iyengar* v. *Rangaswami Aiyangar.*

('29) 16 AIR 1929 Cal 719 (722): 122 Ind Cas 220 (DB), *Manmatha Nath* v. *Mati Lal.* (If the landlord dispossesses a tenant there would be no doubt a suspension of rent; but when the tenant gets mesne profits from the landlord for such dispossession the landlord is entitled to deduct the amount of rent payable to him on account of the land in question.)

('01) 5 Cal W N 816 (818) (DB), *Shama Prosad Ghose* v. *Taki Mullik.*

('68) 9 Suth W R 582 (582) (DB), *Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter.* (Non-delivery of whole of the property—Suit for rent — *Held*, delivery of possession on the part of the landlord is ordinarily a condition necessary for the maintenance of an action for rent.);

('28) 15 AIR 1928 Cal 136 (137): 106 Ind Cas 841 (DB), *Sailendra Nath* v. *Satish Chandra.* (Dispossession.)

('69) 3 Beng L R App 119 (119, 120) (DB), *Bullan* v. *Lalit Jha.* (Non-delivery of possession of the whole of the property.)

[*See also* ('12) 17 Ind Cas 238 (241) (DB) (Cal), *Kalanand Singh* v. *Jarad Kumari.*

('20) 7 AIR 1920 Pat 258 (258) : 57 Ind Cas 69, *Surendra Mohan* v. *Gena Sardar.*

('67) 8 Suth W R 54 (55) (DB), *Madhub Chunder* v. *Sidhee Nuzeer Ali Khan.* (Interruption is not an answer to a claim for rent that accrued due before the interruption.)

('09) 4 Ind Cas 324 (324) (DB) (Cal), *Gobinda* v. *Ramachandra*, (Tenant is not relieved from liability of paying rents before eviction.)]

3. ('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.*

('32) 19 AIR 1932 P C 28 (31) : 136 Ind Cas 398 : 59 Cal 1012 : 59 Ind App 29 (PC), *Jogesh Chandra Roy* v. *Emdad Meah.*

[*See also* ('11) 10 Ind Cas 392 (393) (DB) (Mad), *Ramanathan Chettiar* v. *Veera Nagappa Chettiar.* (The right of a lessor to claim payment of a premium reserved under a lease does not depend upon his obligation to put the lessee in possession, as a matter of law — But Courts will not be justified in passing a decree for the payment of the premium alone without compelling the lessor at the same time to perform his obligation and to give possession as is done in the case of sales.)

('70) 15 Suth W R 230 (231) (DB), *Kristo Soondur Sandyal* v. *Chunder Nath Roy.*]

4. ('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.*

Also see Note 3 on clause (b) and Note 8 on clause (c).

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should be bound to pay to the lessor rent for the portion in his enjoyment and from which he has received income.[5]

In England, the law, however, is different. A tenant who is not put in possession of a part of the demised property[6] or who, after being put in possession, is evicted from a part thereof by the lessor[7] is entitled to a suspension of the *entire rent* for the period he is out of possession. The reason of this rule was originally connected with the feudal system which once prevailed in that country and is to the effect that no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the feudal law, he ought to protect and defend;[8] further that, "because of the demise every part of the land was equally chargeable with the whole rent, therefore, the lessor shall not, by his own act, discharge any part from the burden during the continuance of such contract."[9]

It has been held by the High Court of Madras that the doctrine of suspension as applicable in England, does not apply to this country, and that if the tenant continues in possession of a part of the property, he will be liable to an abated share of the rent.[10] The High Court of Allahabad and the Chief Court of Oudh also appear to be of the same opinion.[11]

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5. ('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. v. *Chidambaram Chetty.*
('08) 12 Cal W N 767 (769) (DB), *Siba Kumari Debi* v. *Biprodas Pal.*

6. (1844) 70 R R 800 (802) : 1 Car & Kir 341, *Holgate* v. *Kay.*
('19) 6 AIR 1919 Cal 379 (380) : 52 Ind Cas 13 : 46 Cal 959 (DB), *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri.*
('31) 18 AIR 1931 Cal 537 (541): 133 Ind Cas 577: 59 Cal 155 (FB), *Arun Chandra Sinha* v. *Bhagaban Chandra Roy.*

7. Halsbury, *Laws of England*, Hailsham Edition, Vol. 20, para. 199.
('14) 1 AIR 1914 Cal 480 (481) : 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parshanath Das.* (Eviction by person claiming under landlord.)
('27) 14 AIR 1927 Cal 737 (738) : 104 Ind Cas 775 : 55 Cal 689 (DB), *Susil Biswas* v. *Rajanikanta Chakravarti.*

8. ('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.* (Citing Baron's Abridgment Vol. VII, page 62.)
('69) 12 Suth W R 109 (109) (DB), *Gopanund Jha* v. *Lalla Gobind Pershad.*
[*See* ('01) 28 Cal 188 (190) (DB), *Harro Kumari* v. *Purna Chandra,*]

9. ('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.* (Citing Baron Gilbert in his Treatise on Rents.)
[*See* ('96) 24 Cal 296 (304) (DB), *Dhunput Singh* v. *Mahomed Kazim.*]
[*See also* (1900-01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundri* v. *Rani Surnomoyee Dasi.*]

10. ('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai.*
('12) 15 Ind Cas 711 (716, 717) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.*

11. ('29) 16 AIR 1929 All 52 (52) : 111 Ind Cas 790, *Pir Bakhsh* v. *Rameshwar Nath.*
('20) 7 AIR 1920 Oudh 125 (126): 60 I. C. 462, *Girraj Kunwar* v. *Chandrasekhar.* (A tenant who holds both cultivated and uncultivated land, the latter under a grove-tenure, at a certain rental and who is ejected from the cultivated portion is liable to pay proportionate rent for the remainder.)

The High Court of Calcutta has, however, applied the doctrine of suspension of rent not only to cases of *non-delivery* of possession of a part of the demised property[12] but also to cases of eviction by the lessor of the lessee from a part of the demised property.[13] The High Court of

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12. ('19) 6 AIR 1919 Cal 379 (380, 381): 46 Cal 956: 52 Ind Cas 13 (DB), *Manindra Chandra* v. *Narendra Chandra.*
[*See also* ('28) 15 AIR 1928 Cal 137 (138) : 105 Ind Cas 741 (DB) .*Midnapore Zamindary Co. Ltd.* v. *Shib Narayan Dutta.* (But the right to suspension of rent may be lost by acquiescence by payment of full rent for over 60 years.)]

13. ('33) 20 AIR 1933 Cal 566 (571) : 146 Ind Cas 398, *Sakhi Sona Dassi* v. *Prankrishna Das.*
('10) 8 Ind Cas 30 (31) (DB) (Cal), *Sarip Jan Bibi* v. *Aftab-ud-Din.*
('10) 6 Ind Cas 478 (480, 481) (DB) (Cal), *Chandra Kanta Das* v. *Rama Nath Barman.*
('10) 5 Ind Cas 105 (106) (DB) (Cal), *Rasseswari Chowdhurani* v. *Sourendra Mohun Tagore.* (Substantial interference amounts to eviction.)
('25) 12 AIR 1925 Cal 1187 (1188) : 90 Ind Cas 47 (DB), *Suresh Chandra* v. *Mathura Nath.*
('13) 21 Ind Cas 957 (958) (DB) (Cal), *Godai Molla* v. *Aminuddi Howladar.* (Dispossession by subsequent tenant.)
('13) 18 Ind Cas 621 (622) (Cal) (DB), *Ashutosh Dhar* v. *Joy Lal Sardar.*
('22) 9 AIR 1922 Cal 153 (154, 156): 67 Ind Cas 800: 49 Cal 1019 (DB), *Nagendra Chandra* v. *Manindra Chandra.*
('19) 6 AIR 1919 Cal 1004 (1005) : 46 Ind Cal 539 (DB), *Pramatha Nath* v. *Chandrasekhar Banerjee.* (Where one of several landlords who jointly let out land to the tenant, dispossesses the tenant, the entire rent is suspended during the time tenant is kept out of possession.)
('19) 6 AIR 1919 Cal 379 (380, 381) : 46 Cal 956 : 52 Ind Cas 13 (DB), *Manindra Chandra* v. *Narendra Chandra.*
('18) 5 AIR 1918 Cal 8 (9) : 48 Ind Cas 699 (DB), *Rajani Manna Bagdi* v. *Satish Chandra Roy.*
('17) 4 AIR 1917 Cal 177 (178, 179) : 39 Ind Cas 209 (DB), *Dwijendra Nath Roy* v. *Aftabuddi Sardar.*
('17) 4 AIR 1917 Cal 80 (81) : 41 Ind Cas 91 (DB), *Tipan Prasad Singh* v. *Ramji Ram.*
('15) 2 AIR 1915 Cal 554 (554): 28 Ind Cas 371 (DB), *Saroda Prosad* v. *Monmotho Nath.*
('14) 1 AIR 1914 Cal 480 (481): 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parsha Nath Das.*
('35) 22 AIR 1935 Cal 134 (137) : 155 Ind Cas 506 (DB), *Mahomed Ali Fakir* v. *Karam Ali.*
('32) 19 AIR 1932 Cal 385 (386) : 137 Ind Cas 696 (DB), *Krishna Chandra Ray* v. *Surendra Nath.*
('34) 21 AIR 1934 Cal 146 (148) : 149 Ind Cas 1117, *Dharani Mohan Roy* v. *Rajani Kanta.* (For application of principle, land from which lessee is dispossessed should be proved to be part of tenancy and dispossession should be wrongful or tortious.)
('29) 16 AIR 1929 Cal 516 (519): 119 Ind Cas 132, *Mahim Chandra* v. *Karam Ali.*
('29) 16 AIR 1929 Cal 395 (396) : 119 Ind Cas 297 (DB), *Dhirendra Nath* v. *Bhabatarini Debi.*
('31) 18 AIR 1931 Cal 537 (541): 133 Ind Cas 577: 59 Cal 155 (FB), *Arun Chandra Singha* v. *Bhagaban Chandra Roy.*
('31) 18 AIR 1931 Cal 397 (398): 132 Ind Cas 81 (DB), *Reshee Case Law* v. *Satish Chandra Pal.* (Mere obtaining of a decree for possession by the tenant is not sufficient to defeat the tenant's right to suspension of entire rent for eviction from a portion of the demised premises.)
('29) 16 AIR 1929 Cal 568 (571): 123 Ind Cas 653: 57 Cal 137 (DB), *Abhoya Charan Sen* v. *Hem Chandra Pal.*

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Patna and the Judicial Commissioner's Court of Nagpur have also taken a similar view.[14]

In some cases[15] it has been held that the English doctrine is not to be rigidly applied in this country, but should be applied only as a rule

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('28) 15 AIR 1928 Cal 428 (430) : 108 Ind Cas 587 (DB), *Sarat Kumar Roy* v. *Surendra Nath.*

('23) 10 AIR 1923 Cal 162 (163) : 68 Ind Cas 495 (DB), *Ramani Kanta Roy* v. *Hara Chandra Das.*

(1900) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi.*

('25) 12 AIR 1925 Cal 805 (806) : 85 Ind Cas 781 (DB), *Joyram Chandra* v. *Bishnu Charan.*

[*See also* ('35) 22 AIR 1935 Cal 554 (555) (DB), *Jotindra Nath* v. *Aswini Kumar.* (Onus is on the tenant to prove the fact of dispossession and extent of it.)

('33) 20 AIR 1933 Cal 290 (292) : 143 Ind Cas 30 : 60 Cal 247 (DB), *Satish Chandra Pal* v. *Reshee Case Law.* (Plea of suspension of rent on account of dispossession by landlord—Onus is upon tenant to prove dispossession and not upon the landlord to prove restoration where finding in previous suit was that tenant was dispossessed by landlord. AIR 1931 Cal 537: 59 Cal 155 (FB) relied on.)

('21) 8 AIR 1921 Cal 303 (304) : 65 Ind Cas 839 (DB), *Masbahuddin Ahmed* v. *Abdul Borkat.*

('11) 9 Ind Cas 568 (571) (DB) (Cal), *Purna Chandra* v. *Rasik Chandra.* (A tenant's right to suspension of entire rent for eviction from a substantial portion of land of the tenancy continues till effective steps are taken by the landlord to restore him in possession.)]

14. ('39) 26 AIR 1939 Pat 356 (357) : 180 Ind Cas 98 (DB), *Mt. Deoki Kuar* v. *Shiva Prasad.* (A I R 1938 Pat 379 reversed—Lump rent for the whole area.)

('28) 15 AIR 1928 Pat 428 (429) : 108 Ind Cas 891, *Khub Lal Singh* v. *Daroga Singh.*

('26) 13 AIR 1926 Pat 513 (514) : 96 Ind Cas 585, *Jagat Narain Singh* v. *Tulsi Chamar.* (A tenant, who has been dispossessed of a portion of his holding by the landlord, can withhold payment of the rent of the entire holding, even though his right to recover possession of the dispossessed portion has become barred by limitation.)

('18) 5 AIR 1918 Pat 335 (336) : 44 Ind Cas 658 (DB), *Mosudan Potdar* v. *Satis Chandra.*

('17) 4 AIR 1917 Pat 34 (34) : 36 Ind Cas 528 (DB), *Sham Narayan* v. *Chandra Sekhar.*

('35) 22 AIR 1935 Pat 38 (39) : 153 Ind Cas 298 : 14 Pat 323 (DB), *Dalip Narain Singh* v. *Suraj Naraian.*

('09) 2 Ind Cas 29 (31) : 5 Nag L R 47, *Mohanlal* v. *Mt. Mungia.*

15. ('35) 40 Cal W N 166 (172) (DB), *Jagadish Nath Roy* v. *Surendra Prosad Lahiri.*

('27) 14 AIR 1927 Cal 737 (738, 739) : 104 Ind Cas 775 : 55 Cal 689 (DB), *Susil Kumar* v. *Rajani Kanta.*

('26) 13 AIR 1926 Cal 1148 (1149) : 96 Ind Cas 557 (DB), *Manik Chandra* v. *Hari Mistri.* (To justify a suspension of entire rent it must be shown that the eviction was the act of the landlord, done not merely accidentally owing to want of knowledge of the real boundaries, but with the deliberate intention of depriving the tenant of the enjoyment of the demised premises.)

('26) 13 AIR 1926 Cal 908 (910) : 94 Ind Cas 418 (DB), *Biseshwar* v. *Kali Charan.* (Tenants would not be entitled to suspension of rent, only because of a mistake of the landlord in including certain portion of land, in a previous decree not comprising in the subject-matter of that suit, and consequently having it sold, as the tenants could have corrected the mistake in a subsequent suit.)

('34) 21 AIR 1934 Pat 653 (655) : 13 Pat 396 : 152 Ind Cas 992 (DB), *Rameshwar* v. *Butto Kristo.*

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of justice, equity and good conscience, and in other cases[15a] that where possession of a part of the property is not given, but the tenant has taken possession of the other part, or acquiesced in the non-delivery by payment of rent, or the non-delivery was due to some *bona fide* mistake, there should be an apportionment and not a suspension of rent.

It has further been held that the doctrine of suspension rests upon the fact that the tenure is an entire and indivisible one, the rent being fixed as a lump sum for the entire land,[16] and that, where the rent is separately assessed for separate parcels of the property demised, the doctrine is not applicable.[17] Before the decision of the Privy Council in

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15a. ('41) 28 AIR 1941 Cal 384 (385) : 195 Ind Cas 701, *Sourendra Mohan* v. *Kanai Lal.* (The Court should consider whether the landlord's failure to put the tenant in possession of the entire demised area was due to some mistake as to the extent of the boundaries or some other *bona fide* act.)
('22) 9 AIR 1922 Cal 153 (156) : 49 Cal 1019 : 67 Ind Cas 800 (DB), *Nagendra Chandra* v. *Manindra Chandra.* (In this case the lessee was aware at the time of taking possession that some part of the land was in the possession of a third party.)
('21) 8 AIR 1921 Cal 806 (807)(DB), *Raj Kumari Bose* v. *Surendra Nath Guha.* (By long acquiescence.)
('38) 42 Cal W N 1030 (1031, 1032) (DB), *Dhirendra Nath* v. *Ramlal Datta.* (Failure to give possession of part of the property — Lessee acquiescing in such failure for 55 years—No suspension but abatement.)
('25) 12 AIR 1925 Cal 805 (806) : 85 Ind Cas 781 (DB), *Joyram Chandra* v. *Bisnu Charan.* (But there is exception, namely, that there will be only an abatement of rent where with the knowledge of the tenant, before he entered into the land, a portion of it had been let to another and was in that other's possession.)
('09) 2 Ind Cas 123 (125) (DB) (Cal), *Annada Prasad* v. *Mathura Lal.* (It may be questioned how far the technicalities to be found in the English law should be allowed to affect the relations of landlord and tenant in this country.)
('15) 2 AIR 1915 Cal 554 (555) : 28 Ind Cas 371 (DB), *Saroda Prasad* v. *Manmatho Nath.*
('09) 4 Ind Cas 713 (720) : 37 Cal 293 (DB), *Durga Prosad* v. *Rajendra Narain.*
('25) 12 AIR 1925 Cal 1187 (1188, 1189) : 90 Ind Cas 47 (DB), *Suresh Chandra* v. *Mathura Nath.*
[*See also* ('18) 5 AIR 1918 Cal 525 (525) : 43 Ind Cas 47 (DB), *Nara Narayana* v. *Kali Mohan.*
('26) 91 Ind Cas 686 (687) (DB) (Cal), *Binod Kumar* v. *Ram Kishore.*]

16. ('29) 16 AIR 1929 Cal 395 (396) : 119 Ind Cas 297 (DB), *Dhirendra* v. *Bhabatarini.*
('13) 21 Ind Cas 957 (957)(DB) (Cal), *Godai Molla* v. *Aminuddin.* (Per Caspersz, J.)
('14) 1 AIR 1914 Cal 480 (481) : 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parsha Nath.*
('38) 42 Cal W N 1030 (1031, 1032) (DB), *Dhirendra Nath* v. *Ramlal Datta.*
('97) 24 Cal 296 (305) (DB), *Dhunpat Singh* v. *Mahomed Kazim.*
('35) 22 A I R 1935 Cal 134 (137, 139) : 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali.*
('34) 21 AIR 1934 Pat 653 (656) : 13 Pat 396 : 152 Ind Cas 992 (DB), *Rameshwar* v. *Butto Kristo.*
[*See also* ('32) AIR 1932 Cal 385 (386) : 137 Ind Cas 696 (DB), *Krishna Chandra* v. *Surendra Nath.*]

17. ('96) 24 Cal 296 (305) (DB), *Dhunpat Singh* v. *Mahomed Kazim.*
('29) 16 A I R 1929 Cal 130 (131) : 112 Ind Cas 71 (DB), *Dwarkanath* v. *Sri Gobinda.*

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Katyayani Debi v. *Udoy Kumar*,[18] it was held that the fact that rent was fixed at so much per acre, did not prevent it from being an entire rent so long as the rent was equally chargeable on every part of the property.[19] In *Katyayani Debi's case*[20] which was one of eviction by a paramount title, of the lessee from a part of the demised property, their Lordships of the Privy Council observed :

> "The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

This observation of their Lordships has given rise to a conflict of decisions. On the one hand, it has been held that, where rent is fixed at so much per bigha or acre, the doctrine of suspension has no application to the case.[21] On the other hand, the view has been taken that their Lordships' observations refer only to cases of non-delivery of possession and not to cases of eviction, and, provided there is an indivisibility of the tenure, the question of lump rent or a rental at so much per bigha is not relevant.[22]

In order to constitute an "*eviction*" by the lessor, for the application of the doctrine of suspension of rent, the act done by the lessor must be a *wrongful* or *tortious* act of dispossession.[23] It must not be a mere

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('43) 30 A I R 1943 Cal 91 (92) : ILR (1942) 2 Cal 406, *Samsunnehar* v. *Hari Nath*. (A I R 1929 Cal 130 followed.)

('10) 5 Ind Cas 352 (354) (DB) (Cal), *Mahomed Zeaulla* v. *Sukhiannessa Bibi*.

[*See also* ('38) 25 AIR 1938 Cal 690 (691) : 177 Ind Cas 996, *Surendra Nath* v. *Bhudar Chandra*. (Onus is on the tenant to prove dispossession.)]

18. ('25) 12 AIR 1925 P C 97 (99) : 52 Cal 417 : 52 Ind App 160 : 88 Ind Cas 110 (P C).

19. ('01) 28 Cal 188 (190) (DB), *Harro Kumari* v. *Purna Chandra*.

[*See also* ('07) 34 Cal 191 (196) (DB), *Kali Prasanna* v. *Mathura Nath*.]

20. ('25) 12 A I R 1925 P C 97 (99) : 52 Cal 417 : 52 Ind App 160 : 88 Ind Cas 110 (PC), *Katyayani Debi* v. *Udoy Kumar*. (The facts as explained in AIR 1931 P C 104 : 58 Cal 1281 : 58 Ind App 141 (which was also in connexion with same matter) show that it is a case of eviction by paramount title.)

21. ('29) 16 AIR 1929 Cal 568 (571) : 57 Cal 137 : 123 Ind Cas 653 (DB), *Abhoy Charan* v. *Hem Chandra*.

('29) 16 A I R 1929 Cal 516 (519) : 119 Ind Cas 132, *Mahim Chandra* v. *Karam Ali*.

('26) 13 A I R 1926 Cal 1226 (1227) : 98 Ind Cas 215 (DB), *Tarap Sheikh* v. *Kunja Behary*.

('27) 14 AIR 1927 Cal 951 (952) : 100 Ind Cas 501, *Ebad Ali* v. *Fatima Bibi*.

('31) 18 A I R 1931 Cal 397 (398) : 132 Ind Cas 81 (DB), *Reshee Case Law* v. *Satish Chandra*.

('39) 26 A I R 1939 Pat 356 (357) : 180 Ind Cas 98 (DB), *Mt. Deoki Kuar* v. *Shiva Prosad*. (Assumed.)

22. ('33) 20 AIR 1933 Cal 566 (570, 571) : 146 Ind Cas 398, *Sakhisona Dasi* v. *Pran Krishna*.

('35) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad*.

23. ('34) 21 A I R 1934 Cal 146 (147) : 149 Ind Cas 1117, *Dharani Mohan* v. *Rajani Kanta*.

('35) 22 A I R 1935 Cal 134 (137) : 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali*. (Forcible and deliberate dispossession.)

trespass but must be something of a grave and permanent character done with the intention of depriving the tenant of the enjoyment of the demised property.[24] Further, there must be a substantial interference with the enjoyment of the property, though actual physical expulsion is not necessary.[25] A *bona fide* or innocent dispossession does not constitute an eviction by the lessor and is not a ground for a suspension of rent.[26]

Eviction by paramount title :

Eviction by paramount title is a good defence to a suit for rent.[27] But in order to constitute such an "eviction" —

('34) 21 AIR 1934 Pat 653 (656) : 13 Pat 396 : 152 Ind Cas 992 (DB), *Rameshwar Lal* v. *Butto Kristo.*

24. ('41) 28 AIR 1941 Pat 417 (417) : 193 Ind Cas 250, *Basantilal* v. *Jamuna Prasad.* (Landlord realising rent of part of demised land from sub-tenant by mistake and not with intention of evicting tenant — Tenant not entitled to suspension of rent.)

('36) 23 AIR 1936 Cal 135 (138) : 166 Ind Cas 299, *Nishi Kanta* v. *David Ezra.*

('35) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad.*

('96) 24 Cal 296 (304) (DB), *Dhunpat Singh* v. *Mahomed Kazim.*

('42) 29 AIR 1942 Pat 266 (267) : 197 Ind Cas 160, *Sukhraj Rai* v. *Dip Narain.* (Dispossession by landlord must be deliberate — Portion of tenancy included by mistake in kabuliat executed by landlord in favour of third person—Plea of suspension cannot prevail.)

('12) 17 Ind Cas 238 (242) (DB) (Cal), *Kalanand Singh* v. *Jarao Kumari.*

('34) 21 AIR 1934 Pat 75 (79) : 154 Ind Cas 1066 (DB), *Hira Lal Singh* v, *Rinkauri Singh.*

('26) 13 AIR 1926 Cal 1226 (1227) : 98 Ind Cas 215 (DB), *Tarap Sheikh* v. *Kunja Behary.*

('26) 13 AIR 1926 Cal 1148 (1148, 1149) : 96 Ind Cas 557 (DB), *Manik Chandra* v. *Hari Mistri.* (To justify a suspension of the entire rent it must be shown that the eviction was the act of the landlord and was done with the intention of depriving the tenant of the enjoyment of the demised premises or land and not that it was merely accidental resulting from ignorance of the parties as to the real boundaries of the land.)

(1900) 5 Cal W N 353 (355) (DB), *Lalita Sundari* v. *Surnomoyee Dasi.*

('26) 13 AIR 1926 Cal 908 (910) : 94 Ind Cas 418 (DB), *Biseswar Sarkar* v. *Kali Charan.*

25. ('96) 24 Cal 296 (304) (DB), *Dhunpat Singh* v. *Mahomed Kazim.*

('36) 23 AIR 1936 Cal 135 (138) : 166 Ind Cas 299, *Nishi Kanta* v. *David Ezra.* (Where a tenant claims suspension of rent owing to an encroachment of few inches on the leased premises by the erection of a platform by the landlord the question of fact which has to be determined is, did the landlord by the erection of this platform do something of a grave and permanent character with the intention of permanently depriving the tenant of a portion of the subject-matter of the demise.)

(1900) 5 Cal W N 353 (355) (DB), *Lalita Sundari* v. *Surnomoyee Dasi.*

('10) 5 Ind Cas 105 (106) (DB) (Cal), *Rasseswari* v. *Sourendra Mohun.*

('17) 4 AIR 1917 Cal 177 (178, 179) : 39 Ind Cas 209 (DB), *Dwijendra* v. *Aftabuddi.*

('13) 21 Ind Cas 957 (958) (DB) (Cal), *Godai Molla* v. *Aminuddi Howladar.*

26. ('35) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad.* (Mistake about the extent of the property demised.)

('41) 28 AIR 1941 Pat 417 (417) : 193 Ind Cas 250, *Basantilal* v. *Jamuna Prasad.*

27. ('74) 22 Suth W R 542 (543) (DB), *Wajed Ali* v. *Mt. Chundrabuty Kooeree.*

('82) 1882 Bom P J 167 (167) (DB), *Subrao* v. *Ratnushet.*

('31) 18 AIR 1931 Cal 537 (541) : 59 Cal 155 : 133 Ind Cas 577 (FB), *Arun Chandra* v. *Bhagaban Chandra.*

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(1) it must have been from something actually forming part of the demised premises,

(2) the party evicting must have a good title and

(3) the tenant evicted must have quitted against his will.[28]

Forcible expulsion is, however, not necessary.[29] If, upon a claim being made by title paramount the lessee consents to an attornment to such person or to change the title under which he holds, or enters into a new arrangement for holding under him, this will be an eviction by paramount title.[30] The mere institution of a suit for possession[31] or the mere apprehension of eviction is not sufficient.[32]

Where the lessee is evicted by title paramount from the *whole* of the property demised, there is no liability upon the lessee to pay any rent at all.[33] Where the eviction is from a *part* of the demised premises, there will be an *abatement* of the rent to the extent of the property lost to the lessee.[34] The doctrine of suspension does not apply to such

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('29) 16 AIR 1929 Cal 22 (25) : 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*

28. ('14) 1 AIR 1914 Cal 730 (731) : 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*

('35) 22 AIR 1935 Cal 368 (384, 385) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*

('29) 16 AIR 1929 Cal 22 (25) : 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*

('29) 16 AIR 1929 Cal 272 (275): 117 I.C. 838(DB), *Indu Bhusan* v. *Moazam Ali.*

29. ('35) 22 AIR 1935 Cal 368 (385) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*

('14) 1 AIR 1914 Cal 730 (731): 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*

('39) 26 AIR 1939 Cal 216 (218) : I L R (1938) 2 Cal 559 : 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.*

('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*

30. ('35) 22 AIR 1935 Cal 368 (385) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*

('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*

('39) 26 AIR 1939 Cal 216 (218) : I L R (1938) 2 Cal 559 : 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.*

[*See also* ('14) 1 AIR 1914 Cal 730 (731) : 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*

(1825) 28 R R 375 (381): 4 L J K B 2, *Hill* v. *Saunders.*]

31. ('39) 26 AIR 1939 Cal 216 (218): ILR (1938) 2 Cal 559: 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.* (It is essential that the person asserting such title should take possession or should be taken in the eye of law to have taken possession of the demised premises.)

32. ('36) 23 AIR 1936 Cal 628 (629): 62 Cal 294 : 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate, Ltd.*

(1870) 14 Suth W R 85 (87) (DB), *Messrs. Burn & Co.* v. *Rusho Moyee Dossee.*

33. ('25) 12 AIR 1925 All 275 (275) : 47 All 63 : 85 Ind Cas 756, *Moti Lal* v. *Yar Muhammad.*

1864) 1 Suth W R 1 (2) (DB), *Bishen Dyal Singh* v. *Probhoo Das.*

34. ('31) 18 AIR 1931 P C 104 (105, 107) : 58 Cal 1281 : 58 Ind App 141 : 131 Ind Cas 309 (P C), *Jatindra Nath Chowdhury* v. *Uday Kumar Das.*

cases.[35] In *Imambandi Begam* v. *Kamleshwari Pershad*,[36] the lessor was unable to give possession to the lessee of a part of the demised property by reason of a third person with paramount title being in possession. Their Lordships of the Privy Council held that the lessee was in a position similar to that of a person who has been evicted from that part and that there was the same equity for apportionment as in the case of 'eviction.' The word "eviction" used by their Lordships must be taken to mean eviction by a paramount title and not by the lessor himself.

Diluvion :

Where the lessee is deprived of a part of the demised property by diluvion[37] or by earthquake[38] or other such similar causes there will be an *abatement* of rent to the extent of the property lost to the lessee, unless there is a contract to the contrary.[39]

Acquisition under the Land Acquisition Act :

It has been held that where part of the demised property has been acquired under the Land Acquisition Act (I of 1894) and the lessor has received compensation for the land acquired, he is bound to make an

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('35) 22 AIR 1935 Cal 134 (138) : 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali.*
('31) 18 AIR 1931 Cal 537 (541): 59 Cal 155: 133 Ind Cas 577 (FB), *Arun Chandra* v. *Bhagaban Chandra.*
('23) 10 AIR 1923 Cal 429 (431) : 70 Ind Cas 828 (DB), *Jitendra Nath Roy* v. *Ashutosh Goswami.*
('69) 12 Suth W R 109 (109) (DB), *Gopanand Jha* v. *Lalla Gobind Pershad.*
('68) 10 Suth W R 120 (121) (DB), *Brajnath Pal Chowdhry* v. *Hiralal Pal.*
('10) 6 Ind Cas 206 (207) (DB) (Cal), *Rani Dassi* v. *Asutosh Roy Choudhury.*
('16) 3 AIR 1916 Cal 63 (64) : 43 Cal 554 : 36 Ind Cas 33 (DB), *Surendra Narain* v. *Dina Nath Bose.* (But the lessor must show what is the fair rent of the lands out of which the tenant was not evicted.)
('15) 2 AIR 1915 Cal 568 (570) : 27 Ind Cas 265 (DB), *Rash Mohinee Dassee* v. *Nafar Chandra Pal.*

35. ('35) 22 AIR 1935 Cal 134 (138) : 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali.*
[**But see** ('73) 20 Suth W R 347 (348) (DB), *F. Aitchison* v. *Nilmonee Singh Deo.* (This was a case of eviction by paramount title—The doctrine of suspension was assumed to apply but as the leased property fixed separate rent for separate mouzahs abatement was given.)]

36. ('94) 21 Cal 1005 (1016, 1017) : 21 Ind App 118 (PC).

37. ('85) 11 Cal 625 (628) (DB), *Kali Prosanna Roy* v. *Dhananjai Ghose.* (Right to abatement is under the general law and as such passes with the land to the purchaser.)
('31) 18 AIR 1931 Cal 537 (539): 59 Cal 155: 133 Ind Cas 577 (FB), *Arun Chandra* v. *Bhagavan Chandra.* (1864 Suth W R Act X Rul 42 followed.)
('09) 2 Ind Cas 169 (170) : 36 Cal 856 (DB), *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal.*
('21) 8 AIR 1921 Cal 220 (221): 62 Ind Cas 474 (DB), *Krista Das* v. *Abdul Karim.*
(1864) 1864 Suth W R Act X Rul 42 (43) (DB), *Sheik Enayutoollah* v. *Sheik Elaheebuksh.* (Title to rent is founded upon the presumption that the tenant enjoys the thing during the contract.)
('16) 3 AIR 1916 Cal 962 (963) : 33 I. C. 349 (DB), *Salimullah* v. *Kali Prosanna.*

38. ('14) 1 AIR 1914 Lah 42 (42) : 25 Ind Cas 26, *Pir Bakhsh* v. *Hiralal.*

39. ('12) 15 Ind Cas 458 (458) (DB) (Cal), *Maindra Chandra Nandi* v. *Kashi Chandra Bakhshi.*

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abatement of the rent.[40] But where the *lessee* receives the whole of the compensation amount, he cannot claim any abatement of rent.[40a]

Trespasser :

An eviction by a trespasser is not a ground for abatement of rent.[41] The lessee must protect himself from illegal encroachment by others. If he fails to do so, this is no ground for prejudicing the landlord's claim for rent.[42]

Mistaken inclusion in lease of tenant's own property :

Where the tenant's own property is by mistake included in the lease and there is no fraud or misrepresentation, the lease is not altogether void, but the lessee will be liable for the rent in proportion to the property of which he is given possession under the lease.[43]

Surrender by tenant :

Where the lessor accepts a surrender of a part of the land from his tenant, he cannot claim rent for that portion.[44]

Miscellaneous :

Where A usufructuarily mortgaged his land to B who leased it back to A, it was held that in a suit for rent by B, A was not entitled to claim a reduction of rent on the ground that B did not advance the full amount of consideration shown in the mortgage document.[45]

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40. ('84) 10 Cal 544 (546) (DB), *Watson & Co.* v. *Nistharini Gupta.*
('83) 9 Cal 571 (573) : 11 Cal L R 366 (DB), *Uma Sankar Sarkar* v. *Tarini Chunder Singh.* (Landlord and tenant taking a moiety of the compensation as per agreement—Tenant held entitled to abatement of rent.)
('14) 1 AIR 1914 Mad 113 (113) : 24 Ind Cas 724, *Nagoor Rowthar* v. *Akbar Alisha Sathguru.*
('71) 16 Suth W R 201 (202) (DB), *Mahtab Chand* v. *Chittro Kumari Bibi.*

40a. ('82) 10 Cal L R 526 (528) (DB), *Peari Mohan* v. *Audhiraj Aftab Chand.*

41. ('38) 25 AIR 1938 Cal 690 (692) : 177 Ind Cas 996, *Surendra Nath Mondal* v. *Bhudar Chandra.*
('25) 12 AIR 1925 P C 97 (98) : 88 Ind Cas 110 : 52 Ind App 160 : 52 Cal 417 (PC). *Katyayini Debi* v. *Udoy Kamar Das.*
('23) 10 AIR 1923 Cal 429 (430) : 70 Ind Cas 828 (DB), *Jitendra Nath Roy* v. *Ashutosh Goswami.*
('70) 14 Suth W R 273 (274) (DB), *Gobind Chunder* v. *Kristo Kanto Dutt.*

42. ('25) 12 AIR 1925 P C 97 (98) : 88 Ind Cas 110 : 52 Ind App 160 : 52 Cal 417 (PC), *Katyayini Debi* v. *Udoy Kumar Das.*
('22) 9 AIR 1922 Cal 87 (92): 69 Ind Cas 126: 49 Cal 948 (SB), *Uday Kumar Das* v. *Katyani Debi.*
('07) 34 Cal 191 (196, 198) (DB), *Kali Prasanna* v. *Mathura Nath.* (Dispossession by other lessee under the same landlord without his authority.)
('38) 25 AIR 1938 Cal 690 (691, 692) : 177 Ind Cas 996, *Surendra Nath Mondal* v. *Bhudar Chandra.* (Thus where *A* let out certain land to *B* in a mouza and other tenants of *A* in that mouza dispossessed *B* on their own initiative it is for *B* to recover the land from the tenants.)
[*See also* (1864) 1 Suth W R 1 (2) (DB), *Bishen Dyal Singh* v. *Probhoo Doss.*]

43. ('12) 14 Ind Cas 540 (543, 544) : 39 Cal 1016 (DB), *Rai Moni* v. *Mathura Mohan.*

44. ('40) 27 AIR 1940 Pat 516 (523) : 192 Ind Cas 17 : 19 Pat 433 (DB), *Jyoti Prasad Singh Deo Bahadur* v. *Samuel Henry Seddon.*

45. ('43) 30 AIR 1943 Mad 220 (221), *Achutha Kurup* v. *Govindan Nayar.*

Section 108 Clause (l) Note 14

The fact that the lessor has taken a lesser rent for some years than that actually due, will not disentitle him from claiming the rent at the stipulated rate.[46]

Clause (m)

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

Synopsis

1. Scope.
2. "Keep . . . . in as good condition . . . possession."
3. "Reasonable wear and tear."
4. Irresistible force.
5. Right of entry upon the property.
6. Notice.
7. Contract to the contrary.
8. Liability to third persons for damage caused as a result of non-repair.

1. Scope. — This clause refers to the liability of the lessee for what is known as "permissive waste" in English law. Clause (o) refers

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46. ('16) 3 AIR 1916 Cal 104 (105) : 32 Ind Cas 251 (DB), *Kailash* v. *Darbaria.*
('17) 4 AIR 1917 Cal 734 (735) : 32 Ind Cas 185 (DB), *Manindra Chandra* v. *Durga Sundari.*
('13) 21 Ind Cas 750 (752) : 40 Ind App 223 : 41 Cal 493 (P C), *Durga Prasad* v. *Rajindra Narayan.*
('29) 16 AIR 1929 Pat 717 (719) : 9 Pat 487 : 124 Ind Cas 625 (DB), *Kuman Das* v. *Radhika Singh.* (But where the conduct of the landlord shows that he has sued the tenant on the basis of the reduced rent as if that was the rent payable for the land, it may be presumed that the landlord has waived the right to recover higher rent.)
('12) 14 Ind Cas 817 (818) (DB) (Cal), *Baijnath Prosad* v. *Raghuntah Rai.*
('09) 2 Ind Cas 160 (161) (Cal), *Bishambar Roy* v. *Lakhatullaha Sheikh.*
('17) 4 AIR 1917 Mad 143 (144) : 32 Ind Cas 703 (DB), *Maharaja of Bobbili* v. *Appala Naidu.*
('03) 26 Mad 195 (196), *Karampali Unnikurup* v. *Tekku Vittil Muthroakutti.*
('99) 22 Mad 261 (264) : 8 Mad L Jour 196 (DB), *Mayandi Chetti* v. *Oliver.* (An agreement therefore by which the landlord agreed to accept the lower rate of rent than what was specified in the registered lease, and in pursuance of which he did accept such reduced rent for a number of years cannot be proved in a suit for rent at the rate provided in the registered lease.)
('04) 14 Mad L Jour 477 (479) (DB), *Jagannatha* v. *Muthia Pillai.* (Non-payment of rent.)

Section 108
Clause (m)
Notes 1–2

to his liability for what is known as "*voluntary* waste" in English law.[1] A waste which consists in permitting the demised property to become ruinous is called *permissive* waste and a waste which consists in doing unauthorised acts which alter the character of the demised property is called *voluntary* waste.[2] In the absence of an express covenant on the subject, the English law implies a covenant on the part of the lessee that he will use the buildings in a tenantable and proper manner and deliver up possession to the landlord at the termination of the tenancy in the same condition as demised, reasonable wear and tear excepted.[3]

This clause enacts, in substance, the above rule. While there is no general rule of law apart from contract or statute to compel the *lessor* to repair the demised property, there is an implied obligation on the part of the tenant to keep the premises "wind and water-tight" and to make fair and tenantable repairs.[4] But the doctrine of permissive waste is to be applied under the rules of general common sense and goes no further than that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged.[5]

2. "Keep .... in as good condition .... possession."—The tenant is bound to keep and restore the property to the lessor in as good condition as it was when he received it.[1] He is bound to preserve the boundaries of the land he holds as tenant and not to permit them to be destroyed. This is especially so, where he holds adjoining land of his own. If he does not do so he is bound to make good to the landlord the quantity of the land to which the latter is entitled.[2] Where a lessee entered into a covenant "to keep a house in good condition" it was held by Fletcher-Moulton, L. J., in *Lurcott* v. *Wakeley and Wheeler*[3] that the covenant involved an obligation on the part of the covenantor to do all that is necessary to maintain it as a habitable house and, if

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Section 108, Clause (m) — Note 1

1. ('17) 4 AIR 1917 Bom 34 (36) : 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshaoji Meghji & Co.*

2. Topham, *New Law of Property*, pages 51, 52.

3. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 215.

4. ('23) 10 AIR 1923 Cal 524 (525) : 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co. Ltd.*

('27) 14 AIR 1927 Bom 115 (118) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakshmichand Khetse* v. *Ratanbai.* (This clause imposes a qualified obligation on the tenant to repair.)

('17) 4 AIR 1917 Bom 46 (51) : 43 Ind Cas 273, *Bai Monghibai* v. *Doongersey Lakhimidass.*

5. ('17) 4 AIR 1917 Bom 34 (36) : 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshaoji Meghji & Co.*

Note 2

1. ('99) 1 Bom L R 191 (194) (DB), *Narayan* v. *Daji Ram.*

2. ('83) 6 Mad 263 (266) (DB), *Dugappa* v. *Tirthasami.*

('01) 5 Cal W N 846 (858) (DB), *Ismail Khan Mahomed* v. *L. P. D. Broughton.*

(1813) 13 R R 76 (77) : 2 Ves & B 263 : 35 E R 319, *Attorney-General* v. *Fullerton.*

[*See also* (1878) 47 L J Ch 323 (324) : 7 Ch D 871 : 38 L T 285 : 26 W R (Eng) 420, *Spike* v. *Harding.*]

3. (1911) 80 L J K B 713 (722) : (1911) 1 K B 905 : 104 L T 290 : 55 S J 290.

necessary, to put it in that condition, whether the means to that end consisted of repair or renewal, though the nature of the obligation would vary according to the age and character of the house.

In the undermentioned case[4] where a tenant covenanted to keep the premises "in as good repair and condition as the same are now in", it was held that the tenant would commit a breach of the covenant if he allowed the property to become infested with bugs.

The liability to keep the demised property in good condition continues throughout the period of tenancy. The tenant cannot claim that he is entitled to allow the property to be in a bad condition provided he effects the necessary repairs and restores it at the termination of the tenancy in as good a condition as it was when his tenancy began. The lessor is entitled to sue the tenant, even before the expiry of the tenancy, for relief for breach of the obligation to keep the property in good condition.[5]

3. **"Reasonable wear and tear."**—The obligation of the lessee to keep the demised property in as good condition as it was when he received it, is subject to the changes in the property caused by reasonable wear and tear. It will exclude dilapidation caused by friction of the air, dilapidations caused by exposure and by ordinary use.[1] In the undermentioned case[2] it was held by the Bombay High Court that if a wall of the leased premises collapsed for no fault of the lessee, he was not liable to the lessor in damages or to restore the building to its original state.

4. **Irresistible force.** — Fire is 'irresistible force' within the meaning of this clause. But the lessee will be free from any liability only if it was not caused by his negligence. If he is responsible for the fire, he will be liable to the lessor.[1]

5. **Right of entry upon the property.** — In England, under the Common law, a landlord has no right to enter upon the demised premises for any purpose whatsoever. As a general rule, however, a covenant for a right of entry for the purpose of viewing the state of repair is inserted in the lease.[1] This clause gives a statutory right to the lessor to that effect.

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4. (1918) 87 L J K B 510 (512) : 34 T L R 455, *Jones* v. *Joseph.*
5. (1818) 1 B & Ald 584(586): 106 ER 215(215): 19 R R 396, *Luxmore* v. *Robson.*

Note 3

1. (1901) 17 T L R 570 (570), *Terrell* v. *Murrey.*
2. ('17) 4 AIR 1917 Bom 34 (36, 38) : 43 Ind Cas 258, *Dongersey Lakhmidas* v. *Keshavaji Meghji & Co.*

Note 4

1. ('20) 7 AIR 1920 Mad 493 (495, 496) : 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponna Pillai.* (Per Krishnan, J.)
(1900) 4 Cal W N 521 (523) (FB), *J. H. Hechle* v *S. J. Tellery.*
('41) 28 AIR 1941 All 327 (328, 330) : 196 Ind Cas 234, *Deputy Lal* v. *Reoti Prasad Gupta.*
('28) 15 AIR 1928 Mad 1140 (1141) : 51 Mad 994 : 114 Ind Cas 234 (DB), *East India Distilleries & Sugar Factories Ltd.* v. *Mathias.*

Note 5

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 766.

Section 108 Clause (m) Notes 6-8

6. Notice. — Where the lessor gives the required notice under this clause but the lessee, in answer, repudiates his liability to pay damages, the lessor is not bound to wait till the expiry of the three months before instituting a suit for relief. The tenant, by his repudiation, must be taken to have waived his right to the period of three months.[1]

7. Contract to the contrary. — This clause is, like the other clauses of the section, subject to a *contract to the contrary* between the parties fixing their own terms and making their own bargains.[1]

8. Liability to third persons for damage caused as a result of non-repair. — See Woodfall, *Landlord and Tenant*, 22nd Edn., page 910 and the undermentioned case.[1]

Clause (n)

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

1. Scope. — It is the duty of every lessee to protect his lessor's property from encroachment or unlawful eviction. If he fails to do so he exposes himself to an action for damages by his landlord.[1] The clause merely reproduces the law existing prior to the Act, namely that a tenant on whose land there is an encroachment must give such notice to the landlord as would enable him to defend his right.[2] It will be noticed that the *lessor* does not owe any duty to the lessee to protect him from legal proceedings or trespasses which would interfere with his possession, though he is under a duty under clause (c) to secure the lessee in his possession without interruption by the lessor himself or by persons with paramount title. This clause throws the duty upon the *lessee* to give notice to the lessor of legal proceedings to recover the property or of encroachments upon the lessor's right, in order that the lessor may, if he so chooses, protect his own interests and may be safeguarded against

Note 6

1. ('20) 7 AIR 1920 Mad 493 (494, 496) : 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponna Pillai*.

Note 7

1. (1900) 4 Cal W N 521 (523) (FB), *Hechle* v. *Tellery*.
[*See also* (1866) 36 L J C P 1 (9) : L R 2 C P 153 : 15 L T (N S) 279 : 15 W R (Eng) 170, *Coward* v. *Gregory*. (Covenant by lessor to put demised property in repair—There could be only one breach of covenant and one recovery of damages.)

Note 8

1. ('17) 4 AIR 1917 Bom 46 (51) : 43 Ind Cas 273, *Bai Monghibai* v. *Doongersey Lakhmidass*.

Section 108, Clause (n) — Note 1

1. ('82) 9 Cal L Rep 347 (348) (DB), *Prosonnomoyi Dasi* v. *Kali Das Roy*.
2. ('82) 1882 Bom P J 167 (167) (DB), *Subrao* v. *Ratnushet*.

the results of a collusive eviction submitted to by the lessee.[3]

Section 108 Clause (n) Note 1

The encroachment or interference, in respect of which the tenant is bound to give notice, is an encroachment upon or interference with the *lessor's rights* concerning such property. If, for instance, a stranger enters upon the land and destroys trees and buildings on the land, this will be an encroachment upon or interference with the lessor's rights. But a mere trespass on the land leased without any damage to the property is only an interference with the lessee's rights and not with the lessor's rights so as to oblige the lessee to give notice to the lessor under this clause. The reason is that the possession of such a trespasser is not adverse to the landlord[4] who is not bound to sue the trespasser for possession. But if the trespass is such that it interferes with the lessor's right to recover rent, it will be an interference in respect of which the lessee will be bound to give notice under this clause.[5]

Clause (o)

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell [a][or sell] timber, pull down or damage buildings [a][belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

a. These words were inserted by Section 56 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Scope.
2. Reasonable user of demised property.
3. User for purposes other than those for which the property is leased.
4. Cutting of trees on the land.
5. "Belonging to the lessor."
6. Working mines and quarries.
7. "Any other act which is destructive," etc.
8. Effect of breach of obligation.

1. Scope. — In England a tenant, whether from year to year or for a term of years or for life, cannot commit what is known as a

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3. ('29) 16 AIR 1929 Cal 272 (276) : 117 Ind Cas 838 (DB), *Indu Bhushan* v. *Moazam Ali.*
4. ('18) 5 AIR 1918 Cal 244 (245) : 46 Ind Cas 587 (DB), *Joy Chandra* v. *Sm. Khuki.*
('25) 12 AIR 1925 Cal 155 (157) : 82 Ind Cas 22 (DB), *Kumudini Dasi* v. *Surendrabala Dasi.*
See the Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 86.
5. *See* ('10) 8 Ind Cas 844 (844) (Mad), *Rangasawmy Iyengar* v. *Krishna Govinden.*

Section 108
Clause (o)
Notes 1–3

voluntary waste, i.e., any unauthorised act which alters the character of the land or destroys the land such as cutting down timber, opening or working mines, ploughing up pasture land, pulling down buildings, etc.,[1] or which does a lasting damage to the demised property.[2] This clause enacts, in substance, the said principle of English law and further provides that the lessee may use the property as a person of ordinary prudence would use it if it were his own but that he should not use or permit another to use it for a purpose other than that for which it was leased.

2. Reasonable user of demised property. — The lessee is bound to manage the leasehold property in a proper and efficient manner.[1] Where he uses the property in a reasonable and tenant-like manner he is not liable to the lessor for any damage that may be caused to the property by such user.[2] Thus, where a warehouse was let to the defendant for storing goods, and tenant stored his goods not unreasonably, but the floor gave way by the weight of the goods, it was held that the lessee was not liable for the damage.[3] It has been held that a tenant cannot be said to make a reasonable use of the land leased if he collects the surface stones on the land and sells the same.[4]

3. User for purposes other than those for which the property is leased. — A tenant must use the property only for the purpose for which it is granted.[1] The words "for a purpose other than that for which it was leased" mean acts inconsistent with the purpose of the lease.

Illustrations.

(1) Building a godown and brick kiln on land let for agricultural purposes.[1a]

Section 108, Clause (o) — Note 1

1. Topham, *New Law of Property*, 4th Edn., 1932 page 51.
Halsbury, *Laws of England*, Hailsham Edn., Vol. 20, paras. 213, 216.
Woodfall, *Landlord and Tenant*, 22nd Edn., page 776.
(1900) 69 L J Ch 257 (262) : (1900) 1 Ch 624 : 82 L T 85 : 48 W R (Eng) 284, *West Ham Central Charity Board* v. *East London Water-works Co.*
2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 778.

Note 2

1. ('17) 4 AIR 1917 Pat 549 (550) : 42 Ind Cas 111 : 2 Pat L Jour 713 (DB), *Kadir Baksh* v. *Sheo Prasad.*
2. ('70) 14 Suth W R (O C) 45 (51) : 5 Beng L R 401 (FB), *Koegler* v. *Yule.*
3. ('70) 14 Suth W R (O C) 45 (51): 5 Beng L R 401 (416, 417) (FB), *Koeglar* v. *Yule*
4. ('41) 28 AIR 1941 Pat 13 (15, 17) : 20 Pat 96 : 193 Ind Cas 760 (DB), *Kusum Kamini Debya* v. *Jagdish Chandra Deo Dhabal Deb.*
[*See also* ('28) 15 AIR 1928 Rang 85 (86) : 107 I. C. 175 : 5 Rang 813, *Burma Ry. Co.* v. *Mg. Hla Tin.* (Tenant cannot take out mineral and cart away the earth.)
('02) 25 Mad 669 (671) : 12 Mad L Jour 406, *Chaladom Tholan* v. *Kakkath Kunhambu.* (*Quære*—Digging shells from paddy fields for the purpose of proper cultivation if justified. But property in the shells is in any case in the landlord.)]

Note 3

1. ('78) 3 Cal 781 (784) : 2 Cal L R 294 (DB), *Lal Shahoo* v. *Deo Narain Singh.* (Even an occupancy tenant must use the property only for a purpose for which it was let.)

1a. ('36) 23 AIR 1936 Oudh 316 (317) : 163 Ind Cas 186 : 12 Luck 256, *Bind Prasad* v. *Bihari Tewari.*

(2) Converting a wet land into a garden by planting fruit trees.[2]
(3) Turning agricultural land into building land.[3]
(4) Land let for tying cattle and storing cowdung cakes being used for building a structure for keeping and preserving chaff.[4]

See also the undermentioned cases.[4a]

The following are the illustrations of cases in which the user was held not to be inconsistent with the purpose of the lease.

Illustrations.

(1) Where a lease of a land was given for winning oil by sinking wells and the lessee, finding that oil could not be got in commercial quantities, made use of the gas that came out of the wells, it was held by their Lordships of the Privy Council that the use of the gas, set free by the wells, was not necessarily inconsistent with the purpose of the lease.[5]

(2) The conversion, by a permanent tenant, of a wet land, used for paddy and raggi cultivation, into a cocoanut garden was held not to be a conversion of the land for a purpose different from that for which it was let.[6] It was observed in that case that what shall be considered in farming as

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2. ('89) 12 Mad 320 (322) (DB), *Kunhammed* v. *Narayan Mussad.* (Kanom lease.)

3. ('90) 12 All 419 (422) : 1890 All W N 162 (FB), *Madho Lal* v. *Sheo Prasad.*

4. ('26) 13 AIR 1926 All 66 (67) : 88 Ind Cas 746, *Bhagwan Rai* v. *Jaddu Raj Rai.*

4a. ('87) 10 Mad 351 (362, 363), *Lakshmana* v. *Ramchandra.* (In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.)

('04) 31 Cal 174 (176, 177) : 9 Cal W N 87 (DB), *Surendra Narayan Singh* v. *Hari Mohan Misser.* (Land let out for agricultural purposes generally — The erection of an indigo factory on a part of such land is misuse.)

('93) 16 Mad 407 (409, 410) : 3 Mad L Jour 185, *Ramanadhan* v. *Zamindar of Ramnad.* (Agricultural land—Occupancy tenant cannot build dwelling house for purposes not connected with agriculture and thus alter character of land.)

('01) 24 Mad 65 (69), *Orr* v. *Mrithyunjaya Gurukal.* (Do.)

('36) 23 AIR 1936 Oudh 316 (317) : 12 Luck 256 : 163 Ind Cas 186, *Binda Prasad* v. *Bihari Tiwari.* (Building by occupancy tenant alters character of the lease.)

('40) 27 AIR 1940 Mad 32 (33) : 186 Ind Cas 90, *Doraikannu Ammal* v. *Ramaswami Mudaliar.* (Erection of building in flower garden is misuse of property.)

(1898) 67 L J Ch 205 (205) : (1898) 1 Ch 424 : 78 L T 224 : 46 W R (Eng) 331, *Hobson* v. *Tulloch.* (House let for private residence—User for receiving as lodgers the governesses and pupils of a neighbouring school is a breach of covenant.)

('71) 8 Beng L R App 69 (70) (DB), *Tarini Charan Bose* v. *Debnarayan Mistry.* (Converting cultivable land into tank.)

[*See also* ('09) 4 Ind Cas 734 (735) (DB) (Cal), *Harak Singh* v. *Kirat Narain Singh.* (An agricultural holding misused by growing thereupon a mango orchard.)]

5. ('29) 16 AIR 1929 P C 108 (110) : 115 Ind Cas 705 : 7 Rang 157 : 56 Ind App 140 (PC), *U Po Naing* v. *Burma Oil Co.*

6. ('99) 22 Mad 39 (41, 42) : 8 Mad L Jour 278 (DB), *Venkayya* v. *Ramasami.* (Distinguishing 12 Mad 320.)

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Clause (o)
Notes 3–4

a good and husband-like user must vary according to the nature of the soil, its situation, and the climate.

(3) In *Harrymohun Misser* v. *Surendra Narain Singh*,[7] where the leased land was used for indigo cultivation and a factory was erected thereon, it was held by their Lordships of the Privy Council that the question whether the user will render the land unfit for the purpose of the tenancy will depend upon the size of the holding, area withdrawn from actual cultivation, and the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation.

See also the undermentioned cases.[8]

4. Cutting of trees on the land.—Trees standing upon land at the time of the lease are part of the land and belong to the landlord.[1]

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7. ('07) 34 Cal 718 (722, 723) : 34 Ind App 133 (PC.)

8. ('99) 9 Mad L Jour 146 (147) (DB), *Krishna Doss Balamukanda Doss* v. *Venkatappa*. (Planting trees not materially affecting the character of the holding is not an inconsistent user.)
('66) 6 Suth W R (Act X Rulings) 40 (40) (DB), *Nyamutoolah* v. *Gobind Churn*. (Building by occupancy tenant not a misuse.)
('90) 12 All 419 (422) : 1890 All W N 162 (FB), *Madho Lal* v. *Sheo Prasad*. (Granting a usufructuary mortgage is not an inconsistent use.)

Note 4

1. ('67) 11 Moo Ind App 295 (313, 316) : 10 Suth W R 13 : 2 Sar 292 (PC), *Ruttonji Edulji* v. *Collector of Tanna*.
('23) 10 AIR 1923 All 406 (406, 407) : 45 All 361 : 71 Ind Cas 971 (DB), *Kampta Prasad* v. *Sheo Prasad*.
('83) 5 All 616 (618) : 1883 All W N 169 (DB), *Kasim Mian* v. *Banda Hussain*.
('01) 23 All 211 (212) (DB), *Janki* v. *Sheoadhar*.
('99) 21 All 297 (299) : 1899 All W N 72 (DB), *Kausalia* v. *Gulab Kuar*.
('07) 29 All 484 (486) : 4 All L Jour 452, *Badam* v. *Ganga Dei*.
('10) 8 Ind Cas 151 (151) (All), *Ram Baksh* v. *Ram Sarup*.
('12) 14 Ind Cas 582 (583) (DB) (All), *Lachman Das* v. *Mohan Singh*.
('07) 30 All 134 (135) : 5 All L Jour 99 (DB), *Ganga Dei* v. *Badam*.
('30) 17 AIR 1930 Cal 240 (241) : 123 Ind Cas 316 : 57 Cal 344 (DB), *Kamal Krishna* v. *Madusudhan Choudhury*.
('94) 22 Cal 742 (751) (DB), *Nafar Chandra* v. *Ram Lal*.
('24) 11 AIR 1924 Pat 147 (149) : 73 Ind Cas 629 (DB), *Nathuni Rai* v. *Rameshwar Singh Bahadur*. (If any custom deviating from this general proposition is alleged it must be proved conclusively by those who maintain it.)
('23) 10 AIR 1923 Pat 295 (295) : 72 Ind Cas 157, *Ram Parichan Singh* v. *Biranji Prasad Singh*. (The burden is on the tenant to prove the contrary—Where however the record of rights contains an entry in favour of the tenant the onus is shifted and the landlord must rebut by evidence the presumption raised by the entry.)
('08) 4 Nag L R 104 (110), *Hiria* v. *Mahomad Sirajuddin Khan*. (If cut, landlord can take the trees away.)
('07) 30 Mad 155 (157) : 17 Mad L Jour 64 (DB), *Bodda Gaddeppa* v. *Maharaja of Vizianagaram*.
('81) 1881 Pun Re No. 61, *Mt. Gur Devi* v. *Sondha*.
('35) 22 AIR 1935 Pat 188 (191) : 155 Ind Cas 966, *Jangbahadur Singh* v. *Thithar Singh*.
('21) 8 AIR 1921 Sind 109 (111) : 79 Ind Cas 819 : 16 Sind L R 87, *Pir Mukudhum* v. *Malik Boola Khan*. (11 Moo Ind App 295 followed.)

Section 108
Clause (o)
Note 4

The tenant is entitled to enjoy such trees during the period of his tenancy but cannot cut down such trees and appropriate them to himself unless such a right is given by contract or is an incident of the tenure by virtue of some positive law or custom.[1a] Thus, in the case of a perpetual lease at a fixed rent it has been held that it is an incident of the tenure that the tenant is entitled to the ownership of the trees on the land.[2] See also the undermentioned cases.[3] Where a lease is made for the purpose of clearing jungle land and bringing it under cultivation and the lease contains no reservation, it has been held that the tenant has a right to cut and take the trees for himself.[4] The reason is that a contract to that effect must be implied in such cases. The principles stated above apply equally to trees growing spontaneously on the land during the period of the lease.[5]

The lessor or the landlord cannot, however, interfere with the tenant's enjoyment of the trees during the period of the tenancy.[6]

('41) 28 AIR 1941 Pat 13 (15) : 20 Pat 96 : 193 Ind Cas 760 (DB), *Kusum Kamini Debya* v. *Jagdish Chandra Deo.*

1a. ('90) 3 C P L R 18 (19), *Daryaosingh* v. *Sitru Mokasi.*
('20) 7 AIR 1920 Nag 113 (115) . 54 Ind Cas 789, *Tikaram* v. *Ramchandra.* (Mere grant of protected status does not confer right to cut trees.)
('42) 29 AIR 1942 Oudh 460 (461) : 201 Ind Cas 728 (DB), *Sri Gur Prasad Singh* v. *Mehdi Husain.*

2. ('74) 21 Suth W R 344 (346) (DB), *Goluck Rana* v. *Nubo Soonduree Dossee.* (A peshcushi sanad, or grant at a quit rent of homestead and waste land.)
('68) 10 Suth W R 419 (419) (DB), *Sharoda Soondari Debia* v. *Gonee Sheik.*
('18) 5 AIR 1918 Cal 794 (795) : 38 Ind Cas 49 (52) (DB), *Radhika Nath Roy* v. *Samir Fakir.* (10 Suth W R 419 followed.)
('29) 16 AIR 1929 Cal 330 (330) : 113 Ind Cas 568 (DB), *Hemangini Dassi* v. *Asutosh Das.*
('25) 12 AIR 1925 Cal 139 (140) : 76 Ind Cas 990 (DB), *Midnapore Zamindary Co.* v. *Jagat Chandra.*
('01) 23 All 126 (127) : 1901 All W N 15 (DB), *Harbans Lal* v. *The Maharajah of Benaras.*

3. ('35) 22 AIR 1935 Pat 472 (472) : 159 Ind Cas 346, *Ram Brich Lal* v. *Emperor.* (Under S. 23, Bengal Tenancy Act, the tenant can cut trees.)
('73) 1873 Pun Re No. 61, *Kalian Das* v. *Buta.* (Occupancy tenant—Wajib-ul-arz allowing tenant to cut trees.)
('74) 1874 Pun Re No. 79, *Sahiba* v. *Khushal.* (Do.)
[*See also* ('75) 1875 Pun Re No. 4, *Jani* v. *Ghulam Farid Khan.*]

4. ('74) 22 Suth W R 523 (524) (DB), *Rotun Ram Doss* v, *Collector of Sylhet.*
('96) 23 Cal 209 (211, 212) (DB), *Mon Mohini Goopta* v. *Raghoonath Misser.*
[*See also* ('67) 11 Moo Ind App 295 (314) (PC), *Ruttonji Edulji Shet* v. *Collector of Tanna.*]

5. ('42) 29 A I R 1942 Oudh 460 (461): 201 Ind Cas 728 (DB), *Gur Prasad Singh* v. *Mehdi Husain.*
('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
('08) 4 Nag L R 104 (110), *Hiria* v. *Mahomed Sirajuddin Khan.*
('16) 3 AIR 1916 Mad 939 (940): 31 Ind Cas 12 (DB), *Krishna Charya* v. *Anthakki.* (Mulgeni lease—Tenant can cut trees of spontaneous growth as a customary incident of the tenure — 24 Mad 47 and 5 Ind Cas 437 Followed.)

6. ('08) 30 All 134 (135, 136): 5 All L Jour 99 (DB), *Ganga Dei* v. *Badam.*
('07) 29 All 484 (486): 4 All L Jour 452, *Badam* v. *Ganga Dei.*
('10) 8 Ind Cas 151 (151) (All), *Ram Bakhsh* v. *Ram Sarup.*
('12) 14 Ind Cas 582 (583) (DB) (All), *Lachman Das* v. *Mohan Singh.*

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Clause (o)
Notes 4–6

This clause prohibits the felling or selling of *timber* belonging to the lessor by the lessee. As has been seen in Notes on S. 3, the word "timber" is used to denote trees intended to be cut and used in the building and repairing of houses and for industrial purposes. The fact that the section refers to *timber* only does not mean that the lessee can cut other trees belonging to the lessor. The cutting of such trees would clearly be "an act which is destructive or permanently injurious" to the property leased. The reason why the clause refers expressly to timber appears to be to avoid a possible view being taken that timber being trees which are intended to be cut and sold, the felling thereof would not be an act destructive or injurious to the property leased.

5. **Belonging to the lessor.** — It has been seen in the Notes on cl. (h) that the lessee may remove all things which *he* had attached to the earth and can consequently cut away the trees planted by him and remove the buildings erected by him. Under the clause as it stood before the amendment of 1929, the lessee was prohibited from felling timber or pulling down or damaging buildings, without any distinction being made between timber or buildings belonging to the lessor, and those which the lessee himself had attached to the earth. But obviously, in view of clause (h) the prohibition extended only to trees and buildings which belonged to the lessor and not to the lessee. The amendment of the clause by the addition of the words "belonging to the lessor" makes this position now clear.

6. **Working mines and quarries.** — As a general rule the grant of a lease, even though a permanent one does not carry with it the right to minerals in the absence of an express contract to the contrary.[1] The property in the mines and minerals remains in the

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('23) 10 AIR 1923 All 406 (406, 407) : 71 Ind Cas 971 : 45 All 361 (DB), *Kamta Prasad* v. *Sheo Prasad.*

('10) 5 Ind Cas 256 (256) (DB) (All), *Jugdip Narain Singh* v. *Jokhan Ahir.*

(1864) 1864 Suth W R 367 (367) (DB), *Sheikh Abdool Rohoman* v. *Dataram Bashee.*

('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.* (It is not open to the lessee to arbitrarily refuse permission to the lessor when the latter as owner of the timber desires to fell what he is entitled to take but reasonable notice of the lessor's intention to enter and fell should be given.)

('26) 13 AIR 1926 Mad 853 (857): 92 Ind Cas 753 (DB), *Thanappa Chetty* v. *Esuf Khan.* (Tenant entitled to minor produce of land during tenancy.)

('08) 30 All 134 (135): 5 All L Jour 99 (DB), *Ganga Dei* v. *Badham.*

('17) 41 Ind Cas 907 (907, 908): 1917 Pun Re (Rev) 5, *Pokardas* v. *Amir.*

('90) 3 C P L R 18 (19), *Daryao Singh* v. *Sitru Mokasi.*

('08) 4 Nag L R 104 (110), *Hiria* v. *Mahomed Sirajuddin Khan.*

[*See also* ('88) 1 C P L R 151 (152), *Puna Patil* v. *Gangji Mokasi.* (In the case of lease of jungle land it was doubted whether the strict rule should be enforced.]

Note 6

1. ('16) 3 AIR 1916 P C 191 (192) : 44 Cal 585 : 44 Ind App 46 : 40 Ind Cas 139 (P C), *Sashi Bhusan* v. *Jyoti Prasad.*

('17) 4 AIR 1917 P C 163 (164): 45 Cal 87: 44 Ind App 246: 42 Ind Cas 651 (P C), *Thakur Girdhari Singh* v. *Megh Lal Pandey.* (Construction — Mokurrari lease does not give right to minerals to lessee even though words "Mai hak hakuk" are used.)

proprietor of the soil.[2] A lessee therefore cannot work mines in the land leased out to him.[3] Where the right to minerals is, however,

('19) 6 AIR 1919 PC 17 (20) : 47 Cal 95 : 46 Ind App 158 : 50 Ind Cas 849 (P C), *Raghunath Roy* v. *Durga Prasad Singh.*

('31) 18 AIR 1931 P C 299 (301) : 58 Ind App 392 : 59 Cal 699 : 135 Ind Cas 632 (P C), *H. V. Low & Co.* v. *Jyoti Prasad Singh Deo.*

('31) 18 AIR 1931 P C 302 (302) : 10 Pat 877 : 134 Ind Cas 1073 (P C), *Jagat Mohan Nath* v. *Pratap Udai Nath.*

('29) 16 AIR 1929 P C 152 (156): 56 Ind App 223 : 52 Mad 538 : 117 Ind Cas 481 (P C), *Surya Row Bahadur* v. *Secy. of State.*

('34) 21 A I R 1934 All 906 (907) : 153 Ind Cas 691, *Basdeo Sahi* v. *Man Singh.* (Removal of kankar is analogous to extracting of minerals—Therefore landlord is owner of kankar and not tenant.)

('12) 15 Ind Cas 219 (221): 39 Cal 696 (PC), *Durga Prasad Singh* v. *Brojo Nath.*

('10) 6 Ind Cas 785 (787) : 37 Ind App 136 : 37 Cal 723 (PC), *Hari Narayan Singh* v. *Sri Ram Chakravarti.*

('17) 4 AIR 1917 Pat 477 (478) : 42 Ind Cas 808 (DB), *Ranjit Narayan Singh* v. *Motilal Marwari.* (No express grant.)

('26) 13 AIR 1926 Pat 103 (109):4 Pat 799:90 Ind Cas 513 (DB), *Satya Niranjan Chakravarty* v. *Sushila Bala Dasi.*

('28) 15 A I R 1928 Pat 482 (484) : 112 Ind Cas 659 : 8 Pat 190 (DB), *Mangobinda Sahu* v. *Satya Niranjan.* (No express grant.)

('43) 30 A I R 1943 Pat 31 (31) : 203 Ind Cas 442 (DB), *Purnendu Narain* v. *Narendra Nath.* (The right of a tenant to make bricks for his own domestic or agricultural purposes, i. e., for his own use on the tenure or holding cannot be questioned, though it cannot be held that the making of bricks is a use of the surface to which the tenant is ordinarily entitled, unless the right is expressly excluded. A right of quarrying can of course be acquired by adverse possession. But unless the tenant has acquired by grant or by adverse possession a right of ownership in the subsoil, the digging of earth for bricks to be taken away from the area of the tenure and to be disposed of to strangers is an appropriation of the corpus of the grant which a tenant in India is not entitled to make.)

('36) 23 AIR 1936 Pat 111 (111) : 160 I. C. 114, *Ras Behari* v. *Jagadish.*

('35) 22 AIR 1935 Pat 149 (151) : 163 Ind Cas 169, *Jyoti Prasad Singh* v. *Bengal Coal Co. Ltd.*

('11) 12 Ind Cas 482 (485) : 38 Cal 845 (DB), *Jooti Prosad* v. *Lachipore Coal Co.*

('28) 15 AIR 1928 P C 234 (237) : 55 Ind App 320 : 111 Ind Cas 345 : 56 Cal 1 (PC), *Bejoy Singh* v. *Surendra Narayan.*

('06) 33 Cal 203 (215) : 32 Ind App 185 : 8 Sar 908 (PC), *Tituram Mukerjee* v. *Cohen.* (A lessee under a jungleburi lease becomes entitled to the use and possession of the surface. The mineral rights remain in the owner.)

('31) 18 AIR 1931 P C 162 (163, 164) : 132 Ind Cas 610 : 58 Ind App 228 : 59 Cal 80 (PC), *Bhupendra Narayan Sinha* v. *Rajeshwar Prosad.* (The words 'Chaya Hrad' (shades and lakes) and 'Daro bast Hakuk' (with all rights) in a patni grant do not pass subsoil rights.)

[*See* ('12) 16 Ind Cas 441 (442) (DB) (Cal), *Ali Quader* v. *Jogendra Narain.* (Patni lease—On construction held to have passed mineral rights to the lessee.)]

[*See also* ('25) 12 AIR 1925 P C 42 (45) : 4 Pat 244 : 52 Ind App 109 : 86 Ind Cas 289 (PC), *Satya Niranjan* v. *Ram Lal.* (Whether grant of putni tenure includes grant of mineral rights is an open question.)]

The following cases are no longer good law :

('07) 34 Cal 358 (365, 366): 11 Cal W N 527 (DB), *Megh Lal Panday* v. *Girdhari*

('07) 34 Cal 753 (784): 12 Cal W N 193 (DB), *Brojonath Bose* v. *Durga Pershad.*

('06) 33 Cal 54 (65):10 Cal W N 425 (DB), *Sriram Chakraburty* v. *Hari Narain.*

('06) 33 Cal 511 (530): 10 Cal W N 738 (DB), *Shyama Charan Nundy* v. *Abhiram Goswami.*

2. ('35) 22 AIR 1935 Cal 368 (381) : 62 Cal 346 : 159 Ind Cas 98 (DB), *Raj Krinshna Prasad* v. *Borabani Coal Concern Ltd.*

3. ('11) 12 Ind Cas 482 (485):38 Cal 845 (DB), *Jyoti Prosad* v. *Lachipore Coal Co.*

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Clause (o)
Notes 6–7

expressly granted to the lessee, the right to work mines is also impliedly granted thereby.[4]

7. "Any other act which is destructive," etc.—A tenant cannot alter the land in such a way as to permanently injure the interests of the landlord.[1] The felling of timber, the pulling down or damaging of buildings, the working of mines and quarries, are all illustrations of acts which are destructive or permanently injurious to the leased property. An excavation of agricultural land for the purpose of making bricks will be injurious to the property and a tenant cannot make such excavations in the absence of a provision in the lease to that effect.[2] Even if there is such a provision in the lease it has been held in the undermentioned case[3] that the terms cannot be construed as giving the lessee a right to make such excavations as would cause the complete destruction of the property. But in the case noted below[3a] where a tenant having a permanent and heritable right at a fixed rent in a large tract of land, made a small excavation in an area of a few square feet for the purpose of making bricks, it was held that the act was not detrimental to the land and that the tenant's right of enjoyment extended to making such excavations.

The construction of a well upon an agricultural holding is not a destructive or a permanently injurious act.[4] Nor is the use of an agricultural land temporarily for a theatrical company, where there are no crops on the land, destructive or injurious to the land.[5] A transfer by way of usufructuary mortgage is also not an act which can be said to injure the property.[6] An act cannot be said to be detrimental to the land unless it injures the land itself.[7]

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4. ('25) 12 AIR 1925 P C 42 (44) : 4 Pat 244 : 52 Ind App 109 : 86 Ind Cas 289 (PC), *Satya Niranjan* v. *Ram Lal Kaviraj.*
('06) 33 Cal 462 (472) : 10 Cal W N 17 (DB), *Ramessur Malia* v. *Ram Nath Bhattacharjee.* (The owner of the underground rights will, however, be justified in doing such acts only as may be reasonably necessary for the above purposes.)

Note 7

1. ('83) 9 Cal 609 (611) : 12 Cal L R 300 (DB), *Noyna Misser* v. *Rupikun.*
(1865) 2 Suth W R 157 (158) (DB), *Kadumbenee Dabee* v. *Nobeen Chunder Adukh.* (A ryot destroying land by making holes in it for providing earth for bricks, or allowing another to do so, renders himself liable for damages.)
2. ('72) 17 Suth W R 416 (417) (DB), *Anund Coomar Mookerjee* v. *Bissonath Banerjee.*
3. ('05) 9 Cal W N 255 (257) (DB), *Girish Chandra Chando* v. *Sirish Chandra.*
3a. ('24) 11 AIR 1924 Cal 56 (57) : 75 Ind Cas 55 : 50 Cal 694 (DB), *Barada Prasad* v. *Bhupendra Nath.*
4. ('12) 13 Ind Cas 554 (556) : 15 Oudh Cas 170 (DB), *Raghunandan Singh* v. *Jarao.*
(1864) 1864 Suth W R Gap Civ 279 (279), *Dheput Singh* v. *Halal Khoory.*
('92) 1892 All W N 103 (104), *Muhammad Raza Khan* v. *Dalip.*
('99) 21 All 386 (389) :1899 All W N 133 (DB), *Dharmraj Kunwar* v. *Sumeeran.*
5. ('98) 20 All 469 (470) : 1898 All W N 114, *Yusuf Ali Khan* v. *Hira.* (Case under N. W. P. Rent Act.)
6. ('90) 12 All 419 (422, 425):1890 All W N 162 (FB), *Madho Lal* v. *Sheo Prasad.*
7. ('90) 12 All 419 (422, 425) : 1890 All W N 162 (FB), *Madho Lal* v. *Sheo Prasad Misr.*

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Note 8

8. Effect of breach of obligation. — A breach of the obligation under this clause does not necessarily entail a forfeiture of the lease. But the lessor would be entitled to claim damages for such breach[1] or, in the case of a threatened breach, for an injunction restraining the tenant from committing such breach.[2] He cannot on his own responsibility evict the tenant or induct any other person on the land.[3]

Clause (p)

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

1. Scope.—Under the English law, there is no prohibition against a tenant erecting permanent structures on the land which do not cause damage to the land but which really improve it.[1] This clause departs from the English law in this respect. A lessee cannot erect any permanent structure on the land for non-agricultural purposes.[1a] The lessee of a building cannot even add a structure to it, for it might, have wholly different effects from what was contemplated when the lease was given.[2] But where a house on the premises, not used for agricultural purposes, falls into disrepair, the tenant has been held entitled to rebuild and repair that portion.[3]

The clause excepts buildings for *agricultural purposes*. Thus, a tenant can erect a dwelling house on the land for the purpose of facilitating his agricultural work.[4] An agriculturist tenant can also erect a walled enclosure on the land and build a cattle-shed, as they are for agricultural purposes.[5]

In the case of *agricultural* leases to which the provisions of this Act are not applicable, it has been held that the English law should be applied as to the right of the tenant to erect buildings, and that a tenant with a permanent right of occupancy cannot be prevented from erecting

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Note 8

1. ('83) 9 Cal 609 (611) : 12 Cal L R 300 (DB), *Noyna Missir* v. *Rupikun.*
2. ('75) 23 Suth W R 298 (300) (DB), *Tarini Churn Bose* v. *Ramjee Pal.* (The act was held not to be injurious—No injunction granted.)
('40) 27 AIR 1940 Mad 32 (33) : 186 Ind Cas 90 (DB), *Doraikannu Ammal* v. *Ramaswami Mudaliar.*
('10) 6 Ind Cas 286 (286) (DB), *Meera Mohideen Rowthan* v. *Dubash Kadur.*
3. ('17) 4 AIR 1917 Pat 549 (550): 42 Ind Cas 111: 2 Pat L Jour 713 (DB), *Kadir Bakhsh* v. *Sheo Pershad.*

Section 108, Clause (p) — Note 1

1. Woodfall, *Landlord and Tenant*, 22nd Edition, pages 777, 780.
('32) 19 AIR 1932 Mad 328 (336) : 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda.*
1a. ('82) 9 Cal L R 221 (223), *Jagganath Baisak* v, *Prosonno Coomar.*
('94) 16 All 328 (330) : 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar.*
2. ('95) 19 Bom 133 (135) (DB), *Kilabhai Lallubhai* v. *Hargovan.*
('27) 14 AIR 1927 Lah 225 (225) : 100 Ind Cas 834, *Abdul Rahim* v. *Municipal Committee, Delhi.*
3. ('88) 1888 All W N 125 (126), *Narain Prasad* v. *Dammar.*
4. Section 76 of the Bengal Tenancy Act authorises occupancy tenants to build for agricultural purposes.
5. ('88) 1888 Pun Re No. 122, *Daswandhi* v. *Ghulam.*

Section 108 Clause (p) Note 1

permanent structures on the land[6] unless such an erection will cause permanent damage or injury to the property.[7]

Where the land is let for *building purposes* this clause will not apply inasmuch as there must in such a case be deemed to be a covenant of the lessor, for such building.[8]

Where a tenant erects a permanent structure on the land for non-agricultural purposes, the lessor cannot on that ground eject him; he can, however, claim that it should be demolished.[9] It has been held by the High Court of Patna[10] that one of several lessors cannot enforce the obligation under this clause and ask for the demolition of the building erected, where the other co-lessors are not willing to enforce it.

Clause (q)

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

1. Scope. — This clause enacts the well settled rule that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord possession of the demised property.[1] The

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6. ('32) 19 AIR 1932 Mad 328 (336) : 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda.*

7. ('93) 16 Mad 407 (409) (DB), *Ramanadhan* v. *Zamindar of Ramnad.*
('01) 24 Mad 65 (68) (DB), *Orr* v. *Mrithyunjaya Gurukkal.*

8. ('35) 22 AIR 1935 All 1040 (1040) : 159 Ind Cas 680 (DB), *Ahmad Nazar Beg* v. *Brij Nandan Prasad.*

9. ('14) 1 AIR 1914 All 285 (287) : 21 Ind Cas 967, *Kehri Singh* v. *Hulasi.*
('07) 17 Mad L Jour 197 (198) (DB), *Appa Rao* v. *Venkatadri.*

10. ('39) 26 AIR 1939 Pat 428 (430) : 185 Ind Cas 284, *Jadunandan Das* v. *Mt. Maho.*

Section 108, Clause (q) — Note 1

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 923.
('98) 22 Bom 348 (353) (DB), *Baliramgiri* v. *Vasudev.*
('37) 24 AIR 1937 Lah 121 (124) : 173 Ind Cas 694, *Abdul Qayum* v. *Mohammad Fazal Azim.*
('21) 8 AIR 1921 Bom 93 (101), *Lakshman Gowroji* v. *Ramji Antone.* (The tenant of a several fishery must give up the fishing stakes on the termination of the tenancy, and he cannot claim to retain them on the ground that he has repaired them from time to time or even renewed them. *Prima facie* the boundaries mentioned would include every fixture within their limits at the creation of the tenancy.)
('86) 1886 Bom P J 314, *Santo* v. *Venkaji.*
('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Firm Jamita Mal Sant Ram* v. *Gokal Chand.*
('37) 24 AIR 1937 Mad 882 (889) : I L R (1937) Mad 638 : 171 Ind Cas 444 (FB), *Arumugham Chetti* v. *Subramaniam Chetti.*
('05) 15 Mad L Jour 368 (369) (DB), *Bankala Vittill Usman Koya* v. *Chidria Mokkausa Akoth.*
('17) 4 AIR 1917 Cal 219 (220) : 37 Ind Cas 201 (DB), *Parmananda Singh* v. *Syjou Singh.*
('98) 1898 Pun Re No. 14 (DB), *Abdul Kadir* v. *Nur-ud-din.* (Upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises but to restore possession thereof to the landlord and if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.)

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Note 1

tenant cannot refuse to give up such possession on the ground that the landlord has no title,[2] unless subsequent to the lease there is an ouster of the landlord's right by a paramount title.[3] Nor can he refuse to give up possession on the ground that at some time during the period of his lease he was disturbed for a few days in his possession,[4] or on the ground that there is a covenant for renewal in his favour,[5] or on the ground that he has erected permanent structures on the land to the knowledge of the lessor and without interference by him,[6] unless the lessor is barred by the doctrine of equitable estoppel from claiming possession.[7]

The lessee is bound to put the lessor in possession of not only the land leased but also the crops on the land,[7a] of any accessions made to the property and of any encroachments made by the lessee which enure for the benefit of the lessor under clause (d).[8]

If the lessee fails to deliver possession on the determination of the lease, the lessor can sue him in ejectment.[9] But he cannot be ejected by force. If he is so ejected he can sue the lessor for the recovery of the possession under S. 9 of the Specific Relief Act.[10] The lessor can also sue

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[*See also* ('31) 18 AIR 1931 Pat 268 (270) : 131 Ind Cas 811 : 10 Pat 203 (DB), *Rupan Singh* v. *Akhaj Singh*.
('26) 13 AIR 1926 Cal 354 (355) : 90 Ind Cas 114 (DB), *Raj Kristo Ghose* v. *Bata Kristo Ghose*.]

2. ('71) 8 Bom H C R A C 175 (177) (DB), *Vasudev Daji* v. *Babaji Ranu*.
('12) 15 Ind Cas 844 (845) (DB) (Mad), *Narayana Nambudri* v. *Muhammad*.
('28) 15 AIR 1928 Rang 162 (163) : 120 Ind Cas 657 (DB), *Q. A. Vertannes* v. *R. G. Robinson*.
('25) 12 AIR 1925 Oudh 694 (696) : 89 Ind Cas 590, *Mahomad Hussain & Sons* v. *Uberoi & Co. Ltd.*
('21) 8 AIR 1921 Bom 93 (100), *Lakshman Gowroji* v. *Ramji Antone*.
('99) 1 Bom L R 491 (493) (DB), *Lakshman* v. *Raghunath*.

3. ('05) 15 Mad L Jour 368 (369) (DB), *Bankala Vittill Usman Koya* v. *Chidria Mokkausa Akoth*.

4. ('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Jamita Mal Sant Ram* v. *Gokal Chand*.

5. ('16) 3 AIR 1916 Mad 1224 (1224) : 31 Ind Cas 919 (DB), *Dt. Board of Tanjore* v. *Vythilinga Chetty*.

6. ('99) 21 All 496 (502) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal*.
('38) 25 AIR 1938 Pat 236 (237) : 175 Ind Cas 463, *Mt. Batulan* v. *Sayid Mohammad*. (*Ramsden* v. *Dyson*, (1865) L R 1 H L 129, followed.)

7. ('99) 21 All 496 (502) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal*.

7a. ('10) 5 Ind Cas 306 (307) (DB) (Cal), *Akhil Chandra* v. *Surendra Nath*. (NOTE—This must be read subject to the provisions of cls. (h) and (i).)

8. ('25) 12 AIR 1925 Cal 1114 (1116) : 87 Ind Cas 630 (DB), *Indu Bhusan Bose* v. *Atul Chandra Biswas*.

9. ('10) 6 Ind Cas 701 (702) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkataratnam*.
('18) 5 AIR 1918 Cal 391 (392) : 39 Ind Cas 137 (DB), *Azimuddin Chaudhury* v. *Peer Mahomed Bepari*.
('17) 4 AIR 1917 Cal 219 (220) : 37 Ind Cas 201 (DB), *Paramanda Singh* v. *Sijou Singh*.
[*See also* ('25) 12 AIR 1925 Pat 17 (19) : 81 Ind Cas 535 (DB), *Gita Prasad Singh* v. *Emperor*.]

10. ('25) 12 AIR 1925 Sind 275 (278) : 87 Ind Cas 1002, *Secretary of State* v. *Dinshaw Navroji*.

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Note 1

the lessee for damages for wrongful occupation,[11] but not for rent.[12]

Where a lessee surrenders his tenancy by notice to the landlords, followed by delivery of possession to *one* of them, the others cannot sue the tenant either for rent or for damages for use and occupation.[13] Nor is the lessee liable for rent or for use and occupation if he has offered to deliver possession but the lessor has refused to take it.[14]

Where land is leased to several lessees jointly, *all* the lessees must vacate at the determination of the tenancy. If some of them alone vacate, this will not relieve them of liability so long as any one or some of them remain in occupation.[15]

The clause is subject to a contract to the contrary. Where it is expressly provided in the lease that the lessee need not deliver possession at the expiry of the lease, he is not under any obligation to put the lessor in possession.[16]

('05) 29 Bom 213 (215) : 7 Bom L R 12 (DB), *Rudrappa* v. *Narasing Rao.*

11. ('98) 22 Bom 348 (354) (DB), *Baliramgiri* v. *Vasudeo.*

('37) 24 AIR 1937 Lah 121 (124) : 173 Ind Cas 694, *Abdul Qayum* v. *Md. Fazal Azim.* (If actual possession is with an under-tenant, who at the determination of the tenancy holds over against the will of the tenant, the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession, and the costs of the legal proceedings to oust the under-tenant.)

('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Firm Jamita Mal* v. *Gokal Chand.*

('77) 1877 Bom P J 171 (171) (DB), *Narayan* v. *Pande.*

('32) 19 AIR 1932 Lah 275 (276) : 13 Lah 216 : 138 Ind Cas 290 (DB), *Narain Dass* v. *Dharam Das.*

('33) 20 AIR 1933 Lah 61 (64) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sunder Singh* v. *Ram Saran Das.*

('37) 24 AIR 1937 All 328 (332) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board Meerut.* (Lessor can obtain interest if the lessee was responsible for non-payment earlier.)

('24) 11 AIR 1924 Cal 240 (242) : 83 Ind Cas 757 : 50 Cal 667, *Sundermull* v. *Ladhuram Kaluram.*

('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.*

('10) 6 Ind Cas 766 (769) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*

(1856) 105 R R 782 (786) : 11 Ex Ch 769 : 26 L T (O S) 260 : 25 L J Ex 101 : 4 W R (Eng) 293, *Watson* v. *Lane.*

The use of the expression "damages for use and occupation" in the following decisions does not appear to be correct in view of what has been stated in Note 40 on S. 105 :

('33) 20 AIR 1933 Lah 509 (510): 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari.*

('37) 24 AIR 1937 Mad 478 (479): 171 I.C. 642, *Ramiah* v. *Chinnakaruppannan.*

[*See also* ('11) 11 Ind Cas 270 (272) (DB) (All), *J. D. Scott* v. *Jyotis Saroop.*]

12. ('77) 1877 Bom P J 171 (171) (DB), *Narayan* v. *Pande.*

13. ('24) 11 AIR 1924 Lah 474 (475): 78 Ind Cas 570, *Ram Gopal* v. *Parmeshri.*

14. ('37) 24 AIR 1937 Lah 121 (124) : 173 Ind Cas 694, *Abdul Qayum* v. *Md. Fazal Azim.*

15. ('36) 23 AIR 1936 Sind 213 (215) : 30 Sind L R 135 : 166 Ind Cas 677 (DB), *Ramji* v. *Vasudev.* ((1840) 60 R R 779 *Christy* v. *Tancred*, followed.)

16. ('86) 1886 Bom P J 78 (DB), *Shrimadaltmanand* v. *Shivasavant.*

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Rights of lessor's transferee.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Transfers the property."
4. "The property leased or any part thereof or any part of the interest therein."
5. "All the rights ..... of the lessor as to the property or part transferred."
6. "If the lessee so elects, be subject to all the liabilities."
7. Notice.
8. Rent paid in advance. See Notes on S. 50.
9. Arrears of rent.
10. Apportionment of rent.

Other Topics (miscellaneous)

Protection of lessee as regards *bona fide* payments. See Note 7.

Rights of the lessor's transferee. See Note 5.

Right of part-transferee to eject tenant. See Note 5.

Severance of the reversion. See Note 4.

Transfers by operation of law —Section, whether applies. See Note 2.

1. Analogous law.—The section may be compared with Ss. 140, 141, 142 and 151 of the Law of Property Act, 1925 (15 Geo. V, *c.* 20). Provisions similar to the second paragraph of the section have been

Section 109 Notes 1–2

enacted in the various local Tenancy Acts.[1]

2. Scope of the section.—The general principle is that rights and liabilities *attached to property* i. e., arising *out of the possession and control of property* will pass with the property.[1] *Qui in jus dominiumve alterius succedit jure ejus uti debet.*[2] Thus, the transferee of the wreck of a vessel which was sunk by accident in a public navigable river would be under the same duty as the transferor himself, to take precautions to prevent injury to other vessels by their striking against it.[3]

On the other hand, the general rule as to rights and liabilities, *not attached to property* but arising out of some *personal relationship* of the transferor, whether contractual or otherwise, with third parties, is that a person can transfer his *rights* but not his *obligations*.[3a] If the obligations are inseparable from the rights he cannot transfer even his rights. "A man cannot assign," said Innes, J., in *Cherukomen* v. *Ismala*,[4] "obligations (i. e., cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing; and whereas, in the present case, rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations."

This is the principle on which this section is based. The rights and liabilities referred to arise out of the *contractual relationship* of the transferor with his lessee, and the section provides that the *rights* of the transferor as to the property will pass[4a] but not the *liabilities* unless the lessee elects to hold the transferee liable.

Note 1

1. See S. 72 of the Bengal Tenancy Act (1885) and S. 270 of the Agra Tenancy Act (III of 1926).

Note 2

1. Broom, *A Selection of Legal Maxims*, 10th Edition, 1939, Pages 306, 308.
2. Broom, *A Selection of Legal Maxims*, 10th Edition, 1939, Pages 306, 308 and Wharton's *Law Laxicon*.
3. (1854) 156 E R 463 (467) : 10 Ex 312 : 2 C L R 1215 : 23 L J Ex 317 : 2 W R (Eng) 624, *White* v. *Crisp*.

3a. Holland, *Jurisprudence*, 6th Edition, Page 373.

4. ('72-73) 6 Mad H C R 145 (151) (DB).

[*See also* ('14) 1 A I R 1914 Low Bur 200 (201) : 7 Low Bur Rul 95 : 22 Ind Cas 940, *Dickman Bros. & Co. Ltd.* v. *Sulaiman Hajee Bros. and Co.* (Benefit of contract is, but burden is not, assignable by one party without consent of the other.)]

4a. ('13) 19 Ind Cas 865 (867) (DB) (Cal), *Peary Lal* v. *Madhoji Jiban*.
('91) 4 C P L R 61 (61), *Narayan Das* v. *Parasram*.
('87) 14 Cal 176 (183), *Kristo Nath* v. *T. F. Brown*.
('23) 10 AIR 1923 Cal 189 (191) : 50 Cal 146 : 71 Ind Cas 327 (DB), *Rajendra* v. *Abu Naseer*.
('26) 13 AIR 1926 Nag 495 (495) : 96 Ind Cas 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain*.
('20) 54 Ind Cas 569 (570) (DB) (All), *Kudai Khan* v. *Jagat Narain*. (If a proprietor transfers his proprietary rights to a thekadar, the latter becomes the tenant's landlord and has the power to eject the tenant unless the proprietor has reserved such power to himself.)

Under the English law, however, transfers of leased property have been regarded as an exception to the principle last mentioned, in that such a transfer passes to the transferee all the rights *and liabilities* of the transferor with reference to the subject-matter of the lease.[5]

This section, in terms, does not apply to transfers by operation of law.[6] But the principle underlying it is applicable to such cases.[7]

The section does not, by virtue of the provisions of S. 117, apply to a transfer of property which has been leased out for agricultural purposes. But, even in such cases, the principle underlying the section is applicable.[8]

This section may be compared with S. 37. The latter deals with transfers of all kinds of property and is not limited, as this section is, to transfers of *property which has been leased*. Further, it deals with the performance by a *third person* of obligations relating to the property transferred, on a severance of such property into several shares, and not, as this section does, with the performance *by the transferor or his transferee* of obligations relating to the property.

3. **"Transfers the property."** — As to what is "transfer of property" within the meaning of this Act, see generally Notes on S. 5.

An *agreement* to transfer property is not a "transfer of property" and the contractee has no right to the property until the transfer is actually effected, and cannot claim the benefit of this section.[1]

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5. Holland, *Jurisprudence*, 6th Edition, pp. 273, 274.
See sections 141 and 142 of the Law of Property Act, 1925 (15 Geo. V, c. 20.)
(1820) 106 E R 706 (708) : 3 B & Ald 392 : 21 R R 516, *Campbell* v. *Lewis*. (Covenant for quiet enjoyment is a covenant running with the land.)
('06) 75 L J K B 149 (150) : (1906) 1 K B 155 : 94 L T 171 : 54 W R (Eng) 379 : 22 T L R 217, *Williams* v. *Gabriel*. (Do.).
(1815) 128 E R 1020 (1022) : 6 Taunt 224 : 2 Marsh 1 : 16 R R 605, *Collison* v. *Lettsone*.
[*See also* (1904) 73 L J K B 97 (100) : (1904) 1 K B 362 : 90 L T 78 : 20 T L R 109, *Stuart* v. *Joy*.
('05) 74 L J Ch 555 (563) : (1905) 2 Ch 257 (279) : 54 W R (Eng) 7 : 93 L T 257 : 21 T L R 581, *Woodall* v. *Clifton*.
(1900) 69 L J Q B 904 (906) : (1900) 2 Q B 609 (614) : 48 W R (Eng) 642 : 83 L T 64, *Cohen* v. *Tannar*.]

6. See Section 2 clause (d).

7. ('26) 13 AIR 1926 Nag 495 (495): 96 Ind Cas 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain*,
('80) 5 Cal 902 (906) : 6 Cal L R 421 (F B), *Iswar Chunder* v. *Ram Krishna*.
('83) 12 Cal L Rep 479 (482) (D B), *Raisuddin Chowdhry* v. *Khodu Newaz*. (A mortgagee who has foreclosed his mortgage is not entitled to rent from a tenant of the property from the date of the foreclosure, but from the date on which he has perfected his title and the tenant has notice of his having done so.)
('23) 10 AIR 1923 Nag 91 (92) : 82 Ind Cas 616, *Daulat* v. *Sardar Singh*.

8. ('06) 29 Mad 29 (35, 36) (D B), *Appa Rao* v. *Prattipati Ramayya*.

Note 3

1. (1838) 132 E R 1183 (1185) : 5 Bing N C 477 : 7 Scott 494 : 2 Arn 70 : 8 L J C P 299, *Hartshorne* v. *Watson*.
[*See also* ('09) 4 Ind Cas 471 (472) (D B) (Cal), *Jarraw Kumari* v. *Hanifuddin Akanda*. (*Held*, *Sarbakari* Pattah did not create any interest in the land; therefore its holder was not a transferee.)]

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The section assumes that there has been a *valid* transfer of property.[2]

4. "The property leased or any part thereof or any part of the interest therein." — It is not necessary for the section to apply that the *entire* property leased should have been transferred. The transfer may be of a *part* of such property or a part of the lessor's interest in such property. Thus, the section will apply to a transfer of two acres out of ten acres of leased property, or to a mortgage of the leased property[1] or even to a lease of the reversion.[2]

Illustrations.

(1) A, the owner of property leases the property to B, and thereafter usufructuarily mortgages it to C. A cannot after the mortgage accept any surrender from the lessee or enforce a forfeiture clause against him; for, such rights will pass to C.[3]

(2) A, the owner of property, executes a lease thereof to B, and subsequently, before the expiry of such lease, executes another lease of the same property in favour of C. A cannot, after the date of the second lease, give B any notice to quit[4] or recover any rent due after the date of the second lease from B.[5] C will be entitled to those rights.

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2. ('22) 9 AIR 1922 All 45 (46) (D B), *Jitan Tamboli* v. *Namko.*

Note 4

1. ('27) 14 AIR 1927 Lah 188 (189) : 100 Ind Cas 672, *Tirkha Ram Chunilal* v. *Maman.*
(1843) 12 LJQB 333 (335): 1 Dowl & L 213 : 67 R R 853, *Burrowes* v. *Gradin.*
2. ('19) 6 AIR 1919 Lah 31 (32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*
3. ('30) 17 AIR 1930 Bom 329 (330) : 125 Ind Cas 689 (D B), *Havu* v. *Ganapati.* (Surrender.)
('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.* (Forfeiture.)
('27) 14 AIR 1927 Bom 145 (148) : 100 Ind Cas 1033 (D B), *Barjorji* v. *Shripatprasadji.* (Mortgagee in possession can determine a lease without consent of the mortgagor.)
4. ('03) 90 L T 89 (90) : 52 W R (Eng) Dig 84, *Wordsley Brewery Co.* v. *Halford.*
5. ('08) 30 All 369 (371) : 5 All L Jour 423 (D B), *Ram Anant Singh* v. *Shankar Singh.*
(1853) 175 E R 566 (567), : 3 Car & Kir 307, *Harmer* v. *Bean.*
('22) 9 AIR 1922 Cal 412 (415) : 49 Cal 495 : 67 Ind Cas 108 (D B), *Jahar Lal* v. *Bhupendra Nath.* (Landlord can carve out a new tenancy from his reversion but not so as to prejudice the prior tenancy.)
('04) 8 Cal W N 438 (441), *Ram Kanai* v. *Fakir Chand.* (An intermediary holder between a landlord and tenant—He is a transferee of the landlord so far as the right to collect rent from the tenant is concerned—Per Mitra J.)
[*See* ('23) 10 AIR 1923 Cal 189 (192) : 50 Cal 146 : 71 Ind Cas 327 (DB), *Rajendra* v. *Abu Naseer.* (Bengal Patni Regulations—Patni over patni cannot be created : 9 Cal W N 656 not approved).]
[*See also* ('26) 13 A I R 1926 Nag 495 (495) : 96 Ind Cas 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain.* (Lessee of transferee landlord is not liable to pay rent if he does not get peaceful possession from the lessee of the transferor landlord.)]

Section 109 Note 5

5. "All the rights.....of the lessor as to the property or part transferred."—The transferee under this section gets *all* the rights of the transferor *as to the property or part transferred*. Thus, where the *entire* property is transferred the transferee can sue to eject the tenant on the basis that the tenancy has terminated[1] or on the basis of a forfeiture for breach of *condition*[2] which, as has been seen in Note 5 on S. 10, is a quality annexed to the estate. He can also continue the suit instituted by the lessor in connection with the property leased.[3]

Where *part* of the property is transferred the transferee gets all the rights of the transferor as to the part transferred. So far as the right of *ejectment* is concerned, the lessor himself has no right to sue to eject his tenant from a part of his holding[4] and consequently *this section* would not enable the transferee of a part to eject the tenant from such part. But under the general law, independent of this section, an assignment of a part of a holding effects a severance of the holding and entitles the transferee to eject the tenant from the land covered by the assignment.[5] A right under a *covenant running with the land* is one "as to the property" transferred and will therefore pass to the transferee under this section.[6] A *privity of estate* arises in such cases between the lessee and the lessor's assignee, even though there is no contract between them.[7] A covenant to pay rent[8] or to

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[But see ('23) 10 AIR 1923 Cal 368 (369) : 76 Ind Cas 252 (DB), *Sangsar Ali* v. *Jagannath Pal.* (Case under Bengal Tenancy Act—It would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord first to one raiyat and then to another, the second raiyat would be entitled to collect the rent payable by the first.)]

Note 5

1. ('37) 24 AIR 1937 Mad 91 (91) : 168 Ind Cas 462, *Shanmuga* v. *Kandasami-* (Tenant holding over.)
2. ('18) 5 AIR 1918 Bom 79 (79) : 43 Bom 28 : 47 Ind Cas 198 (DB), *Vishveshvar* v. *Mahableshvar.*
3. ('69) 12 Suth W R 122 (123) (DB), *Wilson* v. *Government.*
(1694) 83 E R 743 : 3 Lev 387 : 1 Salk 246, *Smartle* v. *Williams.*
4. ('20) 7 AIR 1920 Mad 838 (840) : 42 Mad 603 : 51 Ind Cas 286 (FB), *Kannyan* v. *Alikutti.* (Sheshagiri Ayyar, J., dissenting.)
5. ('20) 7 AIR 1920 Mad 838 (841) : 42 Mad 603 : 51 Ind Cas 286 (FB), *Kannyan* v. *Alikutti,*
('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445 : 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.*
[But see ('80) 5 Cal 902 (905) : 6 Cal L R 421 (FB), *Iswar Chunder* v. *Ram Krishna.* (Assignment does not necessarily effect severance of tenant.)]
6. ('36) 23 AIR 1936 Bom 88 (91, 94) : 161 Ind Cas 57 : 60 Bom 394 (DB), *Abdul Rehman* v. *Phiroze Cursetji.*
7. (1587) 76 E R 676 (677, 679) : 3 Co Rep 226 : Moore (KB) 351, *Walker's Case.*
(1857) 156 E R 1430 (1435) : 1 H & N 817 : 26 L J Ex 117 : 28 L T (OS) 231 : 5 W R (Eng) 351 : 108 R R 842, *Martyn* v. *Williams.*
8. ('36) 23 AIR 1936 Bom 88 (91, 94) : 60 Bom 394 : 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji.*
('70) 14 Suth W R 83 (83) (D B), *Gour Dyal Singh* v. *Hubeel Hossein.*
('94) 1894 Bom P J 76 (D B), *Govind* v. *Vaikunt.* (Payment of rent to assignee discharges lessee.)
(1902) 102 E R 490 (492) : 2 East 575 : 6 R R 511, *Stevenson* v. *Lambard.*

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repair[9] is one running with the land and the assignee is therefore entitled to enforce such right.

A purely *personal* right of the lessor against the lessee under a contract cannot be said to be a right "as to the property" and therefore will not pass to the transferee.[10]

As to covenants running with the land, see Notes on S. 40.

6. **"If the lessee so elects, be subject to all the liabilities."** — An assignee of property will under this section, be subject to the liabilities of the transferor as to the property only *if the lessee so elects it*. This is in accordance with the principle referred to in Note 2 that a man cannot assign his obligations without the consent or authority of those to whom the duties are owing.

But once the lessee does make his election it would be *final*. He cannot thereafter turn round and charge the original lessor in respect of his liabilities.[1]

7. **Notice.**—It is not incumbent either on the transferor or on the transferee to give the lessee notice of the transfer. The section provides no penalty for want of such notice except the loss of rent which might be paid by the lessee to the original lessor in ignorance of the transfer.[1] But where the lessee knows that his original lessor has transferred his interests to another his paying rent to the original lessor is not valid. It is immaterial from whom the lessee receives such notice. The essential thing is that the transfer is brought to his knowledge.[2]

No attornment is necessary under this Act.[3] In the undermentioned case,[4] decided before the Act, it was held that attornment was necessary.

8. **Rent paid in advance.**—See Notes on Section 50.

[*See also* ('01) 3 Bom L R 679 (680) (DB), *Ramchandra* v. *Shaikh Hussan.* (Lessor cannot accept *surrender* effected by the lessee with notice of the transfer.)
('30) 17 AIR 1930 All 105 (105) : 124 Ind Cas 32, *Nathu* v. *Ganpat Singh.* (Tenant of exproprietary holding cannot evade payment of rent to assignee of person with whom he enters into an agreement to pay rent).]

9. (1818) 20 R R 368 (371) : 2 Burn & Ald 105 : 20 R R 368, *Twyman* v. *Pickard.*

10. ('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (D B), *Manikkam* v. *Rathnasami.*
[*See also* (1802) 102 E R 490 (492):2 East 575:6 R R 511, *Stevenson* v. *Lambard.* (1887) 57 L T 527 (530) : 36 W R (Eng) Dig 111, *Gower* v. *Post Master General* (Covenant to pay collateral sum of money—Covenant not running with the land —Assignee not liable to be charged.)

Note 6

1. ('34) 21 AIR 1934 Mad 658 (662) : 152 Ind Cas 201, *Iswara* v. *Ramappa.*

Note 7

1. ('23) 10 AIR 1923 Lah 389 (389) : 72 Ind Cas 86, *Bhola Nath* v. *Supper.*
('98) 1898 Bom P J 383 (DB), *Antaji* v. *Sakhya.* (The lessee shall not be liable to pay rent over again to the transferee.)
(1864) 1864 Suth W R F B 30 (31) (FB), *Attapyee Mowlah* v. *Sukhawut Ally.*
2. ('13) 19 Ind Cas 865 (868) (DB) (Cal), *Peary Lal* v. *Madhoji Jiban.*
('03) 7 Cal W N 454 (456) (DB), *Nobin Chandra* v. *Surendra Nath.* (Case under Bengal Tenancy Act (1885), S. 72.)
('12) 14 Ind Cas 801 (802) (Low Bur), *Subramanian Chetty* v. *Mg. Po Thet.*
3. ('39) 26 AIR 1939 Lah 49 (50) : 182 Ind Cas 533, *Daulat Ram* v. *Haveli Shah.*
4. ('70) 13 Suth W R 228 (229) (DB), *Ram Lall* v. *Chunder Bullee Debea.*

9. Arrears of rent.—A transferee is not entitled to arrears of rent due *before* the date of the transfer. Under the English law rent in arrears is no part of the reversion but is a mere chose in action and therefore does not pass with the transfer of the reversion.[1] But such may be specifically contracted to be transferred to the assignee and in such a case the latter would be entitled to it, not, however, by virtue of the transfer of the property, but by virtue of the *contract*.[2] In the undermentioned case[3] A transferred to B his property "together with the arrears of past years' due" by the tenants of such property. It was held that the words "arrears of past years' due" did not pass to the purchasers of *decrees* for arrears of rent held by the vendors.

10. Apportionment of rent.—The lessor cannot by his transfer increase the burden of the obligations of the lessee under his lease. An apportionment of the rent made by the lessor and his transferee without the consent of the lessee is, according to the English law, not binding on the latter.[1] In the absence of such consent, it can be done only through Court. This view was followed in this country also before the Act was passed.[2] The last paragraph of the section has given legislative effect to this view.

Where the lessor, the transferee and the lessee have agreed as to the amount of rent payable to the transferee, the lessor or the transferee can sue for the rent payable to him without impleading the other.[3]

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110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for year.

Note 9

1. (1841) 151 E R 1086 (1086) : 8 M & W 379 : 10 L J Ex 304 : 9 Dowl P C 770 : 58 R R 744, *Sharp* v. *Key*.
2. ('75) 7 N W P H C R 88 (91) (DB), *Balam Das* v. *Dwarka Das*.
3. ('75) 7 N W P H C R 88 (91) (DB), *Balam Das* v. *Dwarka Das*.

Note 10

1. (1822) 106 E R 1411 (1414) : 5 B & Ald 876 : 1 Dowl & Ry 291 : 24 R R 601, *Bliss* v. *Collins*.
(1882) 52 L J Q B 340 (342): 10 Q B D 48 (51): 31 W R (Eng) 506 : 47 L T 657, *Swansea Corporation* v. *Thomas*.
2. ('72) 18 Suth W R 508 (509) (DB), *Tara Monee* v. *Punchanun*.
('80) 5 Cal 902 (905) : 6 Cal L R 421 (F B), *Iswar Chunder* v. *Ram Krishna*.
3. ('42) 29 AIR 1942 Pat 120 (126) : 196 Ind Cas 837 (DB), *Bhudeb Chandra* v. *Bhikshakar Pattanaik*.

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Note 1

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Synopsis

1. Commencement of lease.
2. "Particular day."
3. Second paragraph.
4. Third paragraph.

Other Topics (miscellaneous)

Computation of time. See Note 1.
Option to break or determine lease. See Note 4.

1. Commencement of lease. — The first paragraph of the section deals with the date of commencement of a lease. The word "from" as a general rule excludes the day from which the time is to be reckoned except where the context requires a contrary rule to be adopted.[1] This general rule is applicable whenever time is to be computed from a day specified, whether such time is fixed for the performance of a contract or is prescribed by law for the doing of an act or for the institution of proceedings in a Court of law. This principle is found embodied in S. 9 of the General Clauses Act, 1897, and S. 12 of the Limitation Act, 1908. Section 9, sub-s. (1) of the General Clauses Act runs as follows :

> "In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from," and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

And section 12, sub-s. (1) of the Limitation Act runs as follows :

> "In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded."

The first sentence of the first paragraph of this section is an application of the said general principle to contracts of lease. Where a lease is expressed as commencing "from" a particular day, in computing that time, such day is to be excluded.[2] Where a lease of certain premises dated 29th June 1921 was expressed to be "from 1st June 1921 for the term of four years" it was accordingly held by their Lordships of the Privy Council that the 1st June should be excluded in computing the period of four years.[3] Where a lease deed demised certain premises "for the term of five years *computed* from the first day of December 1924," it was held

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1. Wharton, *Law Lexicon*, 14th Edn., 1938, *sub voce* "from."
2. ('37) 24 AIR 1937 Nag 139 (140) : I L R (1937) Nag 214 : 170 Ind Cas 790, *Sheikh Nuroo* v. *Meghraj Ramkaran.*
('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit Shah.* (A I R 1932 P C 279 : 60 Cal 380 : 59 Ind App 414 (PC) followed.)
3. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni.*

that the word "computed" must be regarded as having the same meaning as the word "beginning" and that the lease must be regarded, for the purposes of the first paragraph of the section, as a lease expressed to begin "from" a certain day.[4] A lease expressed to be "from henceforth" is a lease from the day of its execution.[5]

Where no day of commencement is *named* in the lease, the section provides that the time limited begins from the making of the lease and this principle has been applied even to agricultural leases[6] to which the section in terms does not apply. It has been held in the undermentioned cases[7] that even in cases where no day for commencement of the lease is *named*, it may commence on another day, if the intention of the parties *implied* from the circumstances, is to make the lease commence on that day. This view does not give full effect to the words "expressed" and "named" used in the section and, it is submitted, is not correct.

Where there is no evidence as to when the lease was granted and when it was intended to commence, the presumption will be that the tenancy expires on the last day of each month.[8]

2. "Particular day." — The particular day from which a lease commences to run may be prior to, the same as, or subsequent to, the day on which the lease is effected. In the Privy Council decision of *Benoy Krishna Das* v. *Salsiccioni*[1] the lease deed of certain premises dated 29th June 1921 provided that lease was to be "from *1st June 1921* for the term of four years." In the undermentioned cases[2] the lease was expressed to commence some time after the date of the lease deed.

Where a lease deed was executed on a particular date providing for the commencement of the lease from a prior date, it was held in *Shaw* v. *Kay*[3] that the tenant is not liable for acts done after the commencement of the term but before the time of the execution of the lease deed inasmuch as the *habendum* of lease merely expressed the duration of the tenant's interest, the operation as a grant being merely prospective.

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4. ('38) 42 Cal W N 1115 (1119), *Charu Chandra* v. *Bankim Chandra.*

5. (1610) 79 E R 222 (222) : (1610) Cro Jac 258, *Llewellyn* v. *Williams.*

6. ('19) 6 AIR 1919 Cal 837 (838) : 50 Ind Cas 177 (DB), *Kailas Chandra* v. *Bijoy Kanta.* (Agricultural lease.)
('28) 15 AIR 1928 Cal 392 (396) : 110 Ind Cas 368 : 55 Cal 435 (DB), *Dinanath Kundu* v. *Janki Nath.* (Do.)

7. ('07) 30 Mad 109 (112) : 16 Mad L Jour 533 (DB), *Arunachella Chettiar* v. *Ramiah Naidu.*
('38) 25 AIR 1938 Cal 358 (359) : I L R (1938) 2 Cal 134 : 177 Ind Cas 880, *Deb Das Lala* v. *Abdul Gani.*

8. ('08) 8 Cal L Jour 34 (37), *Rakhal Chandra* v. *Secy. of State.*
('36) 23 AIR 1936 Oudh 306 (307) : 12 Luck 241 : 162 Ind Cas 712 (DB), *Ramji Lal* v. *Secy. of State.*

Note 2

1. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC).

2. (1863) 1 Mad H C R 153 (157) (DB), *Pitchakutti Chetti* v. *Kamala Nayakkan.*
('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Muhammad Bakhsh.*

3. (1847) 154 E R 175 (176) : 17 L J Ex 17 : 1 Ex 412.

Section 110
Notes 3–4

3. **Second paragraph.** — In order that this part of the section may be applicable, two conditions must be fulfilled. The lease must be from year to year, or for a number of years, and there must be no *express* agreement to the contrary.[1] Where there is an express agreement to the contrary the terms of the agreement prevail.[2] Where a lease was expressed to be for four years commencing from the first day of June 1921 but the rent for each month was payable before the 7th of the next month, it was held by their Lordships of the Privy Council that this was not "an express agreement to the contrary" as contemplated in this section; and that therefore the lease lasted upto the midnight of the 1st day of June 1925.[3] See also the undermentioned case.[4]

The second paragraph is merely a consequence of the first paragraph, and as was pointed out by Ameer Ali, J., in the undermentioned case[5] is somewhat redundant. He said :

> "The effect of it, in my opinion, is merely to attempt to render certain what in England would have been a subject-matter of some doubt, and to lay down the artificial rule of construction that where a lease or any document is said to commence from a certain date, it means from the end of that date, and will have another day added on at the end. In other words, the end of the 1st December (as in this case) 1924 to the end of 1st December 1929."

Where the time limited is a *month* or week or a number of *months* or weeks the same principle, it is conceived, will apply, though the second paragraph refers only to leases for a *year* or a number of *years*. Where a tenancy for four weeks began "from Monday, the 8th March 1920," it was held in the undermentioned case[6] that the lease was upto the midnight of the fourth Monday from the 8th March 1920.

4. **Third paragraph.** — The rule in this paragraph is based on the general principle that a lease is to be interpreted, as far as possible in favour of a lessee rather than in favour of a lessor. Thus, where a house was leased "for 7, 14, or 21 years" it was held that it was the lessee who could choose the term of the tenancy from the three periods mentioned.[1]

Note 3

1. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni*.
2. ('38) 25 AIR 1938 Cal 358 (359) : I L R (1938) 2 Cal 134 : 177 Ind Cas 880, *Debdas Lala* v. *Abdul Gani*.
3. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni*.
4. ('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmat Ullah* v. *Md. Husain*. (Time limited by lease being number of years—Lease must be deemed to last during whole anniversary of day from which time commences.)
5. ('38) 42 Cal W N 1115 (1118), *Charu Chandra* v. *Bankim Chandra*.
6. (1922) 38 T L R 619 (619), *Savary* v. *Bayley*.

Note 4

1. (1803) 3 B & P 399 (404) : 7 R R 797, *Dann* v. *Spurrier*.
(1807) 9 East 15 (16) : 9 R R 501, *Doe d Webb* v. *Dixon*.
(1872) 41 L J Ch 734 (735, 736) : L R 14 Eq 85 : 20 W R (Eng) 602, *Powell* v. *Smith*.

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Where a lease mentions the person who should exercise the option, the terms of the lease, of course, will prevail.[2] Where a lease was made for "21 years, determinable, nevertheless, at the expiration of seven or fourteen years, if the said *parties* thereto shall so think fit," it was held that the lease would terminate before 21 years only if *both* the parties consented to its termination before that date.[3]

Where the option is exercisable only on certain conditions, such conditions must be strictly fulfilled before the option is exercised.[4]

Determination of lease.

Section 111

111. A lease of immoveable property determines —

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(f) by implied surrender:

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which

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2. (1802) 8 Ves 34 : 149 R R 666, *Russell* v. *Coggins.* (Lease to terminate when lessor wanted premises for building.)

3. (1864) 3 H & C 458 (461): 11 L T (N S) 317 : 13 W R (Eng) 145 : 34 L J Ex 6: 159 E R 610 : 140 R R 555, *Fowel* v. *Tranter.*

4. (1915) 84 L J K B 154 (157): 1915 App Cas 428 : 112 L T 89, *Inland Revenue Commissioners* v. *Southend-on-Sea Estates Co., Ltd.* (Option to put an end to lease if landlord required land for building purposes—There must be intention to build before option can be exercised.)
(1917) 33 T L R 108 (109) : (1917) 1 K B 332 : 86 L J K B 319 : 115 L T 920 *Kirklinton* v. *Wood.*
(1917) 86 L J Ch 400 (402) : (1917) 1 Ch 606 : 117 L T 8, *Burch* v. *Farrow's Bank Ltd.* (Option exercisable on performance of all covenants in the lease and the payment of rent.)

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provides that on breach thereof the lessor may re-enter [a](* * *); or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; [b][or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event]; and in [c][any of these cases] the lessor or his transferee [d][gives notice in writing to the lessee of] his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

a. The words "or the lease shall become void" were omitted by Section 57 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

b. These words were inserted, *ibid.*

c. These words were substituted for the words "either case," *ibid.*

d. These words were substituted for the words "does some act showing," *ibid.*

Synopsis

1. Scope of the section.
2. Clause (a) — Determination by efflux of time.
3. Renewal of lease.
4. Clause (b) — Term limited conditionally.
5. Clause (c) — Cesser of lessor's interest.
6. Death of lessor and lessee.
7. Clause (d) — Merger.
8. Surrender — General.
9. Express surrender — Clause (e).
10. Clause (f) — Implied surrender.
11. Clause (g) — Forfeiture — General.
12. Forfeiture — Permanent lease.
13. Forfeiture for breach of condition.
14. Forfeiture for denial of title.
15. Forfeiture on insolvency of lessee.
16. Notice of intention to determine lease on forfeiture.
17. Tenant cannot deny his landlord's title—Estoppel.
18. Re-entry on forfeiture under clause (g) need not be enforced by suit.
19. Who can enforce forfeiture.
20. Waiver of forfeiture. See Notes on S. 112.
21. Relief against forfeiture. See Notes on Ss. 114 and 114A.
22. Forfeiture of service tenures.
23. Notice to quit or determine the lease—Clause (h).
24. Tenancy-at-will.
25. Leases not governed by the Act.
26. Joint lessors — Termination of lease.
27. Possession after determination of tenancy.

Other Topics (miscellaneous)

Agricultural leases. See Note 1.
Contingent term. See Note 4.
Covenant for renewal — Construction. See Note 3.
Disclaimer — What amounts to. See Note 14.
  Claim to permanent tenancy whether disclaimer. See Note 14.
  Disclaimer must be before suit for ejectment. See Note 14.
Leases before the Act — Merger. See Note 7.
Merger of interests of lessor and lessee
  In the same right. See Note 7.
  The whole of the property. See Note 7.
Surrender by operation of law. See Note 10.
  Acceptance of new lease. See Note 10.
  Relinquishment of possession. See Note 10.
Surrender does not affect derivative interests. See Note 8 and S. 115 Note 1.

1. Scope of the section.—Section 110 deals with the *commencement* and *duration* of a lease. This section deals with the *determination* of leases. It applies only to leases created by act of parties and does not apply, for instance, to a lease created by *devise*.[1] Nor does it apply in terms to agricultural leases which are exempted from its operation by S. 117,[2] or to leases executed before the Act was passed,[3] or to leases executed in Provinces to which the Act is not extended.[4] In such cases, the principles on which the section is based have generally been applied as being in consonance with justice, equity and good conscience.

So long as a tenancy is not determined in one of the ways known to law, a tenant cannot be ejected as a trespasser[5] and a suit on title does not lie against him.[6]

The determination of a lease determines also, with one exception,

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Section 111 — Note 1

1. ('24) 11 AIR 1924 Oudh 305 (305, 306) : 27 Oudh Cas 1 : 79 Ind Cas 695, *Shankardayal* v. *Binayak Prasad.*
2. ('37) 24 AIR 1937 Cal 669 (669): ILR (1937) 1 Cal 679 : 173 Ind Cas 590 (DB), *Sasi Kumar* v. *Golap Banu.*
See also Note 25.
3. ('38) 25 AIR 1938 Cal 128 (129) (DB), *Chandra Singh* v. *Sarat Chandra.*
4. See Note 25.
5. ('82) 6 Bom 70 (72), (DB), *Pandurang Sakharam* v. *Yedneshwar Shitaram.*
('28) 112 Ind Cas 257 (258) (DB) (Mad), *Kadiyam Rayudu* v. *Kamarsu Veeraraju.*
('25) 12 AIR 1925 Mad 881 (882, 883) : 87 Ind Cas 669 (DB), *Gopi Nath Chowdhari* v. *Kristno Chowdhari.* (In the case of an anomalous mortgage of agricultural land, where the mortgagee who was entitled to remain in possession only during the mortgage term, continues to be in possession after its expiry, he becomes an yearly tenant by implied tenancy and then cannot be ejected without proper notice to quit.)
('19) 6 AIR 1919 Mad 1135 (1136) : 43 Ind Cas 977 (DB), *Chandrasekharaswami* v. *Nainar Ammal.*
('26) 13 AIR 1926 Nag 253 (255) : 92 Ind Cas 58, *Vithoba* v. *Sadasheo.* (The mere ejectment of a tenant does not necessarily determine the tenancy, unless there is evidence of acquiescence on his part.)
('76) 25 Suth W R 319 (319) (DB), *Haradhun Mudduck* v. *Dinobundhoo Mojoomdar.*
('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bookto Mahato.*
('82) 11 Cal L R 387 (388) (DB), *Chundra Kumar Guha* v. *Mongul Mollah.*
[*See also* ('24) 11 AIR 1924 Mad 907 (908): 82 Ind Cas 623 (DB), *B. Subbarayudu* v. *V. Narasimha Rao.*]
6. ('03) 13 Mad L Jour 475 (476) (DB), *Nagasamy Aiyar* v. *Perumal Aiyar.*

Section 111 Notes 1–2

all interests derived from the lessee.[7] The exception is a determination by *surrender*. A surrender does not, as will be seen in Note 8, affect the rights of a third person who has derived them from the lessee. So far as such person is concerned, the lease is regarded in law as continuing for his benefit.

2. **Clause (a) — Determination by efflux of time.** — The question of the determination of a tenancy by efflux of time will arise only in those cases where the lease is for a fixed period. No such question can arise, for instance, in the case of a *perpetual* lease; nor can it arise in a lease from year to year, for, as has been seen in the Notes on S. 107, such a tenancy does not terminate at the end of each year, though it is terminable by a notice to quit at the end of any year.[1]

A lease for a term of years *prima facie* implies that the lessee's right to the property demised ends with the term.[2] It does not *prima facie* import any right of renewal.[3] No further act either by the lessor or by the lessee such as a notice to quit[4] is necessary to determine the lease.

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7. ('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 672, *Govindrao* v. *Sarjabai.*
('27) 14 AIR 1927 Oudh 339 (340) : 104 Ind Cas 193 : 2 Luck 612, *Jodha* v. *Darbari Lal.* (The tenancy of a sub-tenant comes to an end on the death of the principal tenant and it is not necessary for the landlord to issue a notice of ejectment against the sub-tenant.)
('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93: 139 Ind Cas 369, *Baldeoprasad* v. *Premnarain.*
('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.* (Under-lease determines on forfeiture of lease.)
('24) 11 AIR 1924 Mad 776 (777): 84 Ind Cas 625 (DB), *Gopala Kuduva* v. *Hamza Sahib.*

Note 2

1. ('70) 13 Suth W R 190 (190) (DB), *Maloddee Noshyo* v. *Bullubee Kant Dhur.*
('02) 12 Mad L Jonr 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*
('17) 4 AIR 1917 Nag 21 (22) : 14 Nag L R 3 : 43 Ind Cas 392, *Sheomangal* v. *Seth Nanhelal.*
('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.*
2. ('15) 2 AIR 1915 P C 59 (66) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (P C), *Secretary of State for India* v. *Bai Rajbai.*
('09) 1 Ind Cas 208 (209) : 31 All 318 (DB), *Khunni Lal* v. *Madan Mohan Lal.*
('73) 1873 Pun Re No. 27 , *Mahomed Bux* v. *Ouliya.*
('33) 20 AIR 1933 Lah 61 (64): 14 Lah 137: 142 Ind Cas 754 (DB), *Sunder Singh* v. *Ram Saran Das.*
3. ('15) 2 AIR 1915 P C 59 (66) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (PC), *Secretary of State for India* v. *Bai Raj Bai.*
4. ('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*
('31) 18 AIR 1931 All 649 (650) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*
('30) 17 AIR 1930 Lah 386 (388): 120 I.C. 166 (DB), *Asa Ram* v. *Kishan Chand.*
('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini.*
('10) 7 Ind Cas 8 (9) (DB) (Mad), *Nandikolla Gapalan* v. *Manyam Mahalakshmi.*
('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.* (No notice necessary in case of lease for one year only.)
('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzzaman* v. *Anwar Hussain.*
('33) 20 AIR 1933 All 756 (758) : 146 I. C. 762 (DB), *Kundan Lal* v. *Deepchand.*
('75) 23 Suth W R 312 (313) (DB), *Shaikh Golam Mehdee* v. *Amjad Ali.*

Where, however, such a lease provides expressly that after the expiry of the term the tenancy is terminable by a notice, the lease is not determined until such notice, as has been agreed upon, is given.[5]

3. Renewal of lease. — A covenant for renewal in a lease will, as a general rule, be construed as a covenant for a *single* renewal and not as a *perpetual* renewal.[1] The reason is that the leaning of the Courts is against perpetual renewals and therefore in order to establish this construction the intention should be unequivocally expressed in the lease deed.[2] Where, however, there are clear expressions indicative of such an intention, Courts would give effect to it. Thus, where a covenant for renewal states that the renewal was to be on the same covenants, 'including this covenant" the covenant will be held to be one for perpetual renewal.[3]

Where a lessee has an option to ask for a renewal but does not ask for it before the expiry of the term and merely continues in possession he becomes merely a tenant from year to year after the termination of the original tenancy.[4] But the right to exercise the option and ask for a renewal does not necessarily cease with the expiry of the term. If the covenant itself requires the lessee to exercise his option *before the expiry of the term* he will lose his right if he does not exercise it within time.[5] But if there is no such restriction, he can, as long as he continues as a tenant (though as one from year to year) exercise his option and call upon the lessor to renew it. Thus, where a lease is for 3 years with an agreement to grant a further lease for 5, 7, 14 or 21 years, the lessee will be entitled, even after the expiry of the 3 years and while continuing in possession as a tenant from year to

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5. ('14) 1 AIR 1914 Mad 301 (303) : 23 Ind Cas 572, *Ramasami Naidu* v. *Venkataramanjulu Naidu.*

Note 3

1. ('83) 7 Bom 109 (115), *In re Purmanandas Jeewandas.*
('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secretary of State* v. *Forbes.*
('26) 13 AIR 1926 Cal 1065 (1066) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogeshchandra Roy* v. *Anand Charan.*
('37) 24 AIR 1937 All 328 (331): 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*
(1898) 67 L J Q B 296 (300) : 78 L T 165, *Lewis* v. *Stephenson.*

2. (1796) 30 E R 1019 (1020) : 3 Ves 295: 3 R R 96, *Baynham* v. *Guys Hospital.*
(1884) 54 L J Q B 6 (9) : 9 App Cas 844 : 52 L T 222 : 23 W R (Eng) 325, *Swinburne* v. *Milburn.* (A covenant for perpetual renewal will not be inferred from equivocal expressions — But there is no *legal* presumption against a right of perpetual renewal.)

3. (1857) 70 E R 19 (23) : 4 K & J 45 : 3 Jur 1294 : 116 R R 255 : 6 W R (Eng) 144 : 27 L J Ch 86, *Hare* v. *Burgess.*
(1914) 84 L J Ch 203 (208) : (1914) 2 Ch 705 : 78 J P 380 : 59 S J 43 : 30 T L R 666, *Wynn* v. *Conway Corporation.*

4. ('20) 7 AIR 1920 Bom 215 (215) : 55 Ind Cas 610 (DB), *Manilal* v. *Nandlal.*

5. ('18) 5 AIR 1918 Cal 59(61) : 51 Ind Cas 690 (DB), *Ram Lal* v. *Secretary of State.*
('29) 16 AIR 1929 Cal 407 (407) : 119 Ind Cas 144 (DB), *Banshidhar Durga Das* v. *Ishan Chandra.* (Where lessee does not exercise his option of renewal, lease terminates.)

Section 111 Note 3

year, to call upon the lessor to renew the lease for 5, 7, 14 or 21 years.[6] But the lessor may, at any time, call upon the lessee to exercise his option and may, in default, determine the lease.[7]

A covenant for renewal which the lessee can claim only on the performance of certain conditions precedent, such as regular payment of rent, cannot be enforced by the lessee unless such conditions are performed.[8]

Where the option for renewal does not state the terms of the renewal, the general rule is that the new lease would be for the same period and on the same terms as the original lease in respect of all essential conditions except as to the covenant for renewal itself.[9]

A covenant "that the lease shall, and may, be renewed" under certain circumstances means the lease as a *whole*. Where, before the expiry of the original lease, the lessee parted with a portion of his interest in favour of a third person, it was held that he could not claim a renewal of the lease in respect of the portion in his hands.[10]

A covenant for renewal in a lease by a Hindu widow having only a limited estate has been held to be not binding on the estate after her death.[11]

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6. (1866) 55 E R 870 (872) : 35 Beav 197 : L R 1 E Q 474 : 13 L T (N S) 623 : 147 R R 110, *Moss* v. *Barton*.
(1866) 36 L J Ch 81 (83) : L R 2 Ch 67 : 15 W R (Eng) 92 : 15 L T (N S) 378 : 147 R R 159, *Buckland* v. *Papillor*.

7. (1854) 52 E R 69 (70) : 18 Beav 174 : 23 L J Ch 818 : 104 R R 419 : 2 W R (Eng) 206, *Hersey* v. *Giblell*.

8. (1910) 26 T L R 375 (376) : 1910 A C 335 : 79 L J P C 86 : 102 L T 380, *Greville* v. *Parkar*.
(1876) 45 L J Ch 522 (524) : 2 Ch D 310 : 34 L T 779 : 24 W R (Eng) 657, *Finch* v. *Underwood*.
(1856) 69 E R 827 (830) : 2 K & J 374, *Job* v. *Barrister*.
[*See also* (1882) 52 L J Ch 191 (197) : 22 Ch D 640 : 31 W R (Eng) 471 : 47 L T 650, *Nicholson* v. *Smith*.]

9. ('17) 4 AIR 1917 Cal 509 (510): 33 Ind Cas 448 (DB), *Lanimia* v. *Muhammad Easin*.
('21) 8 AIR 1921 Cal 574(576):64 I.C. 824(DB), *Guruprasanna* v. *Madhusudan*.
('17) 4 AIR 1917 Cal 526 (526): 33 Ind Cas 450, *Rasul Gazi* v. *Abdul Jalil Khan*.
('20) 7 AIR 1920 Cal 96 (97) : 55 Ind Cas 375, *Epasan Ali* v. *Ram Kumar De*.
(1881) 29 W R (Eng) Dig 113 (114): 18 Ch D 238: 44 L T 742, *Bastin* v. *Bidwell*.
[*See also* ('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (DB), *Secretary of State* v. *Ma Dwe*. (Covenant for renewal will not include the covenant for renewal itself.)]
[But see ('09) 4 Ind Cas 535 (536) (DB) (Cal), *Surendra Nath Sen* v. *Dinabandhu Naik*. (A covenant in a lease for a renewal of the settlement after the expiry of the present terms without specifying the terms or the period of years, and the amount of rent is vague and not enforceable.)
('18) 5 AIR 1918 Cal 391 (392) : 39 Ind Cas 137 (DB), *Azimuddin Choudhuri* v. *Peer Mahomed*.]

10. ('05) 27 All 696 (699) : 1905 All W N 154, *Jaggilal* v. *Cooper*.
('28) 15 AIR 1928 P C 258 (260) : 51 Mad 885 : 55 Ind App 423 : 111 Ind Cas 404 (PC), *Secretary of State* v. *Volkart Brothers*. (Reversing AIR 1927 Mad 513 (516) : 50 Mad 595.)

11. ('37) 24 AIR 1937 All 328 (331) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut*

As to whether a covenant for renewal is one that "runs with the land," see Note 25 on section 40.

See also the undermentioned cases.[12]

4. Clause (b) — Term limited conditionally. — A term may be limited conditionally, e. g., for forty years if the lessee or some other person named therein shall so long live. In such cases the lease would be determined at the end of forty years or on the death of the person or persons named whichever should first happen.[1] On the happening of the event, the lessor may re-enter or maintain an ejectment without any proviso for re-entry.[2] A lease for 100 years if A and B shall so long live is determined by the death of one of them.[3] A lease "for the duration of the war" will be determined when peace is declared.[4] In the undermentioned case[5] it was observed that a service tenancy under which the tenant holds the land on condition that if he refuses to render service the lease will determine, may fall within clause (b).

5. Clause (c) — Cesser of lessor's interest. — As a general rule, a person cannot grant to another a larger interest in property than he himself possesses: *Nemo plus juris ad alium transferre potest quam ipse haberet.* It follows that where the interest of the lessor in the property terminates or his power to dispose of the same extends only to the happening of any event, the lease will terminate on the happening of such event. Thus, a lease by an owner for life will be determined on the death of the lessor.[1] Where a mortgagee grants a

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12. ('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secretary of State* v. *Sibaprosad Jana.* (The grantee under a settlement by Government executed a kabuliat containing a clause: "If I agree to the enhanced rent to be fixed at the time of the next settlement, Government shall have power to settle the lands with me or if I do not agree, then with others"—*Held* that the clause in the lease was a covenant for renewal on the same terms as the old lease except as to the amount of rent.)

('19) 6 AIR 1919 Cal 620 (622) : 45 Ind Cas 939 (DB), *Secretary of State* v. *Digambar Nanda.* (A lease granted by Government contained the following clause: "If you (the lessee) agree to pay the enhanced rent fixed at the time of resettlement in future the Government will have the right to settle with you" — *Held* that the clause embodied a covenant for renewal subject to any higher rent which might be fixed at the settlement.)

('29) 16 AIR 1929 Cal 50 (54, 55) : 55 Cal 841 : 109 Ind Cas 298 (DB), *Mahendra Nath* v. *Kailash Nath.*

Note 4

1. Woodfall, *Landlord and Tenant*, 22nd Edition, page 363.

2. Woodfall, *Landlord and Tenant*, 22nd Edition, page 364.

3. (1610) 77 E R 1476 (1476) : 13 Co Rep 66 : 1 Browne 180, *Hughes' and Crowther's case.*

4. (1916) 33 T L R 114 (115), *Great Northern Railway* v. *Arnold.*

5. ('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.*

Note 5

1. (1900) 27 Cal 156 (162) : 26 Ind App 216 (P C), *Beni Pershad* v. *Dudhnath.*

('19) 6 AIR 1919 Oudh 278 (283) : 49 Ind Cas 80 (DB), *Deputy Commissioner, Partap Garh* v. *Kishan Dayal.*

(1778) 99 E R 36 (38, 39) : 1 Doug (KB) 50, *Doe d. Simpson* v. *Butcher.*

Section 111 Notes 5–6

lease, the lease will determine on the redemption of the mortgage.[2] In the case of agricultural leases it has been held in some cases that a lease in the course of management, by the mortgagee does not terminate on redemption. See S. 76 Note 6.

A sub-lease by a lessee for a term of years will be determined by the expiry of the period of the head lease.[3]

A Hindu widow or other limited owner in Hindu law is not a mere tenant for life. A lease by her does not necessarily terminate with her death. The reversioners may, at their option, treat it as valid for the full term leased or may treat it as determined on the death of the limited owner.[4] In the latter case the tenancy will be determined without any further act being necessary to determine it.[5]

6. Death of lessor and lessee. — The death of the lessor does not determine the lease, except in cases where his own interest ceases on his death or it is provided in the lease that the lease shall terminate on his death.[1]

A lease being a transfer of an interest in immovable property, is a heritable right.[2] The death of a lessee does not, therefore, terminate the lease but the interest survives to his legal representatives[3] except where the lease is *for the life* of the lessee.[4]

[*See also* ('12) 13 Ind Das 686 (687) (Cal), *Prahlad Chandra* v. *Behari Lal.* (A permanent lease of lands by a shebait will enable the grantee to hold for the life of the grantor.)]

2. ('11) 11 Ind Cas 817 (818) (All), *Collector of Basti* v. *Sarnam Gharak.*
('21) 8 AIR 1921 Mad 393 (393) : 69 Ind Cas 651 (DB), *Alagiriswami Mudali* v. *Akkulu Naidu.*
('10) 8 Ind Cas 466 (467) : 1 Upp Bur Rul 14, *Nga Nyan Gyi* v. *Nga Kyaw Nya.*
('06) 1906 All W N 241 (241), *Ram Chand* v. *Raj Hans.*

3. ('15) 2 AIR 1915 Cal 64 (65) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan Bose.*

4. ('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna Mahishi.*
[*See also* ('01) 28 Cal 532 (539) : 5 Cal W N 279 (DB), *Sadai Naik* v. *Serai Naik.*]

5. ('23) 10 AIR 1923 Pat 130 (131) : 2 Pat 171 : 70 Ind Cas 290 (DB), *Raghubar Singh* v. *Jethu Mahton.*

Note 6

1. ('83) 5 All 191 (194) : 1882 All W N 216 (DB), *Badrinath* v. *Bhajan Lall.*

2. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali Bepari* v. *Jamini Lal.*
('28) 112 Ind Cas 651 (653) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('42) 29 AIR 1942 Oudh 325 (326) : 200 Ind Cas 311, *Kapurthala Estate* v. *Sheo Shankar.*

3. (1844) 3 M. I. A. 261 (275) : 6 Suth W R P C 48 (PC), *Tej Chund* v. *Sree Kanth.*
('82) 5 All 191 (194) : 1882 All W N 216 (DB), *Badrinath* v. *Bhajan Lall.*
('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali Bepari* v. *Jamini Lal.*
('27) 14 AIR 1927 Lah 423 (423) : 101 Ind Cas 166, *Bhola Nath* v. *Mahomed.*
('28) 112 Ind Cas 651 (653) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('12) 13 Ind Cas 377 (382) (DB), *Hedlot Khasia* v. *Ka Ran Khasiani.*
('71) 16 Suth W R 147 (148) (DB), *Danoollah* v. *Amanutoollah.*
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*

4. ('20) 56 Ind Cas 656 (656) (All) *Hardutt Singh* v. *Jaikaran Singh.*

Section 111
Notes 6–7

A lease whereby the lessee is given the right to hold the land as long as he pleases is regarded as a lease for the life of the lessee and is determined by his death.[5] So also, as a general rule, a lease for an indefinite period.[6] A lease for five years with an agreement that the lessor would continue to give the land at the same rent, should the tenant require the land, is a lease for the life of the tenant. Where the tenant is a company the lease would last for the life of the company.[7] A lease to a company for a specific purpose would come to an end when the company becomes defunct.[8]

A lease for 100 years if A and B shall so long live terminates if one of them dies.[9]

7. Clause (d)—Merger. — In England, at Common law, where a term of years and the free-hold in the property became vested in the same person in the same right and no other estate intervened between them, the term was swallowed up and merged in the free-hold estate.[1] In equity, however, merger was a question of intention of the parties. There was no merger if there was an intention to keep both the estates separate and alive.[2] It is now enacted by S. 185 of the English Law of Property Act, 1925, that "there is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." In other words the same rule now applies whether at law or in equity, namely, that merger is a question of intention of the parties.[3]

Before the passing of this Act the English doctrine of merger was generally held not applicable to the mofussil in this country[4] and in any

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5. ('80) 4 Bom 424 (425) (DB), *Vaman Shripad* v. *Maki.*
('77) 1877 Bom P J 177 (DB), *Suleman* v. *Asmad.*
('74) 1874 Bom P J 279 (279) (DB), *Gopalrao* v. *Bhavanrao.*
[But see ('26) 13 AIR 1926 Bom 374 (375) : 95 Ind Cas 524 (DB), *Sona Bai* v. *Hiragavri Bai.* (It is a permanent lease and is not determined by death of lessee.)]

6. ('27) 14 AIR 1927 Cal 179 (181) : 99 Ind Cas 200 (DB), *Ashutosh Lahiri* v. *Chandi Charan.* (AIR 1926 Cal 558 : 53 Cal 95 disting.)
[*See also* ('83) 1883 Bom P J 310 (310) (DB), *Kalapa* v. *San Kalapa.*]

7. ('31) 18 AIR 1931 Bom 178 (180, 181) : 130 Ind Cas 598 (DB), *Indian Cotton Co., Ltd.* v. *Raghunath Hari.*

8. ('23) 10 AIR 1923 Nag 243 (245) : 73 Ind Cas 24, *Govardhan Das* v. *Wahedkhan.*

9. (1592) 77 E R 61 (62) : 5 Co Rep 9, *Brudnel's Case.*

Note 7

1. William and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 132.

2. William and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 133.
(1857) 53 E R 225 (226) : 23 Beav 571 : 3 Jur (NS) 1013 : 5 W R (Eng) 485 : 29 L T (OS) 244 : 113 R R 275, *Gunter* v. *Gunter.*

3. William and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., pages 133, 134.

4. ('68) 10 Suth W R 15 (17, 20) (SB), *Woomesh Chunder* v. *Raj Narain.*
('76) 25 Suth W R 503 (503) (DB), *Thomas Savi* v. *Punchanun Roy.*
('27) 14 AIR 1927 Pat 172 (175) : 102 Ind Cas 386 (DB), *Gopi Singh* v. *Jagdeo Singh.*

Section 111 Note 7

case, it was regarded a matter of intention of the parties.[5]

Clause (d) of this section is a departure in this respect, from the present English law. It provides that, independent of any question of intention, where the interests of the lessor and the lessee become united in the same person at the same time in the same right there is a merger and the lease is extinguished.[6]

In cases outside the Act, it has been held that merger is a matter of intention of the parties and not a thing which occurs *ipso jure* upon the acquisition of a superior with inferior right.[7]

It has been held that by virtue of S. 2, clause (c) this clause will not apply where a lease is created before the Act, even though the union of interests is after the Act, and that the question of merger in such cases must be decided with reference to the rule of intention.[8]

('38) 25 AIR 1938 Cal 128 (129) (DB), *Chandra Singh* v. *Sarat Chandra.*
('01) 28 Cal 744 (747) (DB), *Promotho Nath Mitter* v. *Kali Prasanna.*

5. ('14) 1 AIR 1914 Cal 489(490): 23 I. C. 612, *Abdul Karim* v. *Ahammad Ali.*

6. ('39) 26 AIR 1939 Cal 692 (695) : ILR (1939) 2 Cal 551 : 188 Ind Cas 17 (DB), *Suraj Chandra* v. *Behari Lal.*
('10) 7 Ind Cas 346 (347) (Cal), *Ganada Dasi* v. *Adhiraj Bijay Chand.* (When a zemindar purchases a patni right, the right so purchased, merges in the superior zemindari right.)

7. ('28) 15 AIR 1928 Pat 273 (274) : 107 Ind Cas 819 (DB), *Hriday Narain Singh* v. *Kalicharan Singh.*
[*See also* ('01) 28 Cal 744 (745) (DB), *Promotho Nath Mitter* v. *Kali Prasunna.*]
('22) 9 AIR 1922 P C 94 (95) : 48 Ind App 485 : 66 Ind Cas 551 (PC), *Dulhin Lacchanbati* v. *Bodhnath Tiwari.*
('15) 2 AIR 1915 Cal 452 (454): 28 I.C. 314 (DB), *Amaloo* v. *Sheikh Muksud Ali.*
('19) 6 AIR 1919 Cal 642 (644) : 51 Ind Cas 389 (DB), *Ram Bishen Dutt* v. *Haripada Mukerjee.*
('22) 9 AIR 1922 Cal 284 (285) : 65 Ind Cas 469 (DB), *Manmotha Paul* v. *Mahendra Nath.*
('39) 26 AIR 1939 Cal 692 (696) : ILR (1939) 2 Cal 551:188 Ind Cas 17 (DB), *Suraj Chandra* v. *Behari Lal.*
('23) 10 AIR 1923 Cal 373 (375) : 76 Ind Cas 382 (DB), *Jogendra Krishna Roy* v. *Shafar Ali.*
('07) 3 Nag L R 142 (144), *Yesaji* v. *Ram Krishna.*
('11) 12 Ind Cas 734 (736) : 7 Nag L R 154, *Kashi* v. *Durga.*
('09) 2 Ind Cas 654 (656) (DB) (Cal), *Lal Mahomad Sarkar* v. *Jagir Sheikh Mallick.* (It is doubtful whether the doctrine of merger applies to lands in the mofussil.)
[*See also* ('14) 1 AIR 1914 Cal 618 (620) : 22 Ind Cas 966 (DB), *Hirendra Nath* v. *Hari Mohan.*]
[But see ('25) 12 AIR 1925 Nag 406 (407) : 89 Ind Cas 780, *Kisan* v. *Manwar Sahib.* (Agricultural leases — Union of interests — Merger takes place without reference to intention—Principle of S. 111 applies.)]

8. ('36) 163 Ind Cas 829 (830) (Cal), *Bijoy Singh* v. *Sarat Chandra.* (18 Cal W N 860 followed; A I R 1922 P C 94 : 48 Ind App 485 (PC) explained; 36 Cal 802 dissented.)
('14) 1 AIR 1914 Cal 618 (622) : 22 Ind Cas 966 (DB), *Hirendra Nath* v. *Hari Mohun.*
[But see ('09) 3 Ind Cas 994 (995) : 36 Cal 802 (DB), *Ulfat Hossein* v. *Gayani Doss.*
('14) 1 AIR 1914 Cal 489 (490): 23 Ind Cas 612, *Abdur Karim* v. *Ahammad Ali.* (3 Ind Cas 994 : 36 Cal 802 relied on.)]

There is no merger unless the interests united are co-extensive.[9] It is necessary that the interests of the lessor and the lessee in the *whole* of the property should become vested in the same person in the same right.[10] Thus, a lessee of the entire interest in certain properties acquiring one-eighth interest in the proprietary rights thereof does not cause merger.[11] In other words, the purchase by the tenant of a fractional share of the property does not cause a merger.[12] So also, the taking by the tenant of a usufructuary mortgage of the holding does not effect a merger.[13]

Where a merger takes place, subordinate interests derived from the lessee will also come to an end unless the holder of such subordinate interest can show some equity in his favour.[14]

8. Surrender—General.—A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement.[1] It must be made only to the *lessor*. Where there are more lessors than one, it must be made to *all* of them.[2] Where, to the knowledge of the lessee, the lessor Y has transferred the property to X, the lessee

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9. ('22) 9 AIR 1922 Cal 284 (285) : 65 Ind Cas 469 (DB), *Monmotha Paul* v. *Mahendra Nath.*
('11) 12 Ind Cas 734 (736) : 7 Nag L R 154, *Kashi* v. *Durga.* (Tenant taking a mortgage of the property—No merger.)

10. ('19) 6 AIR 1919 Pat 390 (391) : 53 Ind Cas 16 (DB), *Nathuni Prasad* v. *Anwar Karim.*
('36) 23 AIR 1936 Pat 63 (64) : 160 Ind Cas 1066, *Baijnath Prasad* v. *Muneshwar Singh.* (Cosharer landlord purchasing holding from occupancy tenant — No merger occurs.)
('35) 22 AIR 1935 Lah 522 (523): 157 Ind Cas 997, *Paras Ram* v. *Dharam Chand.* (Lessee mortgaging and then acquiring lessor's rights—No merger.)
('25) 12 AIR 1925 Pat 530 (532, 533) : 88 Ind Cas 495 (DB), *Parmeshwar Singh* v. *Sureba Kuer.* (Where a cosharer landlord purchases the interest of a tenant then unless the purchase is made on behalf of all the cosharers the interests of the lessor and the lessee do not become merged in the purchaser.)

11. ('37) 24 AIR 1937 Mad 398 (399) : 171 Ind Cas 634, *Ramakrishna Rao* v. *Subba Rao.* (AIR 1931 P C 63 : 6 Luck 197 : 58 Ind App 75 (PC) distinguished.)

12. ('31) 18 AIR 1931 P C 63 (64) : 6 Luck 197 : 58 Ind App 75 : 131 Ind Cas 334, *Faqir Baksh* v. *Murlidhar.*
('24) 11 AIR 1924 All 460 (460) : 84 Ind Cas 639, *Mata Ghulam* v. *Sheo Mangal.*
('28) 15 AIR 1928 All 164 (165) : 50 All 479 : 107 Ind Cas 562 (DB), *Mt. Kesar Kuar* v. *Kallu Ram.*
('29) 16 AIR 1929 All 258 (258) : 114 Ind Cas 870, *Niadar* v. *Mahomed Ahmed.*
[*See also* ('15) 2 AIR 1915 Cal 452 (453) : 28 Ind Cas 314 (DB), *Amaloo* v. *Muksud Ali.*]

13. ('19) 52 Ind Cas 236 (236) (All), *Tej Prasad* v. *Ram Jas Pande.* (When a non-occupancy tenant of a holding obtains a mortgage of the holding, his tenancy is in abeyance during the existence of the mortgage.)
('02) 24 All 487 (491) : 1902 All W N 157 (DB), *Kallu* v. *Diwan.*

14. ('06) 2 Nag L R 29 (30), *Sakharam* v. *Madhorao.*

Note 8

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 364.
('96) 9 C P L R 122 (123), *Birdhichand* v. *Kashiram.*

2. ('14) 1 AIR 1914 Nag 84 (86) : 10 Nag L R 93 : 26 Ind Cas 608, *Baijnath* v. *Raghunath.*

Section 111 Note 8

cannot, thereafter validly make a surrender to Y.[3] A tenant of one co-owner cannot make a valid surrender to another co-owner.[4]

A surrender by one of several joint lessees is valid only as to his share.[5] It does not avoid the lease.[6]

Surrender does not affect derivative interests :

It has been seen in Note 1 that the general rule is that the determination of the lease puts an end to all derivative interests from the lessee, but that the exception to the rule is a determination by surrender. A surrender cannot be made so as to prejudice the rights of a third person.[7] This is on the principle that a person cannot derogate from his own grant and also on the principle that two persons cannot enter into any agreement affecting the rights of a third party.[8] In *Doe. dem Beadon* v. *Pyke*[9] Lord Ellenborough said :

> "We consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender, had rights, which such extinguishment would destroy, and that as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered, still has, for the preservation of their right, continuance."

Thus, as is provided for in S. 115 a surrender does not affect the rights of a sub-lessee.[10] Where a valid mortgage has been executed by the lessee, the rights of the mortgagee are not affected by the surrender.[10a]

('21) 8 AIR 1921 Pat 341 (343) : 58 Ind Cas 955, *Babu Ram Prasad* v. *Gopal Chand.* (A tenant is not entitled to make a surrender of the holding to the part proprietors.)

3. ('01) 3 Bom L R 679 (680) (DB), *Ramchandra* v. *Shaikh Hussan.*

4. ('18) 5 AIR 1918 Mad 1152 (1152) : 39 Ind Cas 91 (DB), *Kunni Kathial* v. *Kunhi Sooppi.*

5. ('23) 10 AIR 1923 Rang 151 (152) : 1 Rang 19 : 74 Ind Cas 58 (DB), *Maung Kyaw Dun Zan* v. *Ma Sein.*
('11) 11 Ind Cas 382 (382) (DB) (Cal), *Kubir Munshi* v. *Baikunta Chandra.* (8 Cal W N 315 followed.)
('31) 18 AIR 1931 Nag 159 (160) : 27 Nag L R 116 : 134 Ind Cas 286, *Rindu* v. *Vithoba.* (The surrender of an unascertained and undefined portion of a holding by some of the tenants in favour of the landlord is valid and binding on the parties to it.)

6. ('68) 9 Suth W R 147 (149) (DB), *Mohima Chunder* v. *Pitambur Shaha.*

7. ('99) 12 C P L R 134 (136), *Bhagwangir* v. *Narain Babajee.* (A surrender by a tenant to the malguzar is absolutely void against previous alienations whether properly or improperly made.)
('36) 23 AIR 1936 Nag 171 (174) : 166 Ind Cas 686, *Kanchedilal* v. *Jabbarsha.*
('06) 2 Nag L R 29 (30, 31), *Sakaram Sonar* v. *Madho Rao.*
('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 872, *Govindrao* v. *Sarjabai.*
(1902) 71 L J K B 693 (697) : (1902) 2 K B 304 : 51 W R (Eng) 46 : 87 L T 97, *Walter* v. *Yalden.*

8. Broom, *A Selection of Legal Maxims*, 6th Edn., pp. 166, 653.

9. (1816) 17 R R 296 (299) : 5 M & S 146 : 105 E R 1005.

10. ('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarikanath* v. *Mathuranath.*

10a. *See also* ('14) 1 AIR 1914 Nag 38 (40) : 10 Nag L R 129 : 26 Ind Cas 810, *Tikaram* v. *Ghasiram.*

Section 111 Notes 8–9

Where such mortgage is a usufructuary one, the mortgagee is entitled to remain in possession until redemption.[11] Where the lessor has mortgaged the land and the right to receive the rent, he cannot, on the same principle, accept a surrender of the lease without the concurrence of the mortgagee.[12]

See also the undermentioned case.[13]

9. Express surrender — Clause (e). — To constitute an express surrender, there must be *mutual agreement* between the lessor and the lessee in pursuance of which the lessee *yields up his interest* to the lessor. The requirement of mutual agreement implies that there is a yielding up or relinquishment by the lessee on the one hand and the *acceptance* of it by the lessor on the other. A mere relinquishment or abandonment by the lessee of the holding without acceptance on the part of the lessor is not a surrender.[1] The lessee cannot by merely giving notice of relinquishment get rid of his obligations under the lease. The mere fact that the lessor has received the notice cannot be construed as an assent on his part to the relinquishment.[2] Where, however, the lessor accepts the relinquishment it may amount to an *implied* surrender.[3] It has been held in the undermentioned case[4] that this clause does not apply to cases where the lease contains an express clause that the lessee should not surrender before the expiry of the term. This view does not appear to be correct. The lessee cannot, of course, insist on the lessor accepting the surrender before the expiry of the term, but if the lessor agrees to accept the surrender, there does not seem to be any reason why the clause should not apply.

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11. ('69) 1 N W P H C R 41 (42) (DB), *Sheoumbur Rai* v. *Sheobhung Rai.*
('25) 12 AIR 1925 Cal 1238 (1240) : 85 Ind Cas 757 (DB), *Jogeshchandra Roy* v. *Tazar Ali.* (A surrender by the tenant after transfer does not affect transferee.)
('11) 9 Ind Cas 217 (217) : 33 All 335 (DB), *Chhote Lal* v. *Sheopal Singh.* (An occupancy tenant, after mortgaging his holding with possession, has no power to relinquish it in favour of the zamindar.)
('23) 10 AIR 1923 All 295 (295) : 71 Ind Cas 991 (DB), *Rama Khelawan* v. *Brij Lal.*
('11) 10 Ind Cas 307 (308) (DB) (Cal). *Issur Behara* v. *Kashi Nath Panda.*
('70) 5 Mad H C R 120 (123) (DB), *Venkataramanier* v. *Ananda Chetty.*
[*See also* ('08) 4 Nag L R 57 (59), *Bali Ram* v. *Ram Rao Mahratta.*]

12. ('30) 17 AIR 1930 Bom 329 (330) : 125 Ind Cas 689 (DB), *Havu Ravlu* v. *Ganapati Venkataraman.*
(1906) 75 L J K B 38 (41): (1906) 1 K B 125: 94 L T 287: 54 W R (Eng) 105: 22 T L R 206, *Robbins* v. *Whyte.*

13. ('17) 4 AIR 1917 Nag 86 (87) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram.* (Implied surrender under S. 35 (4), C. P. Tenancy Act, is equivalent to forfeiture and will extinguish interests derived from lessee.)

Note 9

1. ('16) 3 AIR 1916 Cal 454 (455) : 33 Ind Cas 98, *Sakayat Mollah* v. *Alam Mollah.*
2. ('92) 15 Mad 67 (68) : 2 Mad L Jour 13 (DB), *Krishna* v. *Lakshminaranappa.*
('83) 9 Cal 671 (677) : 12 Cal L R 343 (DB), *Judoonath Ghose* v. *Schoene Kilburn & Co.*
('73) 20 Suth W R 383 (383) (DB), *Heera Lall Pal* v. *Neel Monee Pal.*
3. See Note 10.
4. ('09) 2 Ind Cas 633 (633) (DB) (Cal), *Maharaja Sir Jotindra Mohun Tagore* v. *Emam Ali.*

Section 111
Notes 9–10

The requirement as to the yielding up of the lessee's interest implies that the lessee must give up possession of the holding. A relinquishment without giving up possession is not a valid surrender.[5] Where a lease provided that the lessee may surrender any portion, or the whole of the property, and the lessee, by a written notice purported to surrender a portion of the property, but nevertheless continued in possession of a part of such portion, it was held that the surrender is not valid in law and could not be treated as valid to the extent to which possession was given up.[6] Where a lease for 999 years provided for the surrender of the lease by six months' notice by the lessee, and the lessee gave such notice and vacated the land demised, it was held by their Lordships of the Privy Council that the surrender was properly made.[7]

A surrender need not be in writing[8] nor need it be in any particular form of words. But where the original lease is by a registered instrument, a surrender of a portion of the lease with an abatement of rent can be effected only by a registered instrument, inasmuch as such surrender effects a variation of the contract of tenancy embodied in a registered instrument.[9]

A conditional surrender will operate only on the performance of the condition.[10]

10. Clause (f)—Implied surrender. — This kind of surrender is, in English law, known as surrender by operation of law. It is applied to cases where the owner of a particular estate (e. g., a lease) has been

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5. *See* ('32) 19 AIR 1932 Oudh 79 (79) : 136 Ind Cas 333 : 7 Luck 425 (DB), *Amar Nath* v. *Har Prasad.*

6. ('99) 26 Cal 29 (37) : 25 Ind App 210 (PC), *Ramchurn Singh* v. *Raniganj Coal Association.*

7. ('18) 5 AIR 1918 P C 125 (128) : 46 Cal 552 : 45 Ind App 275 : 52 Ind Cas 909 (PC), *Durga Prashad Singh* v. *Tata Iron Steel Co., Ltd.*

8. ('19) 6 AIR 1919 Pat 13 (14) : 49 Ind Cas 504 (DB), *Jagadamba Prasad* v. *A. V. Sham.*

('90) 13 Mad 124 (127) (DB), *Narasimma* v. *Lakshmana.*

('21) 63 Ind Cas 483 (484) (DB) (Cal), *Gopal Chandra Das* v. *Harendra Nath Datta.*

('13) 19 Ind Cas 124 (125) (DB) (Cal), *Jangli Rai* v. *Ghura Rai.* (It need not be by a registered deed.)

('19) 6 AIR 1919 Cal 840 (840) : 53 Ind Cas 17 (DB), *Abdul Majid* v. *Hari Charan Haldar.* (Registered instrument not necessary.)

('19) 6 AIR 1919 Cal 694 (695) : 44 Ind Cas 297 (DB), *Bengal Coal Co.* v. *Monoranjan.*

('18) 5 AIR 1918 Cal 233 (233) : 46 Ind Cas 100 (DB), *Brojonath Sarma* v. *Mahewar Gahani.*

('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*

('02) 25 All 77 (79) : 1902 All W N 201, *Waris Khan* v. *Daulat Khan.*

[*See also* ('01) 28 Cal 256 (259) : 5 Cal W N 351 (DB), *Khankar Abdur Rahman* v. *Ali Hafez.*]

[But see ('36) 23 AIR 1936 Cal 774 (779) : 167 Ind Cas 124 (DB), *Secy. of State* v. *Krishna Prosad.* (Surrender must be by registered document where value of interest is more than Rs. 100.)]

9. ('21) 63 Ind Cas 483 (484) (DB) (Cal), *Gopal Chandra Das* v. *Harendra Nath Datta.*

('25) 12 AIR 1925 Nag 459 (460) : 87 Ind Cas 29, *Narbadji* v. *Gopal.*

10. ('33) 20 AIR 1933 Pat 446 (448) : 144 Ind Cas 946, *Jagatbandhu* v. *Shayam Chand.*

Section 111
Note 10

a party to some act having some other object than that of a surrender, but which cannot be effected whilst the particular estate continues, and the validity of which act he is, by law, estopped from disputing.[1] The surrender, in such a case, is an act of the law and takes place independently of, and even in spite of, the intention of the parties.[2]

By acceptance of a new lease :

The illustration to the section is an instance of implied surrender. The acceptance of a new lease during the continuance of the old lease operates as a surrender in law, of the old lease.[3] The reason is, as pointed out by Parke, B., in *Lyon* v. *Reed*,[4] that :

> "If the lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is, of itself, a surrender of the former."

But, for this principle to apply, it is necessary that there must be an *incompatibility* between the enjoyment under the prior and that under the subsequent lease.[5] Thus, the subsequent grant, to the lessee of land for cultivation of coffee, of mining rights in such land does not imply a surrender of the lease for coffee cultivation.[6] The execution of a *kabuliat* by the tenant merely recognising an already existing right is not implied surrender of the old tenancy and the creation of a new one.[7] Such confirmatory *pattas* are very common in this country.[8]

It is also necessary, for the new lease to operate as a surrender of the old one, that the new lease is operative. If the new lease is void or voidable[9] or does not pass an interest according to the contract or

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Note 10

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 370.
2. (1825) 28 R R 505 (514) : 4 L J K B 71, *Johnstone* v. *Hudlestone*.
3. ('39) 26 AIR 1939 Pat 598 (601) : 18 Pat 317 : 183 Ind Cas 56 (DB), *Upendra Singh* v. *Meghnath Singh*.
(1843) 134 E R 1063 (1066) : 13 L J C P 11: 64 R R 838, *Dodd* v. *Acklom*. (Even if the new lease is an oral one and the old lease is one by deed.)
('34) 21 AIR 1934 All 787 (789): 152 Ind Cas 180 (DB), *Tika Ram* v. *Sri Thakur Dooji Maharaj*.
4. (1844) 67 R R 593 (609) : 13 L J Ex 377 : 153 E R 118.
5. Woodfall, *Landlord and Tenant*, 22nd Edn., pages 368, 369.
('25) 12 AIR 1925 Mad 1277 (1277, 1278) : 48 Mad 815 : 90 Ind Cas 729 (DB), *Manavedan Thirumalpad Avergal* v. *Parry Co*.
6. ('25) 12 AIR 1925 Mad 1277 (1277, 1278) : 48 Mad 815 : 90 Ind Cas 729 (DB), *Manavedan Thirumalpad Avergal* v. *Parry Co*.
7. ('04) 32 Cal 51 (60) : 31 Ind App 149 (PC), *Nilratan Mandal* v. *Ismail Khan Mahomed*.
('04) 32 Cal 41 (50) : 31 Ind App 144 (PC), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed*.
[*See also* ('69) 1 N W P H C R 149 (149) (DB), *Dirgani Singh* v. *Foorsut*. (A tenant with a right of occupancy does not lose that right merely by making an arrangement to pay a certain rent for his holding for a certain number of years.)
8. ('73) 19 Suth W R 353 (355) (PC), *Ram Chunder Dutt* v. *Jugheschunder Dutt*.
9. Woodfall, *Landlord and Tenant*, 22nd Edn., page 369.
('24) 11 AIR 1924 Cal 355 (356): 71 Ind Cas 976 (DB), *Jamini Mohan* v. *Debendra Narayan*.

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intention of the parties,[10] it does not operate as an implied surrender of the old lease. The reason is, that, in such cases, a condition is implied by law making void the surrender in case the new lease is inoperative.[11] Thus, a fresh lease by a Hindu widow for a fixed rent to the lessee under an earlier lease for a variable rent by the last male owner, does not operate as a surrender of the old lease inasmuch as her lease is a transaction voidable at the option of the reversioners.[12]

Where there is no actual demise by way of a new lease, a mere agreement to grant a new lease in the future[13] or an agreement for a change in the rent payable[14] or the acceptance of payment of rent from a person who has acquired an interest in the lease under an agreement with the tenant with the assent of the landlord,[15] does not operate as an implied surrender.

The taking of a new lease of a *part* of the lands covered by the old lease operates as an implied surrender of the old lease as to that part only. The lease for the residue will stand good and untouched.[16]

Though the taking of a new lease will be an implied surrender of the old lease, it will not affect the validity of the acts done under the old lease.[16a]

Relinquishment by tenant :

A mere non-payment of rent does not constitute an implied surrender.[17] So also a mere relinquishment of the tenancy does not operate as a surrender, but if it is accepted by the lessor by taking over possession, it amounts to an implied surrender.[18] If the key of the

('10) 7 Ind Cas 253 (254) (DB) (Mad), *Chirakkal Kovilagath* v. *Saidammadath Aya Komba.*

(1805) 102 E R 1219 (1226) : 6 East 86 : 2 Smith 166 : 8 R R 413, *Roe* v. *Archbishop of York.*

10. (1846-48) 17 L J Q B 151 (153) : (1846-48) 11 Q B 702 : 75 R R 600, *Doe* v. *Courtenay.*

('24) 11 AIR 1924 Cal 355 (356) : 71 Ind Cas 976 (DB), *Jamini Mohan* v. *Debendra Narain.*

11. (1846-48) 17 L J Q B 151 (153) : (1846-48) 11 Q B 702 : 75 R R 600, *Doe* v. *Courtenay.*

12. ('24) 11 AIR 1924 Cal 355 (356): 71 Ind Cas 976 (DB), *Jamini Mohan Sarkar* v. *Debendra Narain Singh.*

13. Woodfall, *Landlord and Tenant*, 22nd Edition, page 367.

14. (1844) 13 L J Q B 239 (240): (1844) 5 Q B 841 : 64 R R 664, *Doe* v. *Gee Kie.*

15. ('10) 6 Ind Cas 766 (770) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*

16. Woodfall, *Landlord and Tenant*, 22nd Edn., page 370.

(1844) 67 R R 614 (638) : 14 L J Ex 233, *Earl of Carnarvon* v. *Villebois.*

16a. ('38) 25 AIR 1938 Nag 377 (384) : 181 Ind Cas 126 : I L R (1939) Nag 432 (DB), *Mulji Sickka & Co.* v. *Nurmohammad.*

17. ('96) 18 All 290 (294): 1896 All W N 56 (DB), *Mazhar Rai* v. *Ramgat Singh.* [*See also* ('79) 4 Cal 314 (318) : 3 Cal L R 119 (DB), *Rungo Lall Mundul* v. *Abdul Guffoor.* (Mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist.)]

18. ('39) 26 AIR 1939 Oudh 257 (267) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.*

('08) 7 Cal L Jour 309 (311) (DB), *Hanuman Prasad Singh* v. *Deo Charan Singh.* [*See also* (1864) 1864 Suth W R (Gap) 270 (271) (DB), *Chundermonee Nya Bhoosun* v. *Sumbhoo Chunder Chuckerbutty.*

premises is handed over to the lessor and is accepted by him as a symbol of possession, there is an implied surrender.[19] But if it is not accepted as a token of relinquishment of possession there is no implied surrender. Thus, where keys are left in the office of the lessor who is unable to return them to the lessee not being able to find him, there is no surrender.[20]

Tenant becoming a servant :

Where the lessee of a ferry finding his lease unprofitable accepted the position of a servant under the lessor for looking after the ferry for him, it was held that there was an implied surrender of the lease.[21]

11. Clause (g)—Forfeiture—General.—The word "forfeiture" implies the loss of a legal right by reason of some breach of obligation.[1] Clause (g) provides that a lease will determine by forfeiture in three cases —

(1) on breach of an express condition where a right of re-entry is provided for on such breach,

(2) on denial of the lessor's title by the lessee, and

(3) on the insolvency of the lessee where the lease provides, on such contingency, for a right of re-entry.

It may be noted that there can be no forfeiture in the first and third cases unless a *right of re-entry* is provided for. This qualification is not necessary in the second case.

It is also necessary before a lease can determine in any of these three cases that the lessor must give a notice in writing to the lessee of his intention to determine the lease. Under the clause as it stood prior to the amendment of 1929, a notice in writing was not necessary, but the lessor was to do *some act* showing his intention to determine the lease. The reason is that a determination by forfeiture of a lease being the result of the wrongful act or omission of the lessee, it should not be at his option to determine the lease by his own wrongful act, the general principle being that no man can be allowed to take advantage of his own wrong.[2]

('75) 24 Suth W R 344 (344), *Ram Chung* v. *Gora Chand Chung.*
('26) 93 Ind Cas 86 (87) (DB) (Cal), *Prosanna Kumar De* v. *Ananda Chandra Bhattacharjee.*
('95) 8 C P L R 45 (47), *Balkrishna* v. *Krishna Rao.*
('66) 6 Suth W R 67 (68) (DB), *Muneeruddeen* v. *Mahomed Ali.*
(1865) 2 Suth W R 137 (138) (DB), *Shooden Kurmakar* v. *Ram Churn Pal.*]

19. (1892) 9 T L R 77 (77), *Smith* v. *Roberts.*
(1860) 125 R R 749 (756) : 30 L J C P 3, *Furnivall* v. *Grove.*
(1814) 15 R R 579 (580) : 5 Taunt 518, *Whitehead* v. *Clifford.*

20. (1885) 1 T L R 267 (268), *Smith* v. *Black More.*
[*See also* (1850) 137 E R 1040 (1042, 1043) : 19 L J C P 323 : 82 R R 478, *Cannan* v. *Hartley.* (Merely leaving keys with lessor does not amount to surrender unless lessor accepts them as symbol of possession.)]

21. (1827) 108 E R 610 (612) : 5 L J K B 282 : 30 R R 504, *Peter* v. *Kendal.*

Note 11

1. ('06) 30 Bom 466 (472): 8 Bom L R 360 (DB), *Amolak* v. *Dhondi.*

2. Woodfall, *Landlord and Tenant*, 22nd Edn., pages 389, 390.

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Note 11

The law "abhors a forfeiture"[3] and the Courts both in England and in India lean strongly against forfeiture,[4] so that if the plaintiff comes to a Court relying on forfeiture, he must prove his right strictly;[5] this clause should not be extended to cases not strictly covered by it.[6]

But, though the law abhors a forfeiture, a covenant or condition entailing a forfeiture on breach thereof must, according to English cases,[7] be construed fairly according to the intention of the parties. In *Goodtitle* v. *Salville*,[8] Lord Ellenborough, C. J., said :

> "In the construction of covenants of this sort, they are neither entitled to favour nor disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction upon them, according to the apparent intention of the contracting parties."

In the undermentioned cases,[9] however, it has been held that covenants,

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3. (1845) 66 R R 611 (615): (1845) 6 Q B 953 : 14 L J Q B 189 : 9 Jur 508, *Doe D Muston* v. *Gladwin.*

4. (1864) 1864 Suth W R, Act X Rul, 31 (32) (DB), *Alumchunder Shaw* v. *Messrs. William Moran.*
('34) 21 AIR 1934 All 103 (105) : 149 Ind Cas 517, *Madho Lal* v. *Lal Bahadur Singh.* (Doctrine must be applied with the utmost possible precaution.)
('19) 6 AIR 1919 Mad 897 (899) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Anga Gurusami Chetti.* (Do.)
('16) 3 AIR 1916 Mad 652 (653): 31 Ind Cas 184 (DB), *Raman Nayar* v. *Kannoth.* (Assertions of title as owner by a person having rights in land of a very substantial kind should not be treated as denial of landlord's title so as to work a forfeiture of the tenant's right.)

5. ('03) 5 Bom L R 1016 (1019) (DB), *Chhabildas* v. *Krishnarao.*
('14) 1 AIR 1914 Cal 850 (851): 24 Ind Cas 354 (DB), *Nabakumar Datta* v. *Trailokya Nath Bose.*
('25) 12 AIR 1925 Cal 1212 (1213, 1214): 87 Ind Cas 657 (DB), *Golam Rabbani* v. *Tara Nath.*
('75) 23 Suth W R 10 (11), *Ram Nursingh* v. *Dwarkanath.* (It is not proper to extend a condition of forfeiture beyond the words in which it is expressed.)
('81) 7 Cal 470 (473): 9 Cal L R 260 (DB), *Reasut Hossein* v. *Charawar Singh.*
('26) 13 AIR 1926 Mad 1202 (1202): 50 Mad 331: 98 Ind Cas 1070, *David Cutinha* v. *Salvadora Minazes.*
('33) 20 AIR 1933 Cal 890 (891): 60 Cal 1110: 147 Ind Cas 1220, *Nripendra Bhooshan* v. *Jogendra Nath.*
[*See also* Marsh 474 (475), *Lall Lutchmee Pershad* v. *Bhoodhun Singh.*]

6. ('19) 6 AIR 1919 Mad 886 (887) : 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha Aiyangar.*
(1808) 33 E R 752 (755): 15 Ves 258: 10 R R 74, *Church* v. *Brown.*

7. Woodfall, *Landlord and Tenant*, 22nd Edn., page 384.
(1845) 66 R R 611 (615): 6 Q B 953 : 9 Jur 508: 14 L J Q B 189, *Doe D Muston* v. *Gladwin.*
(1858) 10 E R 1459 (1468): 6 H L C 672 : 27 L J Q B 321 : 108 R R 252 : 6 W R (Eng) 523: 5 E & B 648: 4 Jur (N S) 903, *Croft* v. *Lumley.*
(1828) 173 E R 1126 (1127) : Mood & M 189 : 31 R R 729, *Doe D Davis* v. *Elsam.*

8. (1812) 104 E R 1022 (1025): 16 East 87: 14 R R 305.

9. ('25) 12 AIR 1925 Mad 57 (58) : 81 Ind Cas 1006, *Venkatramana Bhatta* v. *Krishna Bhatta.*
('37) 24 AIR 1937 Cal 636 (637): 173 Ind Cas 578 (DB), *Keshab Chandra* v. *Gopal Chandra.*
('35) 22 AIR 1935 Mad 163 (165) : 58 Mad 378 : 154 Ind Cas 445 (DB), *Raman Menon* v. *Malabar Forest & Rubber Co., Ltd.*

the breach of which entails forfeiture, are always to be strictly construed *against the lessor*. This does not appear to be in consonance with the English law.

Before this clause can be applied it must be established that there was a lease. Where this is not established, no question of forfeiture under this clause can arise.[10]

Where all the conditions of this clause are satisfied, the lease is determined and the lessor is entitled to eject the lessee, unless the forfeiture has been waived or relieved against. It has, however, been observed in the undermentioned case[11] that ejectment is a matter of *discretion* of the Court in such a case. It is submitted that this is not correct unless the decision can be assumed to mean a discretion to grant relief against the forfeiture.

A lease cannot be determined in *part*, by forfeiture.[12]

12. Forfeiture — Permanent lease. — A permanent lease is liable, like any other lease, to be forfeited on breach of a condition which provides that on breach thereof the lessor may re-enter[1] or on the ground of denial of title.[2]

13. Forfeiture for breach of condition. — Under the English law, a lease may be determined for a forfeiture incurred either by —

(1) breach of a *condition* in the lease or,

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10. ('36) 23 AIR 1936 All 385 (386) : 160 Ind Cas 866 (DB), *Kanhaya Lal* v. *Abdullah.*

11. ('28) 15 AIR 1928 All 716 (717) : 110 Ind Cas 872, *Bhagwati Prasad* v. *Peglar.*

12. ('36) 23 AIR 1936 Mad 252 (255): 168 Ind Cas 1005, *Soorayya* v. *Sooranna.*
('82) 4 All 174 (176) : 1881All W N 140 (DB), *Bholai* v. *Rajah of Bansi.*

Note 12

1. ('83) 7 Bom 256 (260) (DB), *Vyankatraya* v. *Shivram Bhat.* (Condition against alienation.)
('83) 7 Bom 262 (265) (DB), *Tamaya* v. *Timapa.* (Do.)
[*See* ('09) 4 Ind Cas 449 (451) : 36 Cal 1003 : 36 Ind App 148 (P C), *Abhiram Goswami Mohant* v. *Shyama Charan Nandi.* (24 Cal 440 (447) approved.)]

2. ('30) 17 AIR 1930 All 479 (481) : 130 Ind Cas 638 (DB), *Ramji Lal* v. *Shib Charan Das.*
('97) 24 Cal 440 (448) : 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.*
('33) 20 AIR 1933 Lah 221 (222) : 13 Lah 796 : 141 Ind Cas 825 (DB), *Mela Ram* v. *Sandhi Khan.*
('10) 6 Ind Cas 1010 (1010) (Lah), *Jalal Din* v. *Ramzan.*
('17) 4 AIR 1917 Cal 86 (87) : 42 Ind Cas 673 (DB), *Annada Charan* v. *Mohin Chandra.*
('17) 4 AIR 1917 Cal 236 (239) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.*
('98) 2 Cal W N 292 (294) (SB), *Sreemutty Monmohini Dassi* v. *Kallidas Ahiri.*
('19) 6 AIR 1919 Mad 266 (268) : 51 Ind Cas 709 (DB), *Vencatachariar* v. *Ranga-swami Aiyangar.*
('19) 6 AIR 1919 Mad 897 (899) : 46 Ind Cas 62 (DB), *Rama Iyangar* v. *Guru-swami.*
('16) 3 AIR 1916 Pat 417 (418) : 35 Ind Cas 544 : 1 Pat L Jour 157, *Bidya Nath* v. *Khikhinda Koer.*

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(2) for breach of a *covenant* in case, and, in case only, the lease contains a proviso for re-entry for a breach of such covenant.[1]

A breach of a *condition* will, under the English law, entail a forfeiture even though there is no express clause for re-entry.[2] In this country before the Act was passed, it was held that there was no forfeiture, even in the case of a *condition*, unless there was a proviso for re-entry on its breach.[3]

This clause also does not recognise the above distinction in English law. It speaks only of *conditions* and not *covenants* and further provides that there would be a forfeiture only if the condition provides that on breach thereof the lessor may re-enter. It has, however, been regarded generally as not limited to " conditions " in the strict sense in which the word is used in the English law, but as applying to all cases whether conditions or covenants, if there is a proviso for re-entry on breach thereof. The proviso for re-entry indeed converts, what would otherwise be a mere covenant, into a condition.

Even in cases not governed by the Act, it has been held as a general principle, that unless there is a proviso for re-entry, a breach of a condition or covenant will not entail a forfeiture.[4]

A forfeiture for breach of a condition will take place under this section only—

(a) if the condition is *express*, and

(b) the condition provides that the lessor may re-enter on breach thereof.[5]

Under the section as it stood prior to its amendment in 1929, the words " or the lease shall become void " occurred after the words " on breach thereof the lessor may re-enter." This was based on a distinction which had, at one time, been recognised in England between a clause

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Note 13

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 382.

2. (1828) 6 L J (O S) K B 185 (186, 187) : 8 B & C 308 : 1 Man & Ry 694 : 32 R R 393, *Doe D Henniker* v. *Watt.*

3. (1864) 1864 Suth W R (F B) 9 (9) (FB), *Gordon Stuart & Co.* v. *Taylor.*
(1865) 2 Suth W R Act X Rul 101 (101, 102) (DB), *Augur Singh* v. *Mohinee Dutt Singh.*

4. ('08) 1908 Pun Re No. 53:1908 Pun W R No. 106, *Miran Baksh* v. *Aziz Baksh.*
('14) 1 AIR 1914 Lah 472 (472) : 1914 Pun Re No. 33 : 23 Ind Cas 395, *Allah Ditta* v. *Faraz Bihi.*
('29) 16 AIR 1929 Oudh 529 (532, 533) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.*
('18) 5 AIR 1918 Oudh 300 (301) : 46 Ind Cas 73, *Deputy Commissioner, Sitapur* v. *Muhammad Amir.*
('20) 55 Ind Cas 518 (519) (DB) (Oudh), *Fateh Bahadur Singh* v. *Nagendra Bahadur Singh.*
('12) 15 Ind Cas 385 (387):15 Oudh Cas 91 (DB), *Alimohammad Khan* v. *Chhedan.*

5. ('14) 1 AIR 1914 Cal 850 (851) : 24 Ind Cas 354 (DB), *Nabakumar Datta* v. *Trailokya Nath Bose.*
('19) 6 AIR 1919 Cal 1028 (1029) : 46 Ind Cas 507 (DB), *Khirode Chandra* v. *Midnapore Zemindary Co., Ltd.* (No provision for re-entry — No forfeiture.)

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for re-entry and a clause of nullity, namely, that a forfeiture in the former case could be relieved against but a forfeiture in the latter case could not.[6] Even in England, such a distinction was not recognised in later cases.[7] A lease providing that on breach of a condition, it shall become void was held only to be a *voidable* transaction[8] the reason being that the lessee could not be allowed to free himself, by reason of his own wrongful act, from his obligation.[9] Further, S. 114 provided for relief against forfeiture irrespective of the fact whether there was a clause for re-entry or a clause for nullity on breach of the condition. The words "or the lease shall become void" have been removed by the amendment of the section in 1929 as they served no useful purpose.

The condition, in order to effect a forfeiture, must be a *valid* one. In *Maharajah of Jeypore* v. *Rukmini*,[10] it was held by their Lordships of the Privy Council that the breach of a condition of attendance by the lessee on the lessor on ceremonial occasions did not operate to cause a forfeiture.

What is meant by an "express condition" is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument, giving to them their ordinary meaning so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them.[11]

Condition against alienation :

Section 10 provides that a condition against alienation in a lease is valid *if it is for the benefit of the lessor* or those claiming under him. Under this clause even a valid condition against alienation will not operate to cause a forfeiture or render the alienation in breach of it inoperative, unless there is a proviso for re-entry by the lessor for the breach of the condition.[12] This clause has no application to tenures one

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6. ('22) 9 AIR 1922 Pat 528 (529): 69 Ind Cas 886: 1 Pat 363 (DB), *Hiranandhan Ojha* v. *Ramdhar Singh.*

7. ('22) 9 AIR 1922 Pat 528 (528, 529) : 1 Pat 363 : 69 Ind Cas 886 (DB), *Hiranandhan Ozha* v. *Ramdhar Singh.*

8. (1841) 66 E R 969 (977) : 90 R R 879 : 1 Hare 109 : 11 L J Ch 132 : 5 Jur 1106, *Bowser* v. *Colby.*
(1836) 150 E R 490 (493) : 1 M & W 402 : Tyr & G 769 : 5 L J (N S) Eq 185 : 46 R R 326, *Doe D. Nash* v. *Birch.*
(1877) 47 L J P C 8 (16) : 3 App Cas 115 : 37 L T 727, *Davenport* v. *The Queen.*

9. (1821) 106 E R 984 (986) : 4 B & Ald 401 : Gow N P 220 : 23 R R 318, *Doe D Bryan* v. *Bancks.*

10. ('19) 6 AIR 1919 P C 1 (5) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC).

11. ('10) 8 Ind Cas 309 (310) (DB) (Mad), *Mussa Kutti* v. *Rangachariar.*

12. ('06) 28 All 400 (401): 3 All L Jour 196 (DB), *Netrapal Singh* v. *Kalyan Das.*
('05) 9 Cal W N 56 (60), *Nadhu Mandal* v. *Kartick Mandal.*
('19) 6 AIR 1919 Cal 405 (405) : 52 Ind Cas 19, *Nishi Kanta Dutta* v. *Shassi Kanta.*
('90) 17 Cal 826 (827) (DB), *Nil Madhab Sikdar* v. *Narattam Sikdar.*
('03) 26 Mad 157 (161) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga.*
('71) 16 Suth W R 103 (104) (DB), *Mahomed Faez* v. *Shib Doolaree.*

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of the *incidents* of which is that it is transferable or to tenures one of the incidents of which is that it is not transferable. An alienation will not cause a forfeiture in the former case[13] while in the latter case, a transfer will put an end to the tenure though no right of re-entry is reserved.[14]

A condition against alienation means a condition against alienation by *act of parties* and not one by operation of law or by or in execution of a decree.[15]

A condition against alienation is not broken by an alienation of a *part* of demised premises[16] or by an alienation by only one of several lessees,[17] though, where the share of each tenant is specified, the landlord may re-enter on the share of the person alienating but not on the shares of the others.[18] A condition against an assignment is not broken by a sub-demise of the lease by way of mortgage.[19] A condition against

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('09) 2 Ind Cas 416 (416) : 36 Cal 745 (DB), *Basarat* v. *Manirulla.*

('20) 7 AIR 1920 Mad 1006 (1008) : 43 Mad 503 : 61 Ind Cas 658 (DB), *Udipi Seshagiri* v. *Seshamma.*

('29) 16 AIR 1929 Cal 228 (229) : 116 Ind Cas 153 (DB), *Khetra Nath* v. *Baharali.* (Where a lessor does not reserve to himself the right of re-entry on breach of a covenant against alienation, the lessor cannot sue the holder of the lease hold for recovery of possession on the breach of the condition.)

('21) 8 AIR 1921 Cal 474 (476) : 47 Cal 979 : 60 Ind Cas 984 (DB), *Jogesh Chandra Ray* v. *Mokbul Ali.*

[But see ('97) 21 Bom 195 (197) (DB), *Madar Saheb* v. *Sannabawa Gajaransha.* (*Obiter* — Condition against alienation does not require express right of re-entry in the event of breach.)]

13. ('25) 12 AIR 1925 Mad 914 (914) : 86 Ind Cas 294, *Krishnan Nambudripad Kunkan Nair.* (Karam kozhu tenure—AIR 1922 Mad 290 and AIR 1922 Mad 274 : 45 Mad 394 (FB) followed.)

14. ('11) 12 Ind Cas 1007 (1008) : 36 Mad 380 (DB), *Achutha Menon* v. *Sankaran Nair.* (Karamkari tenure.)

('21) 8 AIR 1921 Oudh 13 (13) : 61 Ind Cas 945, *Jagmohan* v. *Deputy Commissioner, Partabgrah.*

15. ('90) 12 All 192 (197) : 1890 All W N 71 (DB), *Re West Hopetown Tea Co.*

('93) 20 Cal 273 (278) (DB), *Golak Nath* v. *Mathura Nath.* (Sale in execution.)

('22) 9 AIR 1922 Cal 96 (97) : 70 Ind Cas 81 (DB), *Monmatha Nath* v. *Chunilal.* (A condition in a lease restraining transfer is not applicable to a case of involuntary transfer.)

(1798) 101 E R 1264 (1267) : 8 T R 57 : 4 R R 586, *Doe d. Mitchinson* v. *Carter.* (Sale *in invitum.*)

(1815) 105 E R 644 (646) : 3 M & S 353 (369) : 16 R R 293, *Doe d. Goodbehere* v. *Bevan.*

16. ('37) 24 AIR 1937 Cal 636 (637) : 173 Ind Cas 578 (DB), *Keshab Chandra* v. *Gopal Chandra.*

('97) 24 Cal 152 (154) (DB), *Bansi Das* v. *Jagdip Narain.* (20 Cal 590 followed.)

('32) 19 AIR 1932 Cal 787 (788) : 60 Cal 47 : 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Ajeraddi.* (Usufructuary mortgage of part of holding.)

17. ('14) 1 AIR 1914 All 305 (306) : 24 Ind Cas 79, *Kundanlal* v. *Kallu.*

18. ('36) 23 AIR 1936 Pat 450 (455) : 15 Pat 680 : 164 Ind Cas 358 (DB), *Pancham Singh* v. *Promotha Nath.*

19. ('28) 15 AIR 1928 Cal 99 (101) : 54 Cal 948 : 110 Ind Cas 296, *Bejoy Lal* v. *Benarasidas.*

('28) 15 AIR 1928 Cal 681 (683) : 114 Ind Cas 786 (DB), *Bejoy Lal* v. *Benarsidas.* (Assignment means parting with whole interest.)

('26) 13 AIR 1926 Mad 1202 (1202) : 50 Mad 331 : 98 Ind Cas 1070, *David Cutinha* v. *Salvadora.*

sub-letting is not broken by the letting of *lodgings*[19a] or by letting part of the premises.[19b] Nor is a condition against alienation broken by an alienation which is not valid and operative.[20]

Non-payment of rent :

The due payment of rent may be an express condition in the lease, a breach of which may cause a forfeiture.[21] There must, in this case also, as in the case of other conditions causing a forfeiture, be a provision for re-entry on breach of such condition.[22] Under the English common law, it was necessary for the lessor before he could claim forfeiture for non-payment of rent, to demand the rent on the exact day on which the forfeiture accrued at the proper place of payment and at a convenient hour before sunset.[23] This rule does not apply in this country.[24]

Breach of condition by lessor:

The act does not provide for the determination of a lease for a term by the *lessee* for breach of a condition by the lessor. The lessee cannot therefore avoid a lease for a breach of a covenant by the lessor e.g. to have a latrine constructed, a well sunk, and a room upstairs built.[25]

14. Forfeiture for denial of title. — The law as to forfeiture of a lease by denial of the lessor's title is not the ancient law of India but has been adopted from the law of England[1] and was applied even before the enactment of this Act[2] on the ground that the rules of

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('25) 12 AIR 1925 Mad 57 (58) : 81 Ind Cas 1006, *Venkataramana Bhatta* v. *Krishna Bhatta.*

19a. (1814) 171 E R 24 (25) : 4 Camp 73 (77) : 15 R R 728, *Doe d. Pitt* v. *Laming.*

19b. (1906) 22 T L R 233 (233), *Wilson* v. *Rosenthal.*

20. ('38) 25 AIR 1938 P C 20 (22) : 65 Ind App 45 : 17 Pat 69 : 32 Sind L R 276 : 172 Ind Cas 443 (P C), *Secretary of State* v. *Kuchwar Lime and Stone Co. Ltd.* (Alienation inoperative for want of registration.)
('36) 23 AIR 1936 Pat 372 (377) 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime and Stone Company, Ltd.* v. *Secretary of State.*

21. ('35) 156 Ind Cas 351 (352) (All), *Narain Das* v. *Permanand.*

22. ('72) 18 Suth W R 244 (244) (DB), *Ruhmoonissa* v. *Soopun Jan.*
('35) 22 AIR 1935 Lah 863 (865) : 159 Ind Cas 1019 (DB), *Bhagwan Das* v. *Ghulam Mohammad.*
('21) 8 AIR 1921 Nag 10 (11) : 17 Nag L R 205 : 62 Ind Cas 850, *Mahadeo* v. *Jainarayan.*

23. (1826) 172 E R 111 (111) : 2 C & P 245, *Doe d. Chandless* v. *Robson.*
('67) 2 Agra Ext O. C. J. 1 (11), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*

24. ('67) 2 Agra Ext O. C. J. 1 (11, 12), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*

25. ('25) 12 AIR 1925 Mad 833 (834) : 87 Ind Cas 10, *Govindaswami* v. *Palaniappa.*

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1. ('19) 6 AIR 1919 P C 1 (3) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jaypore* v. *Rukmani.*

2. ('19) 6 AIR 1919 P C 1 (3): 46 Ind App 109: 42 Mad 589: 50 Ind Cas 631 (PC), *Maharaja of Jaypore* v. *Rukmani.*
(1865) 2 Mad H C R 109 (110) (DB), *Mayavanjari Chumaren* v. *Nimini Mayuran.*

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forfeiture in England were in consonance with justice, equity and good conscience.[3]

Under the English law, it is only a tenancy for *a term of years* that is *forfeited* by a denial or disclaimer by the tenant of the landlord's title. A disclaimer of the landlord's title in the case of a tenancy *from year to year* operates to put an end to the tenancy, not by forfeiture, but as evidence of an election to put an end to the tenancy and supersede the necessity of a notice to quit.[4] This Act, while importing the general doctrine of English law of forfeiture by denial of title by the tenant does not recognise the above distinction between a lease for a *term of years* and other leases, as regards forfeiture.[5]

The landlord's right of forfeiture arising from disclaimer of title is no part of the contract of tenancy but is a right which the law implies in all cases from the relation of landlord and tenant.[6]

In order to constitute a disclaimer of title there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold the estate on a ground wholly inconsistent with the existence of such relation, which, by necessary implication is a repudiation of it.[7] A disclaimer is thus a renunciation by the party of his character of tenant either by setting up a title in another, or by claiming title in himself,[7a] and the denial must be by clear and unambiguous words,[8] and

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(1863) 1 Mad H C R 445 (446) (DB), *Ramen Nayar* v. *Kandapuni Nayar*. (The holder on kanom in Malabar who denied his jenmi's title entirely forfeited his right to hold for twelve years.)
('81) 6 Cal 436 (439) (DB), *Mozhuruddin* v. *Gobind Chunder Nundi*.

3. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jaypore* v. *Rukmani*.

4. ('19) 6 AIR 1919 P C 1 (4, 5) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jaypore* v. *Rukmani*.

5. ('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetti*.

6. ('96) 20 Bom 354 (361) (FB), *Venkaji Krishna* v. *Lakshman*.

7. (1836) 150 E R 614 (617) : 1 M &W 695 : Tyr & Gr 1065 : 2 Gale 154 : 5 L J (N S) Ex 253 : 46 R R 464, *Deo d. Gray* v. *Stanion*. (Per Baron Parke.)
('16) 3 AIR 1916 Mad 749 (750) : 31 Ind Cas 220 (DB), *Oydal Kurup* v. *Narayanan Nambudri*. (5 L J Ex 253 and 9 Cal W N 928 relied on.)
('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetti*. (*Doe d. Gray* v. *Stanion* (1836) 1 M & W 695 relied on.)
('19) 6 AIR 1919 Mad 1106 (1107) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komulukutti* v. *Muhammad*.

7a. Woodfall, *Landlord and Tenant*, 22nd Edn., page 463.

8. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jaypore* v. *Rukmani*.
('13) 18 Ind Cas 728 (729) : 35 All 145 (DB), *Prag Narain* v. *Kadir Baksh*. (The execution of a mortgage by the tenant is not a clear denial of title.)
('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma*.
('23) 71 Ind Cas 270 (271) (DB) (Mad), *Sreedharam Valia Rajah* v. *Parakkat*.
('24) 11 AIR 1924 Lah 281 (284) : 70 Ind Cas 349, *Chiragh Din* v. *Muhammad Usman*.
('27) 14 AIR 1927 All 806 (807) : 100 Ind Cas 646, *Sardar Singh* v. *Man Singh*.
('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram*.

to the knowledge of the landlord.[9] Thus, a statement by a tenant to the landlord "you are not my landlord. I am nobody's tenant" is a disclaimer of title.[10]

Disputing terms of tenancy :

In England it was held in *Vivian* v. *Moat*[11] that a denial by the tenant of his landlord's right "to raise the rent" coupled with an offer to pay "customary-rent" was a repudiation of the landlord's title. This view has not been followed in India,[12] and it has been held that where a tenant admits a tenancy but disputes the terms of the tenancy or sets up a more favourable tenancy such as a permanent tenancy, it is not such a repudiation of the tenancy as would cause forfeiture.[13]

('34) 21 AIR 1934 Lah 289 (290) : 15 Lah 683 : 151 Ind Cas 209, *Mahomed Mahmud Khan* v. *Laja Mal.* (The mortgaging of premises by a tenant does not amount to an unequivocal and unambiguous denial of the landlord's title.)
('27) 14 AIR 1927 Nag 50 (51, 52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.*
('35) 22 AIR 1935 Bom 41 (42) : 59 Bom 194 : 155 Ind Cas 516 (DB), *Rachotappa* v. *Konher Anna Rao.*

9. ('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma.*
('32) 19 AIR 1932 Bom 599 (602) : 140 Ind Cas 567 (DB), *Narayan Vithal* v. *Mangesh Vithal.*
('19) 6 AIR 1919 Mad 1106 (1108) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komulu Kutti* v. *Muhammad.*
('23) 71 Ind Cas 270 (271) (DB) (Mad), *Sreedharam Valia Rajah* v. *Parakkat.*
('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari Mukrya.*

10. (1840) 173 E R 1047 (1049) : 9 Car & P. 773, *Doe d. Bennett* v. *Long.*
('34) 21 AIR 1934 All 103 (104) : 149 Ind Cas 517, *Madho Lal* v. *Lal Bahadur Singh.*

11. (1881) 50 L J Ch 331 (332) : 16 Ch D 730 : 29 W R (Eng) 504 : 44 L T 210.

12. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jeypore* v. *Rukmani.*

13. ('20) 7 AIR 1920 Bom 53 (53, 54) : 58 Ind Cas 226, *Gol Daji* v. *Dod Laxman.* (An assertion by an annual tenant that he is a permanent tenant is not a denial of the landlord's title. Such a tenant is therefore entitled to notice before he can be evicted.)
('93) 1893 Bom P J 292 (DB), *Krishna* v. *Ladu.* (The setting up of a permanent lease does not constitute such a denial of title as to relieve the owner from giving notice to the tenant.)
('86) 13 Cal 248 (253, 254) (DB), *Kali Krishna Tagore* v. *Golam Ally.*
('86) 13 Cal 3 (6) (DB), *Kali Kishan Tagore* v. *Golam Ali.* (*Vivian* v. *Moat*, (1881) 44 L T 210, does not apply to this country.)
('96) 1896 Bom P J 451, *Ramchandra* v. *Kashinath.* (Setting up by the defendant of a right in himself to hold the lands on mirasi tenure on payment of the annual assessment was not such a disclaimer as to entitle the landlord to forfeit the tenancy and to sue without determining it by notice.)
('94) 17 Mad 218 (220) : 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta.* (*Vivian* v. *Moat*, (1881) 44 L T 210, not followed.)
('26) 13 AIR 1926 Cal 1181 (1182) : 96 Ind Cas 586 (DB), *Rajendra Kumar Das* v. *Sarat Chandra Das.* (An assertion by occupancy tenants of a higher right than what they actually have, will not cause a forfeiture of their rights as occupancy raiyats.)
('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram.* (Claim to hold as an ante-ijara tenant does not amount to a repudiation of the title.)

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Requiring further information or putting the landlord to proof of his title :

Where a person claiming to be the landlord is not the original lessor but is one who claims under a derivative title from him and the lessee without repudiating his character as tenant states that the original lessor's title is really vested in another person[13a] or where he puts the claimant to proof of his title[14] or where he merely requires further information *bona fide* before he pays the rent to anybody[15] there is no disclaimer of title. Where there is no renunciation of the lease but the lessee, being unable to get possession of a part of the property claimed by a third person executed a lease to him in respect of that part, there is no denial of title.[16]

('39) 26 AIR 1939 Oudh 257 (267, 268) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.* (Assertion that they were holding under heritable and transferable lease, does not amount to disclaimer of landlord's title.)

('89) 12 Mad 353 (354, 355) : 13 Ind Jur 256 (DB), *Subba* v. *Nagappa.* (Setting up permanent tenancy is not denial of title — *Vivian* v. *Moat*, (1881) 44 L T 210; 1 Mad H C R 13 ; 13 Cal 96; 13 Cal 248; 8 Bom 828 referred.)

('04) 27 Mad 23 (24) (DB), *Chinna Narayudu* v. *Harischendana Deo.* (An assertion by the tenant of his alleged title as a permanent tenant and his denial of the landlord's title to give a lease of the land to a third party, is not a denial of title.)

('16) 3 AIR 1916 Mad 249 (259) : 29 Ind Cas 365 (DB), *Maharaja of Jeypore* v. *Sri Rukmini Pattamahadevi Garu.*

('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.* (The setting up of an occupancy right by a tenant is not a disclaimer of title.)

('21) 8 AIR 1921 Bom 395 (396) : 45 Bom 303 : 59 Ind Cas 278 (DB), *Ram Ranchod* v. *Sayad Abdul Rahim.* (The setting up of a permanent tenancy by a yearly tenant is not tantamount to disclaimer of the landlord's title; such a tenant is therefore entitled to a notice to quit before he can be evicted by the landlord.)

('86) 10 Bom 669 (672) (DB), *Purshottam* v. *Dattatraya.*

[*See also* ('91) 15 Bom 407 (413, 414) (DB), *Vithu* v. *Dhondi.* (*Quære* — Setting up permanent tenancy right if a disclaimer of title.)]

[But see ('84) 8 Bom 228 (230) (DB), *Baba* v. *Vishwanath.* (Setting up permanent tenancy—Setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title which absolves the landlord from his obligation to give notice to quit.)]

13a. ('26) 13 AIR 1926 Cal 1205 (1206) : 96 Ind Cas 1056 (DB), *Abdulla* v. *Mohammad Muslim.*

('72) 18 Suth W R 465 (466) (DB), *Doorga Kripa Roy* v. *Janoo Lathak.* (The fact of a tenant having stated in a former suit that he had a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a forfeiture of the tenure in favour of the landlord.)

('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Guruswmi Chetti.* (But the tenant must act *bona fide*, seeking to clear a doubt whether the plaintiff is the real landlord or somebody else.)

('19) 6 AIR 1919 Mad 266 (268) : 51 Ind Cas 709 (DB), *Venkatachariar* v. *Rangasami.* (AIR 1919 Mad 897 : 46 Ind Cas 62 followed.)

14. ('08) 12 Cal W N 525 (527) (DB), *Mathewson* v. *Jadu Mahto.*

('20) 7 AIR 1920 Cal 734 (734) : 57 Ind Cas 956 (DB), *Mehdiali Khan Panee* v. *Basiruddin Chaudhury.*

('25) 12 AIR 1925 Cal 1212 (1213) : 87 Ind Cas 657 (DB), *Golam Rabbani* v. *Taranath Deb.*

('05) 2 Cal L Jour 389 (391) (DB), *Mallika Dasi* v. *Makham Lal.*

('28) 15 AIR 1928 Cal 312 (315): 113 I. C. 13 (DB), *Hatimullah* v. *Mahomed Abju.*

15. ('24) 11 AIR 1924 Bom 454 (455): 83 Ind Cas 45 : 48 Bom 541 (DB), *Rukmini* v. *Rayaji.*

('28) 15 AIR 1928 Cal 312 (315): 113 I. C. 13 (DB), *Hatimullah* v. *Mahomed Abju.*

16. ('08) 7 Cal L Jour 648 (651) (DB), *Farman Bibi* v. *Tasha.*

Denial of extent of interest of landlord :

An admission in good faith by a tenant, of the superior title of a third person to a portion of the lands included in the tenancy without denying the landlord's title to receive the entire rent is not such a denial as would entail a forfeiture.[17]

Denial in suit to which lessor is not a party :

A setting up, in a suit to which the landlord is not a party, of the title of a third person, without any denial of payment of rent to him before suit is not such a denial as would entail a forfeiture.[18]

Setting up title of cosharer landlord :

The setting up of the title of a cosharer landlord is not a denial of the whole title and does not work a forfeiture.[19]

Denying execution of kabuliat :

A denial of execution of a *kabuliat* is not a denial of title.[20]

Non-payment of rent :

A mere non-payment of rent[21] or a refusal to pay rent[22] or the payment of rent to a third person[23] is not, in the absence of a renunciation of the relation of landlord and tenant, a denial of title, and will not put an end to the tenancy or constitute the possession of the tenant adverse to the landlord.[24] Coupled with other circumstances it may

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17. ('15) 2 AIR 1915 Mad 85 (86) : 25 Ind Cas 944 (DB), *Abbakka Shetthi* v. *Seshamma.*

18. ('15) 2 AIR 1915 Mad 85 (86) : 25 Ind Cas 944 (DB), *Abbakka Shetthi* v. *Seshamma.*

19. ('15) 2 AIR 1915 Cal 660 (661) : 26 Ind Cas 619 (DB), *Neamatulla* v. *Bajiulla.*

20. ('26) 13 AIR 1926 Cal 1205 (1206) : 96 Ind Cas 1056 (DB), *Abdulla* v. *Mahomed Muslim.*

21. ('12) 15 Ind Cas 338 (339) (All), *Anrup Misir* v. *Kedar Pande.*
('12) 17 Ind Cas 523 (524) (All), *Deokinandan* v. *Bindeshwari.*
('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram.*
('23) 10 AIR 1923 Pat 201 (203): 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*
('13) 18 Ind Cas 728 (728) : 35 All 145 (DB), *Prag Narain* v. *Kadir Baksh.*
('75) 1875 Bom P J 364 (364) (DB), *Raoji* v. *Jagoji.*
('24) 11 AIR 1924 Cal 647 (647) : 77 Ind Cas 551 (DB), *Monmatha Kumar* v. *Josada Lal.*
('13) 19 Ind Cas 119 (120) (All), *Abdul Karim* v. *Chunni Bibi.*

22. ('31) 18 AIR 1931 Nag 105 (106): 122 I. C. 271 (272), *Haidar* v. *Janakiram.*

23. ('14) 1 AIR 1914 Cal 645 (646) : 22 Ind Cas 796 (DB), *Shyama Charan* v. *Ram Prosad.*

24. ('14) 1 AIR 1914 Cal 645 (646) : 22 Ind Cas 796 (DB), *Shyama Charan* v. *Ram Prosad.*
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bhusan.* (Mere non-payment of rent.)
('33) 20 AIR 1933 Lah 776 (777) : 146 Ind Cas 726, *Mohammad* v. *Makhu.* (Do.)
('35) 22 AIR 1935 Lah 441 (443), *Amru* v. *Santa.* (Do.)
('13) 19 Ind Cas 64 (65) (DB) (Cal), *Chintamoni* v. *Jogeshur.* (Do.)
('20) 7 AIR 1920 Lah 217 (217) : 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh.* (Do.)
('07) 6 Cal L Jour 72 (74) (DB), *Bama Charan Chowdhry* v. *Administrator General of Bengal.* (Do.)
('81) 1888 Pun Re No. 18, *Tota* v. *Sakotia.* (Do.)

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however, constitute a denial of title.[24a]

Renunciation of tenancy :

A mere renunciation of tenancy is not a disclaimer of title unless there is a repudiation of the character of landlord and tenant by setting up a title in another or by claiming a title in himself.[25]

Alienation of lease interest :

An alienation by the lessee by way of a mortgage is not necessarily a denial of title of the landlord[26] though it may be evidence of such denial.[27]

Denial by a joint tenant :

A denial of title by some only of several joint tenants does not work a forfeiture of the tenancy.[28]

Denial of title after assignment of lease :

The denial of title by the lessee, after an assignment by him of the lease to another cannot work a forfeiture of the assignee's interest.[29]

Denial of title must have occurred before suit for ejectment.

In a suit for ejectment filed by the lessor, a denial of the landlord's title in the written statement filed by the lessee is not a denial of title of which advantage can be taken in that suit itself, because the forfeiture

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('32) 19 AIR 1932 Lah 586 (587) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh.* (Do.)

('36) 23 AIR 1936 Lah 461 (462): 163 Ind Cas 592, *Girdhari Ram* v. *Qasim.* (Do.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.* (Do.)
('08) 7 Cal L Jour 202 (214) (DB), *Rameshar Koer* v. *Gobardhan Lal.* (Do.)
('98) 1898 Bom P J 355 (DB), *Mahadeo Vithal* v. *Vishnu Bhat.* (Do.)
('05) 9 Cal W N 122 (122) (DB), *Apurba Krishna Roy* v. *Ashutosh Dutt.* (Do.)
('16) 3 AIR 1916 Lah 353 (355) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Baksh* v. *Baladeo Singh.* (Do.)
('25) 12 AIR 1925 Nag 452 (453) : 89 Ind Cas 741, *Khubchand* v. *Mulloo.* (Do.)
('02) 15 C P L R 9 (10), *Tikaram* v. *Budhu.* (Do.)
(1862-64) 1862-64 Suth W R (Sp No.) 34 (34) (FB), *Umrithnauth* v. *Koonj Behary.*

24a. (1841) 173 E R 1047 (1049) : 9 C & P 773, *Doe d. Bennet* v. *Long.* (Refusal to pay rent coupled with statement "you are not my landlord, I am nobody's tenant" would amount to a disclaimer of title.)
('16) 3 AIR 1916 Lah 353 (355) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Baksh* v. *Baldeo Singh.*

25. ('14) 1 AIR 1914 Cal 51 (52) : 20 Ind Cas 823 (DB), *Protap Narain* v. *Biraj Dasi.* (*Doe D. Williams* v. *Cooper*, (1841) 1 Man & Gran 135 and *Doe D. Wyatt* v. *Stagg* 5 Bing (N C) 564 followed.)
(1861) 142 E R 664 (667) : 10 C B (N S) 788 : 31 L J C P 66 : S Jur (N S) 387 : 58 J P 213 : 128 R R 932, *Jones* v. *Mills.*

26. ('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhiwaji* v. *Tukaram.*

27. (1840) 133 E R 278 (281): 1 Man & G 135 : 1 Scott N R 36 : 9 L J (N S) C P 229 : 56 R R 313, *Doe d. Williams and Jeffery* v. *Cooper.*

28. ('35) 22 AIR 1935 Cal 393 (394) : 156 Ind Cas 563, *Gani Mia* v. *Vajid Ali.*
('12) 15 Ind Cas 620 (621) : 39 Cal 903 (DB), *Birendra Kishore* v. *Bhubaneswari.*
('09) 4 Ind Cas 875 (876) (DB) (Mad), *Imbichi Kandan* v. *Kozhikot Koshake.*
('08) 7 Cal L Jour 648 (651) (DB), *Farman Bibi* v. *Tasha Haddal Hassan.*

29. ('18) 5 AIR 1918 Bom 132 (132) : 42 Bom 734 : 47 Ind Cas 635 (DB), *Gopal Jayvant* v. *Shriniwas.*

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must have occurred *before* the suit was instituted.[30] But a denial in a previous suit instituted by the landlord in consequence of which the suit was dismissed, can be taken advantage of by the lessor in order to maintain a subsequent suit for ejectment.[31] Where the plaint in an

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30. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jeypore* v. *Rukmini Pattamahadevi.*
('94) 18 Bom 110 (114) (DB), *Dodhu* v. *Madhaorao Narayan.*
('89) 1889 All W N 154 (155) (DB), *Mazhar Husain* v. *Rahmat Ullah.*
('01) 28 Cal 135 (138) : 5 Cal W N 263 (DB), *Nizamuddin* v. *Mamtazuddin.*
('01) 28 Cal 223 (227) (DB), *Madan Mohun Shaha* v. *Rajab Ali.*
('35) 22 AIR 1935 Lah 804 (805) : 159 Ind Cas 962 (DB), *Sarup Singh* v. *Puran Singh.*
('24) 11 AIR 1924 Lah 281 (283) : 70 Ind Cas 349, *Chiragh Din* v. *Mahomed Usman Khan.*
('96) 20 Bom 759 (763) (DB), *Amba Bai* v. *Bhau.*
('07) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian Chetti.*
('91) 1 Mad L Jour 659 (660) (DB), *Kunhunni Nair* v. *Konna Panikar.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prasad.*
('91) 15 Bom 407 (412) (DB), *Vithu* v. *Dhondi.*
('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.*
('86) 13 Cal 96 (98) (DB), *Prannath Shaha* v. *Madhu Khulu.*
('28) 110 Ind Cas 45 (46) (Lah), *Indar* v. *Achhru.*
('29) 113 Ind Cas 84 (86) (Lah), *Mohabbat* v. *Mamura.*
('31) 134 Ind Cas 1038 (1039) (DB) (Lah), *Gujar Singh* v. *Abdul Ghafoor.*
('26) 98 Ind Cas 1059 (1060) (Lah), *Karam Chand* v. *Akbar Khan.*
('23) 10 AIR 1923 Lah 409 (410) : 71 Ind Cas 779, *Kewal Ram* v. *Abdul Hai.*
('09) 2 Ind Cas 656 (658) : 36 Cal 927 (DB), *Partap Narain* v. *Maigh Lal Singh.*
('16) 3 AIR 1916 Pat 104 (106): 37 Ind Cas 935, *Samundar Singh* v. *Mukh Lal.*
('31) 18 AIR 1931 Nag 105 (106) : 122 Ind Cas 271, *Haidar* v. *Jankiram.*
('36) 23 AIR 1936 Pat 275 (280) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal Kandarp Nath.*
('92) 15 Mad 123 (124) : 2 Mad L Jour 81 (DB), *Madavan* v. *Athi Nangiyar.*
('27) 14 AIR 1927 Nag 50 (51, 52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.*
('28) 15 AIR 1928 Cal 713 (714) : 113 Ind Cas 561, *Jharu Mondal* v. *Mahatabuddin.*
[But see ('75) 1875 Bom P J 181 (181) (DB), *Rahim* v. *Kasam.*
('91) 1 Mad L Jour 218 (220) (DB), *Chidambaram Pillai* v. *Sabapathi Pillai.* (2 Mad H C R 109 and 9 Bom 527 followed.)
('07) 17 Mad L Jour 287 (287) (DB), *Kizhakkinyakath Abdulla Naha* v. *K. Moidin Kutti.* (1 Mad L Jour 218 followed.)
('84) 10 Cal 41 (45) : 12 Cal L R 414 (DB), *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt.*]

31. ('78) 2 Cal L R 208 (208) (DB), *Dabee Misser* v. *Mungur Meah.*
('23) 10 AIR 1923 Lah 454 (455) : 4 Lah 160 : 73 Ind Cas 791 (DB), *Zia-ud-Din* v. *Fakhir-ud-Din Ahmad Khan.*
('18) 5 AIR 1918 Pat 174 (175) : 45 Ind Cas 642, *Mohamed Abdul Latif* v. *Habibur Rahman.*
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad.*
('12) 13 Ind Cas 688 (688) (Cal), *Ananda Prosad* v. *Sham Sundar.*
('10) 5 Ind Cas 708 (709) (DB) (Cal), *Sheikh Miadhar* v. *Rajani Kanta Ray.* (Where the defendant in a suit for rent by the plaintiff, his landlord, had denied his title and claimed to hold under a third party—*Held* that in a suit by the landlord for ejectment of the defendant as a trespasser, the defendant was debarred from pleading his tenancy and claiming to hold possession on that ground.)
('10) 8 Ind Cas 660 (661) (DB) (Cal), *Ekabar Sheikh* v. *Hara Bewah.*

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ejectment suit alleges a denial of title by the defendant before suit and this is not denied in the written statement, it has been held in the undermentioned case by the Lahore High Court[32] that the implied admission of a denial of title before suit is not such a clear and unambiguous denial before suit as would entitle the plaintiff to maintain the suit. A contrary view was expressed by the same Court in an earlier case.[33]

Effect of denial of title :

The general principle is that a tenant denying the title of the landlord becomes liable to immediate eviction at the option of the landlord.[34] He cannot claim to be entitled in such a case to any notice to quit[35] or to any notice specified in the lease for determining the

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32. ('23) 10 AIR 1923 Lah 409 (410): 71 Ind Cas 779, *Kewal Ram* v. *Abdul Hai.*
33. ('20) 7 AIR 1920 Lah 66 (66) : 54 Ind Cas 263, *Khem Singh* v. *Ali Sher.*
34. ('88) 12 Bom 352 (356) (DB), *Vishnu Chintaman* v. *Balaji.*
('81) 8 Cal L R 150 (151) (DB), *Shumsher Ali* v. *Doya Bibi.*
('33) 20 AIR 1933 Lah 221 (222) : 13 Lah 796 : 141 Ind Cas 825 (DB), *Melaram* v. *Sandhi Khan.*
(1900) 4 Cal W N 42 (42) (DB), *Ananda Chandra Mondul* v. *Abrahim Soleman.*
('10) 6 Ind Cas 1010 (1010) (Lah), *Jalal Din* v. *Ramzan.*
('20) 7 AIR 1920 Lah 66 (67) : 54 Ind Cas 263, *Khem Singh* v. *Ali Sher.*
('19) 6 AIR 1919 Mad 1106 (1107) : 45 Ind Cas 743 (DB), *Komalukutti* v. *Muhamad.* (Whether the lease is one for term or for life.)
(1865) 2 Suth W R Act X Rul 1 (2) (DB), *Mirza Nadir Beg* v. *Muddurram.*
('10) 8 Ind Cas 227 (228) (Lah), *Muhammad Baksh* v. *Faiz Bakhsh.*
('28) 108 Ind Cas 161 (162) (Lah), *Bhaga* v. *Budha.*
('90) 17 Cal 196 (198) (DB), *Debiruddi* v. *Abdur Rahim.*
('98) 2 Cal W N 292 (294) (SB), *Sreemutty Monmohini Dassi* v. *Kali Das Ahiri.*
35. ('96) 20 Bom 354 (362) (FB), *Venkaji Krishna* v. *Laxman Devji.* (This principle applies even to cases not falling within S. 117 of the Act.)
('88) 12 Bom 678 (682) (DB), *Agarchand Gumanchand* v. *Rakhama Hanmant.*
(1900) 24 Bom 426 (429) : 2 Bom L R 228 (DB), *Mahipat* v. *Lakshaman.*
('32) 19 AIR 1932 Lah 43 (44) : 134 Ind Cas 296, *Imam Din* v. *Natha Singh.*
('33) 20 AIR 1933 Lah 377 (378) : 145 Ind Cas 992, *Karam Chand* v. *Amar Nath.*
('06) 33 Cal 339 (342) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra Mitra.*
('10) 6 Ind Cas 600 (600) (DB) (Mad), *Murugesa Mudaly* v. *Subraya Gramany.*
('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikam-parambil.*
('86) 1886 Bom P J 314 (DB), *Santo* v. *Venkaji.*
('75) 1875 Bom P J 181 (181) (DB), *Rahim* v. *Kasam.*
('25) 12 AIR 1925 Bom 524 (525, 526) : 49 Bom 842 : 90 Ind Cas 614 (DB), *Vidyavardhak Sangh Co.* v. *Ayyappa.* (Even in cases where T. P. Act does not apply.)
('26) 13 AIR 1926 Mad 143 (144) : 91 Ind Cas 316, *Kalliani Amma* v. *Cochin Sirkar.*
('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ram Nath Sil* v. *Siba Sundari.*
('74) 1874 Bom P J 82 (82) (DB), *Mahadaji* v. *Sona.* (A tenant who denies his landlord's title is liable to be treated as a trespasser and to be ejected without the customary notice to quit.)
('95) 1895 Bom P J 165 (DB), *Vyankaji* v. *Bala.*
('27) 14 AIR 1927 Sind 248 (250) : 104 Ind Cas 412 (DB), *Mulibai* v. *Vassibai.*
('14) 1 AIR 1914 Mad 81 (82) : 24 Ind Cas 803 (DB), *Abburi Venkataswami* v. *Nalluri Kristnamma.*

lease.[36] The reason is that by such denial, he must be deemed to waive his right to notice.[37] As was observed by Best, C. J., in *Doe* v. *Frowd*[38] "there can be no necessity for a notice to end that which he (i. e., the tenant) says has no existence."

15. Forfeiture on insolvency of lessee. — Under the second paragraph of S. 12 a condition in a lease making the lease cease on the lessee becoming insolvent is a valid condition. But there was no specific provision in this section for determination of the lease on breach of such a condition. The Special Committee in their report on the Amendment Bill of 1929 appear to have thought that such a condition did not operate to determine the lease under this clause, though the first part of cl. (g) seems to cover all kinds of conditions. Anyhow the Committe having thought it desirable to make an express provision on that point, this provision as to a condition against insolvency of the lessee was inserted in the section in 1929. In England also, a condition for re-entry on forfeiture on the insolvency of the lessee is a valid condition.[1] Where, in a lease, there was a condition for re-entry on the insolvency of the lessee, and the lessee's interest was purchased in execution of a decree by X and thereafter the lessee became insolvent, it was held that the "lessee" for the purpose of the condition, was, under the circumstances, really X and that as *he* did not become insolvent, no forfeiture took place.[2]

A disclaimer of a lease by the Official Assignee under S. 62 of the Presidency Towns Insolvency Act, 1909, puts an end to the lease and the lessor's interest becomes thereby accelerated without anything further being done.[3]

16. Notice of intention to determine lease on forfeiture. — Where a forfeiture is incurred, by reason of an act or omission on the part of the lessee, the lessor has an *option* to take advantage of it, for, the lessee himself cannot take advantage of his own wrong, which would be the result if the lease were to terminate *ipso facto* on such

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(1841) 173 E R 1047 (1049) : 9 C & P 773, *Doe d. Bennet* v. *Long.*
('94) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*
('84) 8 Bom 228 (230) (DB), *Baba* v. *Vishvanath Joshi.*
[*See* ('85) 9 Bom 527 (529) (DB), *Gopalrao Ganesh* v. *Kishor Kalidas.*]

36. ('12) 13 Ind Cas 323 (324) : 1911 Pun Re No. 76, *Zia-ud-Din* v. *Gobind Ram.*

37. ('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikamparambil.*

38. (1828) 130 E R 883 (884) : 4 Bing 557 : 1 Moo & P 480 : 29 R R 624 : 6 L J C P 114.

Note 15

1. (1787) 1 R R 445 (448): 2 T R 133, *Roe. D. Hunter* v. *Galliers.*
(1884) 32 W R (Eng) Dig 107 (107): 13 Q B D 454 : 51 L T 368, *Re Walkar*; *Ex parte Gould.*

2. ('25) 12 AIR 1925 Cal 750 (751) : 88 Ind Cas 808, *Hazarimull* v. *Sadasukh Parruck & Co.*

3. ('36) 63 Cal 1123 (1134) : 40 Cal W N 846 (DB), *Satya Priya Ghosal* v. *Barid Baran Mukerji.*

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Note 16

act or omission.[1] The general rule therefore is that the lessor must do some act evidencing his intention to determine the lease.[2] This was embodied in the section as it stood before 1929 and it was necessary that the lessor should, for determining a lease by forfeiture do some act showing his intention to determine the lease.[3] Under the English law,

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Note 16

1. ('20) 7 AIR 1920 P C 190 (192) (PC), *King* v. *Paulson.*
('35) 22 AIR 1935 Cal 609 (609): 158 Ind Cas 380, *Raghupati* v. *Panchanani Dasi.*

2. ('19) 6 AIR 1919 PC 117 (119) (PC), *Quesnel Forks Gold Mining Co.* v. *Ward.* (Case from British Columbia.)
('28) 15 AIR 1928 Lah 937 (938): 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*
('88) 1888 Pun Re No. 18, *Tota* v. *Sakotia.*
('26) 13 AIR 1926 Cal 193 (203): 85 I. C. 678 (DB), *Gopika Raman* v. *Atal Singh.*
('02) 12 Mad L Jour 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*
('08) 31 Mad 403 (404): 4 Mad L Tim 221 (DB), *Venkatramana Bhatta* v. *Gunda Raya.* (33 Cal 339 followed.)
('36) 23 AIR 1936 Mad 252 (255): 168 Ind Cas 1005, *Soorayya* v. *Sooranna.*
('15) 2 AIR 1915 Mad 813 (815) : 38 Mad 445: 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.* (In agricultural leases which are not governed by the T. P. Act, the lessor is not bound to do any act prior to instituting the suit showing his intention to take advantage of the forfeiture.)
('02) 25 Mad 587 (595): 12 Mad L Jour 249 (DB), *Zamindar of Vizianagaram* v. *Suryanarayana.*
[*See also* ('32) 19 AIR 1932 Lah 43 (44) : 134 Ind Cas 296, *Imam Din* v. *Natha Singh.*]

3. ('35) 22 AIR 1935 Mad 454 (456): 157 Ind Cas 804 (DB), *Sripada Satyanarayana* v. *Venkataramamurthy.*
('30) 17 AIR 1930 Mad 272 (274) : 126 Ind Cas 284 (DB), *Malabar Timber Co.* v. *Prapravan Moidoo.* (Fresh demise to others is such an act.)
('16) 3 AIR 1916 Mad 497 (498) : 31 Ind Cas 211 (DB), *Sivarama Iyer* v. *Alagappa Chetty.* ("Some act showing intention to determine the lease,"—Lawyer's notice sufficient.)
('20) 7 AIR 1920 Cal 866(868): 60 I. C. 312(DB), *Motilal Pal* v. *Chandra Kumar.*
('01) 24 Mad 246 (250, 251): 10 Mad L Jour 415 (DB), *Srinivasa Ayyar* v. *Muthusami Pillai.*
('29) 117 Ind Cas 842 (845) (DB) (Cal), *Bejoy Chand Mahtab* v. *Gurupada Haldar.*
('10) 6 Ind Cas 264 (265) (DB) (Mad), *Mazhoor Pudukudi* v. *Paramban Moideen.*
('19) 6 AIR 1919 Cal 776 (777) : 53 Ind Cas 625, *Hari Kanta Das* v. *Bibi Nurannessa.*
('18) 5 AIR 1918 Cal 969 (971) : 45 Cal 469 : 41 Ind Cas 952 (DB), *Naurang Singh* v. *Janardhan Kishore.*
('27) 14 AIR 1927 All 806 (807) : 100 Ind Cas 646, *Sardar Singh* v. *Man Singh.*
('25) 12 AIR 1925 All 346 (347) : 47 All 348 : 86 Ind Cas 174 (DB), *Shibcharan* v. *Kharka.*
('41) 28 AIR 1941 Cal 506 (509) : 197 Ind Cas 45, *Narendra Chandra* v. *Rajendra Chandra.*
('06) 33 Cal 339 (342) : 3 Cal L Jour 274 (DB), *Anandamoyee* v. *Lakhi Chandra.*
('27) 14 AIR 1927 Oudh 544 (545) : 101 Ind Cas 771, *Mahommed Sayid* v. *Zahir-ud-Din.*
('22) 9 AIR 1922 Mad 349 (349) : 66 Ind Cas 48 (DB), *Thacharakavil* v. *Noor Mohamad Sait.* (A notice determining the lease is sufficient. Such notice need not be as required by S. 106.)
('26) 13 AIR 1926 Sind 71 (74) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruk.*
[*See also* ('18) 5 AIR 1918 Pat 174 (175):45 Ind Cas 642, *Muhamed Abdul Latif* v. *Habibur Rahman.*]

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the bringing of an action in ejectment is itself a sufficient act determining the lease.[4] There was, however, a difference of opinion in this country, one set of cases[5] holding that the act must have been done *before* the institution of the suit while another set of cases[6] held that the institution of the suit was a sufficient act in itself determining the tenancy. This difference of opinion has now been set at rest by the substitution in 1929 of the words "gives notice in writing to the lessee of" for the words "does some act showing" which occurred before. Under the present section therefore, the lessor wishing to determine the lease for forfeiture must give a *notice in writing* to the lessee of his intention to determine the lease[7] and the service of such notice must be proved by legal evidence.[8]

It has been held in the undermentioned cases[9] that in cases not

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4. *See* ('32) 19 AIR 1932 Cal 221 (224) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.*
5. ('20) 7 AIR 1920 Cal 866 (868) : 60 Ind Cas 312 (DB), *Motilal Pal* v. *Chandra Coomar.*
('12) 14 Ind Cas 747 (749) (All), *Qadir Bux* v. *Prag Narain.*
('18) 5 AIR 1918 Cal 969 (971) : 45 Cal 469 : 41 Ind Cas 952 (DB), *Naurang Singh* v. *Janardhan Kishore.*
('14) 1 AIR 1914 All 160 (161) : 24 Ind Cas 624, *Prayag Sonar* v. *Motar Singh.*
('13) 18 Ind Cas 728 (729) : 35 All 145 (DB), *Prag Narain* v. *Kadir Baksh.*
('37) 24 AIR 1937 Cal 129 (139) : ILR (1937) 1 Cal 203 : 170 Ind Cas 214 (DB), *Creet* v. *Gangaraj Gulraj Firm.*
6. ('17) 4 AIR 1917 Bom 5 (7) : 42 Bom 195 : 43 Ind Cas 851 (DB), *Isabali* v. *Mahadu.* (The mere institution of the suit and the assertion in the plaint as to the repudiation of the landlord's title constitutes a sufficient manifestation, of the landlord's intention to determine the lease for the purposes of cl. (g) of S. 111.)
('21) 8 AIR 1921 Bom 307 (309) : 45 Bom 535 : 58 Ind Cas 69, *Kasturbhai Manibhai* v. *Hiralal.* (The presentation of the plaint in ejectment suits is a conclusive declaration of intention by plaintiffs lessors to determine the lease.)
7. ('40) 27 AIR 1940 Oudh 92 (92) : 185 Ind Cas 25, *Saheb Din* v. *Gouri Shankar.*
8. ('20) 7 AIR 1920 P C 190 (197) (P C), *King* v. *Paulson.*
9. ('13) 20 Ind Cas 930 (932) : 38 Mad 445 (DB), *Korapalu* v. *Narayana.* (The provision in S. 111 of the Transfer of Property Act, about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought, is a relic of the old English common law, and is unnecessary in the case of leases not governed by the Transfer of Property Act.)
('14) 1 AIR 1914 Mad 706 (707) : 24 Ind Cas 139 (D B), *Rama Krishna* v. *Baburaya.* (In an ejectment suit, based on leases executed prior to the T. P. Act no act on the part of the landlord showing that he elects to take advantage of the forfeiture for non-payment of rent is necessary.)
('19) 6 AIR 1919 Mad 266 (268) : 51 Ind Cas 709 (DB), *Venkatachariar* v. *Rangaswami.* (Lease before Act came into force.)
('13) 21 Ind Cas 405 (406) (DB) (Mad), *Vidyapurna* v. *Rangappayya.*
('19) 6 AIR 1919 Mad 897 (902): 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami.*
('12) 17 Ind Cas 947 (947) (Mad) (DB), *Ramakrishna* v. *Baburaya.* (In the case of leases made before the Transfer of Property Act came into operation, an act on the part of the landlord showing that he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment.)
('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.*
('10) 6 Ind Cas 447 (449) : 34 Mad 161 (DB), *Padmanabaya* v. *Ranga.* (Overt act determining lease on forfeiture need not be before suit but may be the institution of the suit itself.)

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governed by the Act, the necessity for an overt act showing the intention to determine the lease is not necessary.

Where a lease provides that on breach of condition the lessee should be given notice according to law before ejectment, the tenant cannot be ejected unless a notice according to the contract is given.[10]

17. Tenant cannot deny his landlord's title — Estoppel. —Section 116 of the Evidence Act provides that no tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property. It has been held by their Lordships of the Privy Council that even though the lease expires by efflux of time, a tenant who has been let into possession under the lease cannot deny the landlord's title under S. 116 of the Evidence Act, so long as he has not openly restored possession by surrender to his landlord.[1] Even where

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('15) 2 AIR 1915 Mad 85 (85, 86) : 25 Ind Cas 944 (DB), *Abbakka Shetti* v. *Seshamma.*

('17) 4 AIR 1917 Cal 236 (240, 241) : 34 Ind Cas 833 (DB), *Dwarika Nath* v. *Mathura Nath.*

[But see ('35) 22 AIR 1935 Mad 943 (944) : 158 Ind Cas 1093, *Lakshmu Naidu* v. *Venkayya.* (Lease before T. P. Act.)

('35) 22 AIR 1935 Mad 918 (919) : 163 Ind Cas 36, *Venkatarama* v. *Ponuswami.*]

10. ('17) 4 AIR 1917 Cal 426 (426):34 Ind Cas 516 (DB), *Umesh Chandra* v. *Kala Chand.*

Note 17

1. ('15) 2 AIR 1915 P C 96 (98) : 42 Ind App 202 : 37 All 557 : 30 Ind Cas 299 (PC), *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh.*

('27) 14 AIR 1927 P C 151 (155) : 54 Ind App 276 : 5 Rang 427 : 102 Ind Cas 639 (PC), *Vertannes* v. *Robinson.*

[*See also* ('35) 22 AIR 1935 Bom 144 (147) : 155 Ind Cas 249, *Krishnarao* v. *Ghamon.*

('10) 5 Ind Cas 965 (966) : 34 Bom 329 (DB), *Trimbak Ramchandra* v. *Ghulam Zilani.*

('72) 8 Bom H C R (A C) 175 (177) (DB), *Vasudev Daji* v. *Babaji Ranu.*

('99) 1 Bom L R 491 (492, 493) (DB), *Lakshman* v. *Raghunath.*

('27) 14 AIR 1927 Oudh 544 (545) : 101 Ind Cas 771, *Mahammad Sayid* v. *Zahir-ud-din Ahmad.*

('32) 19 AIR 1932 Mad 298 (299): 138 Ind Cas 34: 55 Mad 601 (DB), *Krishnarao* v. *Mungara Sanyasi.*

('05) 28 Mad 526 (527) : 15 Mad L Jour 419 (DB), *Muthuvaiyan* v. *Sinna Samavaiyan.*

('22) 9 AIR 1922 All 423 (424): 68 Ind Cas 750 (DB), *Debi Prasad* v. *Mt. Gujar.* (A tenant holding over cannot set up an adverse title to the landlord.)

('28) 15 AIR 1928 Cal 546 (547) : 56 Cal 15 : 114 Ind Cas 409 (DB), *Mujibar Rahman* v. *Isab Surati.*

('05) 15 Mad L Jour 368 (369) (DB), *Usman Koya* v. *Chidrimokkausa.*

('30) 17 AIR 1930 Bom 395 (396) : 54 Bom 487 : 125 Ind Cas 695, *Nagindas Sankalchand* v. *Bapalal Purshottam.*

('03) 7 Cal W N 596 (597) (DB), *Ketu Das* v. *Surendra Nath Sinha.*

('92) 19 Bom 133 (135) (DB), *Patel Kila Bhai* v. *Hargovan.*

('26) 13 AIR 1926 Sind 71 (74) : 90 Ind Cas 1007 : 21 Sind L R 185 (DB), *Sidik Haji Yacub* v. *Mahomed Faruq.*

('31) 18 AIR 1931 Mad 577 (580) : 133 Ind Cas 369, *Gopala Kudva* v. *Juvappa Kamathi.*]

the tenant has not been let into possession by X, if once the relation of landlord and tenant comes into existence between them, the tenant cannot dispute the title of X.[2] An under-tenant or assignee from the lessee or a person who comes in by collusion with the lessee is bound by the estoppel against the tenant (his lessor) and cannot deny the title of the original landlord.[3]

But it is always open to a tenant to show that the landlord's title has determined, *since the beginning of the relationship* of landlord and tenant between them.[4] It is also open to him to show that his acknowledgment of a person as a landlord was due to fraud, coercion, or misrepresentation.[5]

Since a tenant cannot deny his landlord's title his possession also cannot become adverse to the landlord so long as the tenancy continues.[6]

18. Re-entry on forfeiture under clause (g) need not be enforced by suit. — Where a right of re-entry has accrued to the landlord on breach of condition, the property reverts to the landlord and the latter can, if he can do so *peaceably* and quietly, re-enter and take possession of the demised property. It is not necessary that he

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[But see ('26) 98 Ind Cas 911 (912) (DB) (Bom), *Sharavan* v. *Fattu*. (From the determination his possesion is adverse—Submitted not correct.)

('10) 7 Ind Cas 202 (207) (DB) (Mad), *Raja of Venkatagiri* v. *Mukku Narasyya*. (Submitted not correct.)]

2. ('28) 15 AIR 1928 Bom 265 (266, 267) : 111 Ind Cas 911 (DB), *Shankar* v. *Jagannath*.

[But see ('85) 11 Cal 519 (524) (DB), *Lal Mahomed* v. *Kallanus*. (Estoppel only against person who had let the tenant into possession.)]

3. ('32) 19 AIR 1932 Cal 241 (243) : 137 Ind Cas 139 : 59 Cal 739 (DB), *Yusuf Sheikh* v. *Jyotish Chandra*. (Under-tenant.)

('06) 16 Mad L Jour 351 (351) (DB), *Parattahath Kunhi Mayan* v. *Parattahath Muhammad*. (Assignee : 13 Mad 335 followed.)

('90) 13 Mad 335 (338) (DB), *Pasupati* v. *Narayana*. (Person coming in by collusion.)

(1834) 111 E R 7 (9) : 2 Ad & El 17 : 1 N & M 25 : 1 Moo & Rob 385: 41 R R 364, *Doe d. Bullen* v. *Mills*. (Do.)

4. ('98) 22 Bom 428 (430) (DB), *Vedu* v. *Nilkanth*.

('29) 16 AIR 1929 Cal 22 (24, 25) : 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mohesh Chandra*.

('35) 22 AIR 1935 Bom 144 (147) : 155 Ind Cas 249, *Krishnarao* v. *Ghaman*.

('79) 2 Mad 226 (229) (DB), *Ammu* v. *Ramakrishna*.

(1833) 131 E R 744 (745): 9 Bing 613: 2 Moore & Scott 760: 35 R R 644, *Hopcraft* v. *Keys*.

5. ('17) 4 AIR 1917 Mad 789 (797, 799) : 40 Mad 561 : 36 Ind Cas 817 (FB), *Venkata Chetty* v. *Aiyanna Goundan*.

('38) 25 AIR 1938 Rang 227 (228): 177 Ind Cas 599, *Alagammal Achi* v. *P. L. P. R. P. R. Firm*. (AIR 1917 Mad 789=40 Mad 561 relied on.)

(1826) 130 E R 596 (596) : 4 L J C P (O S) 159, *Gregory* v. *Doidge*.

('13) 18 Ind Cas 916 (917) (All), *Girdhari Lal* v. *Kallo Mistri*.

[*See also* ('03) 7 Cal W N 596 (597) (DB), *Ketu Das* v. *Surendra Nath Sinha*. (11 Cal 519 distinguished).]

6. See Note 59 on Article 144 of the Authors' Commentaries on the *Limitation Act*, (1942) 2nd Edn., and Note 79 on S. 105, T. P. Act.

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should *sue* for this purpose.[1] But if the lessee resists the plaintiff's entry, then the lessor's only remedy is to sue in ejectment and not to make forcible entry.[2] A condition for re-entry by force is void.[3]

19. Who can enforce forfeiture.—As has been seen already, the *lessee* himself cannot take advantage of his own wrong and cannot vacate a lease for forfeiture caused by his own act.

As a rule the lessor can enforce the forfeiture unless he has parted with his interest.[1] A transfer of the reversion (i. e., the lessor's interest) carries with it the right to enforce a forfeiture, and the transferee can enforce the same even if the forfeiture was incurred *before* the transfer was made.[2] Thus, a usufuctuary mortgagee of the lessor of his interest can enforce a forfeiture clause in the lease given by the mortgagor.[3] In the undermentioned case[4] where after a notice to determine the lease had been given, the lessor granted a new lease in favour of a third person it was held that the latter could enforce the forfeiture against the previous lessee.

As to whether one of several joint lessors can determine the lease for forfeiture, see Note 26.

20. Waiver of forfeiture. — See Notes on Section 112.

21. Relief against forfeiture. — See Notes on Sections 114 and 114A.

22. Forfeiture of service tenures. — The principles relating to forfeiture apply also to service tenures, i. e., tenures granted on the condition of performance of services. In cases to which the Act does not apply, the refusal to perform service will, according to the undermentioned cases,[1] terminate the lease even without any overt act being

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Note 18

1. ('66) 2 Agra Ex O C 1 (11), *Great Eastern Hotel Co. Ltd.* v. *Collector of Allahabad.*

2. ('12) 15 Ind Cas 857 (859) : 15 Oudh Cas 295, *Habibulla Shah* v. *Surji.*
('15) 2 AIR 1915 Oudh 218 (219) : 30 Ind Cas 292 (DB), *Habib Ullah Shah* v. *Bakht Bali Singh.*

3. ('15) 2 AIR 1915 Oudh 218 (219) : 30 Ind Cas 292 (DB), *Habib Ullah Shah* v. *Bakht Bali Singh.* (50 L J Ch 577 followed.)

Note 19

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 390.

2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 391.
('18) 5 AIR 1918 Bom 79 (80) : 47 Ind Cas 198: 43 Bom 28 (DB), *Vishweshwar* v. *Mahabaleshwar.*
('87) 14 Cal 176 (183), *Kristo Nath Koondoo* v. *T. F. Brown.*

3. ('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika,*

4. ('24) 11 AIR 1924 Lah 49 (51, 52): 71 Ind Cas 837 (DB). *Kallan* v. *Jowahar.*

Note 22

1. ('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.* (4 Cal 67 relied on.)
('05) 2 Cal L Jour 403 (406) (DB), *Ansar Ali Jemadar* v. *C. E. Grey.*
(1868) 10 Suth W R 289 (291) (DB), *Ram Gopal Chuckerbutty* v. *Chundernath Sein.*
[*See also* ('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.*

done by the lessor to terminate the lease. In cases governed by cl. (g) as it stood prior to 1929, it was held that an overt act by the landlord was necessary to determine the lease.[2] Under the present clause a notice in writing determining the lease is necessary.[3]

A *notice to quit* is, however, not necessary for determining a lease where a forfeiture has been incurred for refusal to perform the service.[4]

23. Notice to quit or determine the lease—Clause (h).—In the case of a lease from year to year or from month to month, it is, in the absence of a contract or local law or usage to the contrary, terminable by a *notice to quit* under S. 106.[1] Where, in the case of such leases, there is a contract or local law or usage to the contrary, and in cases of leases where the contract of tenancy provides for notice before determination of the lease, the lease is terminable by a *notice to determine the lease* as contemplated by the contract or local law or usage.[2]

A notice to quit or to determine the lease is necessary only where the tenancy is valid and *admitted* to exist between the parties. Where there is no tenancy at all[3] or where the tenancy is denied[4] or where a

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('27) 14 AIR 1927 Cal 561 (562) : 103 Ind Cas 542 (DB), *Sati Prasad* v. *Mahesh Bhunia.*

('95) 22 Cal 938 (942, 943) (DB), *Radha Pershad Singh* v. *Budhu Dashad.*]

2. ('41) 28 AIR 1941 Cal 506 (509) : 197 Ind Cas 45, *Narendra Chandra* v. *Rajendra Chandra.*

('11) 11 Ind Cas 695 (695) (Cal), *Atul Chandra* v. *Bejoy Dhupi.* (Overt act must be by all the joint landlords where there are more than one.)

3. ('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359: 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.*

4. ('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.*

('27) 14 AIR 1927 Cal 561 (562) : 103 Ind Cas 542 (DB), *Raja Sati Prasad* v. *Mahesh Bhunia.*

('95) 22 Cal 938 (942, 943) (DB), *Radha Pershad Singh* v. *Budhu Dashad.*

('09) 2 Ind Cas 992 (994) (Cal), *Babua Das* v. *Abdul Majid.*

('15) 2 AIR 1915 Mad 1135 (1136) : 28 Ind Cas 915 (DB), *Ramasami Chettiar* v. *Ambalagaran.*

[*See also* ('16) 3 AIR 1916 Mad 20 (20) : 27 Ind Cas 863 (DB), *Thikkillath Tarawad Karanavan* v. *Manchu Nair.* (In the case of a Kudima Jenman demise the landlord's power to eject the tenant is limited to cases where the latter omits to perform the services for which the grant was made.)

('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma.* (A kudima tenure will be forfeited if it was granted for future services and the tenant refuses to perform such services — A denial of the landlord's title is tantamount to a refusal to render the services required.)]

Note 23

1. ('20) 7 AIR 1920 Nag 62 (62) : 57 Ind Cas 311, *Manalal* v. *Sukhlal.*

2. *See* ('28) 15 AIR 1928 Mad 687 (688) : 100 Ind Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.*

3. ('39) 26 AIR 1939 Pat 167(168): 178 I,C. 362, *Shiba Prasad* v. *Chamru Pasi.*

4. ('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetty.* (*Doe* v. *Frowd*, 1 Moo & P 480, followed.)

See also cases cited in footnote 35 in Note 14.

Section 111
Note 23

lease is cancelled on the ground of fraud[4a] no such notice is necessary before suing for ejectment.

A lease whether governed by the Act or not, if not determined in any of the modes provided by clauses (a) to (g) of the section, can be determined only by a proper notice to quit or to determine the lease.[5]

The notice to quit or to determine the lease must be *duly* given by the one party to the other before the tenancy can be determined, that is to say, it must be given as required by S. 106 or as required by the contract of lease, if any, or by the local law or usage governing the case. An invalid notice does not determine the lease or render the possession of the tenant wrongful.[6] But where an invalid notice is accepted by the landlord and the defect is waived, the lease will be terminated.[7] Where a tenant gives a notice of his intention to quit by a particular date, but does not vacate fully on that date, the landlord is entitled to another notice to quit or an equivalent rent for the period of notice.[8]

A notice to quit or determine the lease must be given *before* a suit for ejectment is instituted.[9] The Court cannot in its decree in a suit for ejectment, give such notice.[10]

As to whether a plea of want of notice can be taken for the first time in second appeal, see the undermentioned cases.[11]

4a. ('33) 20 AIR 1933 Mad 67 (69) : 140 Ind Cas 281, *Meyappa Chettiar* v. *Nagammai Achi.*
('09) 1 Ind Cas 626 (631) : 36 Cal 675 (DB), *H. Mathewson* v. *Sri Ram Kanai Singh.*

5. ('90) 1890 All W N 175 (176) (DB), *Harbansi* v. *Bholai.* (7 All 899 followed.)
('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.*
('75) 23 Suth W R 271 (272), *C. G. D. Betts* v. *Jamie Shikh.*
('84) 8 Bom 164 (166) (DB), *Balaji* v. *Bhikaji.* (A yearly tenancy can only be terminated by six months' notice on either side ending with the cultivating year.)
('21) 8 AIR 1921 Pat 334 (335): 62 Ind Cas 421, *Farzand Ali* v. *Motilal Chowdhry.*
('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.*
('93-1900) 1893-1900 Low Bur Rul 36 (36), *Asad Ali* v. *Kadimali.*
('97-1901) 2 Upp Bur Rul 414 (415), *Maung San Pyi* v. *Maung Tun.*
[*See* ('92) 1892 Bom P J 405 (DB), *Raghunathrao* v. *Krishnarao.*]
[*See also* ('36) 23 AIR 1936 Cal 351 (352) : 166 Ind Cas 811, *Golam Hossain* v. *Abu Bakkar.*
('10) 6 Ind Cas 701 (702) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkataratnam.* (A landlord is entitled to eject, after giving due notice to quit.)
('11) 9 Ind Cas 19 (20) (Cal), *Mozaffar Ali* v. *Darogha Gope.*]

6. ('28) 15 AIR 1928 All 95 (96) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

7. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmad Moola Dawood.*

8. ('10) 8 Ind Cas 355 (355) : 1910 Pun Re No. 94, *Niadar Mal* v. *Lewin.*

9. ('10) 5 Ind Cas 699 (700) : 6 Nag L R 17, *Udebhan* v. *Jagganath.* (The suit itself will not be regarded as a notice.)

10. ('94) 18 Bom. 107 (108) (DB), *Abu Bakar* v. *Venkataramana.*

11. ('96) 20 Bom 759 (761) (DB), *Ambabai* v. *Bhau.* (Yes.)
('94) 18 Bom 110 (113) (DB), *Dodhu* v. *Madhavrao Narayan.* (Yes—15 Bom 407; 15 Bom 415; 2 Mad 346 and 12 Mad 353 followed.)
('93) 1893 Bom P J 292 (DB), *Krishna Sahharam Swar* v. *Ladu Vithu Kawatkar.* (Yes.)

24. Tenancy-at-will. — A tenancy-at-will is a tenancy only so long as *both* parties are willing to continue it. Either party may terminate it by expressing his desire to do so.[1] It has been held that it is not a "lease" as defined by the Act[2] and this section has, therefore, no application to such tenancy. The observations in the undermentioned case[3] that the tenancy might be terminated under clause (h) of this section are inconsistent with the above view.

A tenancy-at-will is determined by the death of the tenant or the landlord.[4]

No formal notice is necessary to terminate a tenancy-at-will.[5] A verbal demand for possession[6] or the institution of a suit for possession[7] is enough to terminate it. See also S. 105, Note 32.

25. Leases not governed by the Act.—To tenancies created before the Act and to tenancies excepted from its operation, the principles of English law as to the determination of leases have been applied, as being in consonance with justice, equity and good conscience.[1] This section

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('80) 2 Mad 346 (350, 351): 3 Ind Jur 160 (DB), *Abdulla Rawutan* v. *Subbarayyar*. (Yes.)

('23) 10 AIR 1923 Rang 13 (15) : 70 Ind Cas 834 (DB), *The Punjab Motor Co.* v. *Shaikh Juman*. (Question of validity of notice given will be deemed to have been waived if not taken in the first Court.)

('24) 11 AIR 1924 Mad 904 (905) : 82 Ind Cas 956, *Nalluli Pandarathil* v. *Secy. of State for India*. (Cannot be taken as of right in second appeal.)

('12) 15 Ind Cas 584 (586) (Mad), *In re Arumugam Pillai*. (No.)

Note 24

1. ('36) 23 AIR 1936 Bom 98 (98) : 161 Ind Cas 210, *Bai Jivkore* v. *Himatlal*.

2. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy*.

3. ('36) 23 AIR 1936 Bom 98 (98) : 161 Ind Cas 210, *Bai Jivkore* v. *Himatlal*.

4. ('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy*.

('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott*.

(1900) 10 Mad L Jour 201 (202) (DB), *Chemminian Pockan* v. *Udayavarma*.

5. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ram Kishun* v. *Bibi Sohila*. (AIR 1925 Pat 256 followed.)

[*See also* ('26) 13 AIR 1926 Lah 129 (130) : 89 Ind Cas 869, *Kaka* v. *Ram Saran*.]

6. ('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott*.

('07) 34 Cal 57 (64) : 5 Cal L Jour 181 (DB), *Deonandan Pershad* v. *Meghu Mahton*.

(1832) 131 E R 649 (650) : 9 Bing 356 : 2 Moore & Scott 464 : 35 R R 553, *Doe d. Price* v. *Price*.

7. (1900) 10 Mad L Jour 201 (202) (DB), *Chemminian Pockan* v. *Udayavarma*. (23 Cal 200 followed.)

Note 25

1. ('35) 22 AIR 1935 Bom 41 (42) : 59 Bom 194 : 155 Ind Cas 516 (DB), *Rachotappa* v. *Konher Annarao*.

('18) 5 AIR 1918 Lah 286 (287) : 1918 Pun Re No. 32 : 45 Ind Cas 105, *Fakir* v. *Wazir Khan*.

('24) 11 AIR 1924 Lah 281 (283) : 70 Ind Cas 349, *Chiragh Din* v. *Mohammad Usman Khan*.

Section 111
Notes 25–26

is largely based on the English law and, consequently, the principles underlying it may be applied to such cases[2] but not its technical rules. In applying such principles the Courts should have due regard to the equities of the case.[3]

A tenancy not governed by the Act and not determined on any grounds referred to in clauses (a) to (g) can only be determined by a *reasonable* notice to quit.[4]

By some Provincial Acts a right of forfeiture is excluded for denial of the landlord's title.[5] In such a case, of course; the law of forfeiture as laid down in this section or by the English law cannot be applied. Where there is no such exclusion the general principles of the law of forfeiture will apply.

26. Joint lessors — Termination of lease. — Under the English law one of several joint lessors may determine the lease and recover his share. A notice by a joint lessor on behalf of himself and the others will terminate the lease as to all.[1] This is not the law in this country. All of them must act.[2] It has been held by the High Court of

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2. ('03) 26 Mad 157 (160) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga.*
('27) 14 AIR 1927 Nag 50 (51) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde,* (Though S. 111 (g), of the T.P. Act, does not apply to agricultural leases in Berar, yet the principle of forfeiture therein enunciated applies as a principle which should guide the Courts in dealing with such matters.)
('19) 6 AIR 1919 Mad 1106 (1107) : 41 Mad 629 : 45 Ind Cas 743, *Komalukutti* v. *Muhamad.*
('26) 13 AIR 1926 Sind 71 (74, 75) : 90 Ind Cas 1007 : 21 Sind L R 185 (DB), *Sidik Haji Yacub* v. *Mahomed Faruq.* (Lease in Sind to which Act was not made applicable.)
3. ('27) 14 AIR 1927 Nag 50 (52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.*
4. ('79) 4 Cal 339 (341) (DB), *Ram Rotton Mundal* v. *Netro Kally Dassee.*
('04) 8 Cal W N 774 (778) (FB), *Sulatu Das* v. *Jadu Nath Das.*
5. ('33) 20 AIR 1933 Mad 165 (166) : 145 Ind Cas 690, *Gurumurti* v. *Rangiah.*
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian Chetti.*
('86) 12 Cal 82 (88) (DB), *Radha Gobind Koer* v. *Rakhal Das Mukerjee.*
('97) 24 Cal 720 (723) (DB), *Kishori Mohan* v. *Nund Kumar.*
See Bengal Tenancy Act, VIII of 1885.

Note 26

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 437.
(1842) 174 E R 507 (508) : Car & M 280 : 66 R R 867, *Alford* v. *Vickery.*
2. ('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi.*
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram Mohuri* v. *Dakheswar Pershad Narain Singh.*
('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji.* (A tenancy under joint receivers can be determined by a notice given by them jointly.)
('14) 1 AIR 1914 All 160 (161) : 24 Ind Cas 624, *Prayag Sonar* v. *Motar Singh.*
('11) 11 Ind Cas 695 (695) (Cal), *Atul Ghardra Majumdar* v. *Bejoya Dhupi.*
('35) 22 AIR 1935 Cal 577 (577) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari.* (The principle of English law that a joint landlord may put an end to his own demise, as far as it operates on his share, whether his companions join him or not, has no application in India.)
('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian.*

Section 111 Notes 26-27

Madras that where a lease is granted by several joint lessors, containing a clause for forfeiture for non-payment of rent and subsequent to the lease the lessors become divided, each of them can enforce the forfeiture clause for non-payment of his share of the rent, by virtue of the principles underlying sections 37 and 109 of the Act.[3]

Where once a lease has been properly determined, one of the lessors may maintain a suit in ejectment, making the others parties to the suit.[4]

27. Possession after determination of tenancy. — The possession of a tenant who holds over after the determination of the tenancy, without the consent of the landlord is wrongful possession, though not adverse possession.[1] As a person in wrongful possession he will be liable to pay damages to the lessor for such unlawful occupation.[2] The use of the wrods "damages for use and occupation" in such cases is not strictly correct. As seen in Note 40 on S. 105, the said words imply an occupation by a person with the permission of the owner in which case the law implies a contract to pay compensation for such occupation.[3]

Section 112

Waiver of forfeiture.

112. A forfeiture under section 111, clause *(g)*, is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

('24) 11 AIR 1924 Mad 771 (772) : 80 Ind Cas 139 (DB), *Kannan Kutti* v. *Elaya Veettil.* (A notice to quit by one only of two Uralans of a Malabar Devaswom is invalid.)
('06) 29 Mad 29 (34) (DB), *Appa Rao* v. *Prattipati Ramayya.*
('81) 7 Cal 470 (472) : 9 Cal L R 260 (DB), *Reasut Hossein* v. *Chorwar Singh.*
('34) 21 AIR 1934 Cal 127 (128) : 149 Ind Cas 559 (DB), *Jarman Gomez* v. *Ram Kumar.*
[But see ('87) 11 Bom 644 (648), *Ebrahim Pir* v. *Cursetji Sorabji.*]
3. ('13) 20 Ind Cas 930 (931, 932) : 38 Mad 445 (DB), *Korapalu* v. *Narayana.* (29 Mad 29 followed. 35 Cal 807 not followed.)
4. (1865) 2 Suth W R 290 (290) (DB), *Mudun Singh* v. *Nurput Singh.* (Lease determined by efflux of time.)
('17) 4 AIR 1917 Mad 151 (153) : 39 Mad 1049 : 32 Ind Cas 512 (DB), *Ahmad Sahib Shuttari* v. *Magnesite Syndicate, Ltd.*

Note 27

1. See Note 13 on Section 116.
('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu Singh.*
('33) 20 AIR 1933 Lah 509 (510) : 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari Lal.*
('07) 34 Cal 922 (924) (DB), *Khater Mistri* v. *Sadruddi Khan.*
('82) 10 Cal L R 15 (19) (DB), *Boidonath* v. *Anpurna Dabee.*
[*See also* ('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.*]
2. ('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.*
[*See also* ('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen Sahib.*]
3. ('99) 26 Cal 338 (347), *Madhubmoney Dossee* v. *Nundo Lal.*

Section 112 Note 1

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Synopsis

1. Scope of the section.
2. Acceptance of rent.
3. Distress for rent.
4. "Any other act."
5. Knowledge of breach.
6. Effect of waiver.
7. Second proviso.

Other Topics (miscellaneous)

Acceptance of rent after suit. See Note 7.
Subsequent breaches. See Note 6.
Waiver cannot be revoked. See Notes 1 and 6.

1. Scope of the section. — It has been seen in the Notes on S. 111, that incurring of a cause of forfeiture by the lessee does not *ipso facto* determine the tenancy, but that it is at the *option of the lessor* to elect whether he would determine the tenancy or not. The Courts always lean against forfeiture,[1] and if the lessor, knowing that a forfeiture has been incurred, *does any act* whereby he acknowledges the continuance of the tenancy, at a later period, he will be regarded in law as having *waived* the forfeiture.[2] This rule is enacted in this section. The rule really rests on the principle enunciated by the maxim *allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other). A lessor cannot proceed on the footing that a lease subsists and at the same time claim that it has been forfeited.[3]

Where once the forfeiture is waived, the lessor cannot be allowed to retract from it.[4] "Cases of forfeiture," said Lord Mansfield in *Goodright* v. *Davids*,[5] "are not favoured in law; and where the forfeiture is once waived, the Court will not assist it."

Section 112 — Note 1

1. See Note 11 on Section 111.
('24) 11 AIR 1924 Mad 649 (650) : 78 Ind Cas 1007 (DB), *Akkamma Shetti* v. *Chandro Shetti*.
('89) 1889 Pun Re No. 6 (12, 13), *Sukhdeo* v. *Abdul Rahman*.

2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
(1864) 5 B & S 359 (363) : 122 E R 865 (866) : 33 L J Q B 254 : 10 L T (NS) 578 : 12 W R (Eng) 829 : 136 R R 598, *Ward* v. *Day*.
('40) 27 AIR 1940 Pat 478 (478, 479) : 186 Ind Cas 686 (DB), *Shiva Prasad Singh* v. *Mandira Kumari Debi*.
('36) 23 AIR 1936 Mad 252 (258) : 168 Ind Cas 1005, *Soorayya* v. *Sooranna*. (It is at the option of the landlord to take advantage of the forfeiture or not, and if he elects not to do so, the forfeiture is waived.)

3. Broom, *A Selection of Legal Maxims*, 10th Edn., page 107.
('20) 7 AIR 1920 P C 190 (195) (PC), *King* v. *Paulson*.

4. (1864) 122 E R 865 (866) : 5 B & S 359 : 33 L J Q B 254 : 10 L T (NS) 578 : 12 W R (Eng) 829 : 136 R R 598, *Ward* v. *Day*.
('10) 6 Ind Cas 766 (768) (DB) (Mad), *Chengiah* v. *Thimma Nayanim*.

5. (1778) 98 E R 1371 (1371) : Cowp 803.

No question of waiver arises where a lease has been determined by the landlord taking advantage of forfeiture.[6]

2. Acceptance of rent. — The acceptance of rent accruing due after the forfeiture operates as a matter of law to waive all forfeitures then known to the lessor.[1] It operates as a waiver even though it is accepted under protest[2] or conditionally without prejudice to the forfeiture[3] and even though the lease provides that a waiver must be expressed in writing.[4] The fact that the rent received is credited to a suspense account will not prevent it from operating as a waiver of forfeiture.[5]

The rent accepted must be rent which has accrued due *since the forfeiture.*[6] The acceptance of rent due *prior* to forfeiture, though made after forfeiture does not operate as a waiver.[7] The reason is that

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6. ('31) 18 AIR 1931 Pat 240 (240) : 132 Ind Cas 875 (DB), *Upendra Nath Mukherji* v. *Dhubeswar Lal Singh.*
('10) 6 Ind Cas 766 (768) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.* (Per Munro, J.)
('12) 15 Ind Cas 445 (450) (SB) (Mad), *Chengiah* v. *Damara Kumara Thimma.*

Note 2

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
('40) 44 Cal W N 1109 (1112) (DB), *Motilal* v. *Pure Jambad Colliery Ltd.*
('40) 27 AIR 1940 Pat 478 (479) : 186 Ind Cas 686 (DB), *Shiva Prasad* v. *Mandira Kumari Debi.*
('36) 160 Ind Cas 1012 (1013) (Nag), *Shri Deo Janki Ramji* v. *Ramchand.*
('97) 1897 Bom P J 182 (DB), *Vithu* v. *Durgabai.*
('87) 1887 Bom P J 154 (DB), *Shivram* v. *Gangadhar.*
(1864) 1864 Suth W R (FB) 10 (10) (FB), *Peer Bux* v. *Mowzah Ally.*
('25) 12 AIR 1925 Mad 914 (915) : 86 Ind Cas 294, *Krishnan Nambudripad* v. *Kunkan Nair.*
('08) 7 Cal L Jour 648 (649) (DB), *Farman Bibi* v. *Tasha Haddal Hossein.*
('20) 7 AIR 1920 Cal 655 (657) : 59 Ind Cas 273 (DB), *Basanta Kumar Chowdhuri* v. *Secretary of State.*
('14) 1 AIR 1914 All 460 (461) : 26 Ind Cas 107, *Chattar Singh* v. *Nand Kishore.*

2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
('39) 26 AIR 1939 Oudh 257 (268) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.*
('15) 2 AIR 1915 Cal 454 (456) : 28 Ind Cas 343 (DB), *Motookdhari* v. *Jugdip Narain Singh.*

3. Woodfall, *Landlord and Tenant*, 22nd Edn., pages 397, 398.
('20) 7 AIR 1920 P C 190 (195) (PC), *The King* v. *Paulson.*
('23) 10 AIR 1923 Cal 663 (664) : 80 Ind Cas 200 (DB), *Bengal Nagpur Ry. Co.* v. *Firm of Bal Mukunda Bisseswar Lall.* (*Croft* v. *Limley*, 6 W R 523 followed.)
('35) 22 AIR 1935 Mad 454 (455) : 157 Ind Cas 804 (DB), *Sripada Satyanarayana* v. *Venkataramamurthy.* (Conditional acceptance.)

4. ('20) 7 AIR 1920 P C 190 (195) (PC), *King* v. *Paulson.*

5. ('83) 9 Cal 843 (846) : 12 Cal L R 592 (DB), *Kali Krishna* v. *Fazle Ali Chowdhry.*

6. Woodfall, *Landlord and Tenant*, 22nd Edn. page 397.
('72) 18 Suth W R 218 (220) (DB), *Chunder Nath* v. *Sirdar Khan.*
('16) 3 AIR 1916 Cal 931 (933) : 33 Ind Cas 331 (DB), *Raj Mohan De* v. *Mati Lal.*
('24) 11 AIR 1924 Cal 520 (522) : 70 Ind Cas 999 (DB), *Purna Chandra Das* v. *Ali Mahomed.*

7. ('24) 11 AIR 1924 Cal 520 (522) : 70 Ind Cas 999 (DB), *Purna Chandra Das* v. *Ali Mahammed.*

Section 112 Notes 2–4

the acceptance of money as *rent* due subsequent to forfeiture shows that the landlord acts on the view that the lease is subsisting, and not as forfeited, whereas there is nothing inconsistent in a landlord accepting rent due before the supposed determination of the lease.[8]

It is not necessary that the rent should have been paid by the *lessee*. Acceptance of *rent* from any person in possession, such as a sub-lessee, will operate as a waiver.[9]

3. **Distress for rent.** — Where the lessor distrains for rent, he thereby affirms by a solemn act that a tenancy subsists. Consequently, on the principle stated in Note 1, the forfeiture is waived. Under the English law, there is a distinction drawn between a waiver by acceptance of rent and a waiver by distress for rent. An acceptance of rent is a waiver only where the rent is for a period *subsequent* to the forfeiture. But a distress, even if it be for rent due *prior* to forfeiture, will operate as a waiver of the forfeiture. The reason is that there can be a distress in England only *during* the subsistence of relationship of landlord and tenant, so that the taking out a distress at any time involves the position that the lease is subsisting *at that time*.[1] This Act does not recognise this distinction; a distress will not operate as a waiver unless it be for rent due *subsequent* to forfeiture. This is made clear by the use of the words "by distress for *such* rent."

As to a right of distress in this country, apart from agricultural tenancies, see S. 53 of the Presidency Small Cause Courts Act (XV of 1882).

4. **"Any other act."**—The acceptance of rent, and the distress for rent are only important illustrations of acts on the part of the lessor showing intention to treat the lease as subsisting. As instances of other acts may be mentioned the following :

(1) Demand for rent due after forfeiture.[1]

(2) Action for rent due after forfeiture.[2] There is a difference

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(1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582, *Ward* v. *Day*.

8. (1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582 *Ward* v. *Day*.

9. ('25) 90 Ind Cas 832 (833) (DB) (Cal), *Chandra Kumar Saha* v. *Mafizar Rahman*.
('96) 20 Bom 439 (446), *Sarafali* v. *Subraya*. (Assignee in breach of covenant not to assign — Receipt of rent from him will operate as waiver.)

Note 3

1. (1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582, *Ward* v. *Day*.
('16) 3 AIR 1916 Cal 931 (933) : 33 Ind Cas 331 (DB), *Raj Mohan De* v. *Matilal Shah*.

Note 4

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
('87) 14 Cal 176 (184), *Kristo Nath* v. *Brown*.
2. (1858) 27 L J C P 220 (223) : 4 C B (NS) 376 : 6 W R (Eng) 502 : 31 L T (OS) 134 : 114 R R 773, *Dendy* v. *Nicholl*.
('86) 14 Cal 33 (35) (DB), *Jogeshuri* v. *Mahomed Ebrahim*.

of opinion as to whether a suit in which ejectment on forfeiture is claimed and also rent up to the date of delivery of possession constitutes a waiver; one view being that it is a waiver,[3] while according to another view, it is not.[4] It is submitted that the latter view is correct.

(3) A fresh notice to terminate a tenancy is waiver of prior forfeiture.[5]

(4) A notice to quit given by the lessor.[6]

See also the undermentioned case.[7]

A forfeiture may also be *expressly* waived. In England an express waiver of forfeiture was originally regarded as a waiver of the covenant itself so that no question of forfeiture could arise at all thereafter for later breaches of the covenant.[8] This was not followed in India[9] and even in England an express waiver now operates only as a waiver of the particular breach for which the forfeiture was incurred.[10]

The words "any other *act*" show that there must be a *positive* act. It is not sufficient that the lessor, knowing that a forfeiture has been incurred, is merely silent[11] although long continued acquiescence in repeated breaches of a covenant has been regarded in England as a waiver.[12]

(1900) 2 Cal L Jour 540 (542, 543) (DB), *Sitanath* v. *Basudeb.*
('20) 7 AIR 1920 Mad 1006 (1008) : 43 Mad 503 : 61 Ind Cas 658 (DB), *Udipi Seshagiri* v. *Seshamma Shetatti.*
('21) 8 AIR 1921 Mad 284 (284) : 69 Ind Cas 282 (DB), *Ramappa* v. *Abdulla Beari.*
('20) 7 AIR 1920 Cal 899(900): 64 I.C. 711 (DB), *Rash Behary* v. *Upendra Nath.*
('16) 3 AIR 1916 Pat 409 (410) : 1 Pat L Jour 185 : 34 Ind Cas 918, *Midnapore Zamindari Co. Ltd.* v. *Joyram Santal.*
[*See also* ('21) 60 Ind Cas 476 (477) (Pat), *Llewhellin* v. *Ali Asgar.*
('09) 1 Ind Cas 753 (753, 754) (DB) (Cal), *Mansar Ali* v. *Abdul Karim.* (Suit for rent accrued prior to forfeiture, not a waiver.)]

3. ('18) 5 AIR 1918 Cal 552 (553) : 42 Ind Cas 614 (DB), *Abdul Rashid Khan* v. *Safar Ali.*

4.('27) 14 AIR 1927 Mad 261 (263) : 99 Ind Cas 700, *Koragalava* v. *Jakri Beary.*

5. ('24) 11 AIR 1924 Bom 454 (456) : 48 Bom 541 : 83 Ind Cas 45 (DB), *Rukmini Vithu* v. *Rayaji Dattatraya.* (In a suit for ejectment on the ground of forfeiture of tenancy, the plaintiff made an alternative claim that the notice given by him should be treated as a notice terminating the tenancy in suit — *Held*, he was estopped from relying upon the forfeiture since the claim amounted to an assertion that the tenancy was still subsisting and was therefore a waiver of forfeiture.)

6. ('40) 27 AIR 1940 Pat 478 (479) : 186 Ind Cas 686 (DB), *Shiva Prasad Singh* v. *Mandira Kumari Debi.*

7. ('10) 8 Ind Cas 309 (310) (DB) (Mad), *Mussa Kutti* v. *Rangachariar.*

8. Woodfall, *Landlord and Tenant*, 22nd Edn., page 403.

9. ('92) 1892 Bom P J 353 (DB), *Sattyappa* v. *Mahadevamma.*

10. See Law of Property Act, 1925 (15 Geo. V, Ch. 20), S. 148.

11. *See* ('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeshwant* v. *Shiwappa.*
[But see ('24) 11 AIR 1924 Lah 281 (285) : 70 Ind Cas 349, *Chiragh Din* v. *Muhammad Usman Khan.* (Where the lessor did not exercise his right to forfeit the tenancy for two years after his title was repudiated by the tenant and allowed a third party to purchase the leased property at a court auction he was held to have waived his right and was estopped as against the third party from setting up the forfeiture.)]

12. Woodfall, *Landlord and Tenant*, 22nd Edn., page 400.

Section 112 Notes 4–7

Where the lessor in granting a receipt for rent due prior to forfeiture, described the grantee of the receipt as a 'tenant', it was held that this did not show that he intended to treat the lease as subsisting and was therefore not a waiver.[13]

5. Knowledge of breach.—The first proviso merely reproduces the English law, that in order to render acceptance of rent or any other act a waiver of a forfeiture the lessor must have notice or knowledge of the forfeiture at the time of the supposed waiver.[1] For, a man cannot be said to waive that of which he has no knowledge. The *onus* is on the lessee to show such knowledge on the part of the lessor.[2]

6. Effect of waiver. — A waiver of a forfeiture operates not only as regards the particular forfeiture incurred but also all *prior* causes of forfeiture.[1] But it does not preclude the lessor from taking advantage of *subsequent* causes of forfeiture.[2]

Where the breach is of a continuing nature the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach as where the covenant is to keep the premises in repair during the term.[3]

A waiver once made is irrevocable as to the forfeiture waived, and the lessor cannot subsequently claim to enforce the forfeiture.[4]

7. Second proviso.—An acceptance of rent after the institution of a suit for ejectment on the ground of forfeiture is not a waiver.[1] In

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13. ('16) 3 AIR 1916 Cal 931 (934) : 33 Ind Cas 331 (DB), *Raj Mohan* v. *Mati Lal.*

Note 5

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 400.
('32) 19 AIR 1932 Cal 787 (789) : 60 Cal 47: 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Aferaddi.*
('91) 1891 Bom P J 107 (DB), *Nagardas* v. *Ganu.*

2. ('32) 19 AIR 1932 Cal 787 (789) : 60 Cal 47 : 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Aferaddi.*

Note 6

1. ('11) 11 Ind Cas 974 (975) (DB) (Cal), *Kalanand Singh* v. *Gunput Singh.*

2. ('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Dayal Singh* v. *Promatha Nath.*
('16) 3 AIR 1916 Lah 403 (404): 35 Ind Cas 235, *Locha Ram* v. *Jindwadda Khan.*
(1863) 1 Mad H C R 15 (16) (DB), *Cutenho* v. *Souza.*
('92) 1892 Bom P J 353 (DB), *Sattyappa* v. *Mahadevamma.*
('24) 11 AIR 1924 Mad 776 (777) : 84 Ind Cas 625 (DB), *Gopala Kuduva* v. *Hamza Sahib.*

3. ('67) 8 Suth W R 138 (139) (DB), *Dulli Chand* v. *Meher Chand.*
('21) 8 AIR 1921 Bom 307 (308, 309) : 45 Bom 535 : 58 Ind Cas 69, *Kasturbhai Manibhai* v. *Hiralal Dahya Bhai.* (Non-payment of rent at a stipulated rate month after month is a continuing breach — The landlord's conduct in having waived his right to forfeit on such a breach for any particular month or months does not destroy his right to forfeit on similar breaches in a subsequent month.)

4. ('20) 7 AIR 1920 P C 190 (195) (PC), *The King* v. *Paulson.*
('15) 2 AIR 1915 Cal 68 (69) : 25 Ind Cas 880 (DB), *Haldhar Jha* v. *Ashraf Alam.*

Note 7

1. ('40) 44 C W N 1109 (1112) (DB), *Motilal Daga* v. *Pure Jambad Colliery, Ltd.*
('10) 6 Ind Cas 264 (264) (DB) (Mad), *Mashoor Pudukudi* v. *Paramban Moideen.*

England even a distress for rent does not operate as a waiver if it is after the institution of a suit for ejectment.[2] It is doubtful if any act, other than the acceptance of rent, showing an intent to treat the lease as subsisting, will not operate as waiver, even if such act is done after the institution of the suit. Section 112 Note 7

Section 113

113. Waiver of notice to quit. A notice given under section 111, clause *(h)*, is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

Synopsis

1. Scope of the section.
2. "With the express or implied consent."
3. Act showing an intention to treat the lease as subsisting.
4. Effect of waiver.

Other Topics (miscellaneous)

Distinction between waiver of notice to quit and waiver of forfeiture. See Note 2.
Waiver of notice to quit — Instances. See Note 3.

1. Scope of the section. — Section 112 deals with waiver of *forfeiture* under S. 111, cl. (g). This section deals with waiver of *notice to quit* under S. 111, cl. (h), and reproduces substantially the English law on the subject.[1]

The section applies only to leases that are admittedly determinable by a notice to quit, that is, to leases from year to year and from month to month. The section will not apply where the landlord claims to treat the tenant as a tenant from year to year but the latter asserts a permanent tenancy.[2]

2. "With the express or implied consent." — A waiver of a notice to quit under this section can be made only *with the express or implied consent* of the person to whom notice is given. In this respect it differs from a waiver of forfeiture which depends upon the

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('66) 2 Bom H C R 66 (69, 70), *Timmarsa Puranik* v. *Badiya Kuppagooda*.
[*See also* ('10) 6 Ind Cas 447 (450) : 34 Mad 161 (DB), *Padmanabaya* v. *Ranga*. (Under the law prior to the Act claim for rent will not affect lessor's right to eject.)]

2. (1872) 41 L J C P 239 (240) : 20 W R (Eng) 972 : L R 7 C P 360 : 27 L T 268, *Grimwood* v. *Moss*.

Section 113 — Note 1

1. See Halsbury, *Laws of England*, Volume 18, pp. 454, 455, paras. 922 and 923.
2. ('27) 14 AIR 1927 Pat 305 (308) : 102 Ind Cas 821 (DB), *Kamakhya Narain Singh* v. *Khalik Ahmad*.

Section 113 Notes 2–3

exercise of the option by the lessor alone. This is also the English law on the point.[1]

3. **Act showing an intention to treat the lease as subsisting.** — Waiver is a matter of intention of the parties. The act alleged to constitute waiver must import the recognition of the tenancy. The illustrations to the section give two instances of waiver: (1) acceptance of rent which has become due since the expiration of the notice to quit, and (2) giving a second notice to quit.

Acceptance of rent :

The acceptance of rent accrued due *before* the date of the notice to quit is not a waiver of the notice to quit.[1] The acceptance of rent accrued due *subsequent* to the notice is a waiver of the notice.[2] It clearly indicates that the lessor intends to treat the lease as subsisting. The *payment* of rent by the lessee also shows that the lessee *impliedly consents* to waiver.

A *mere demand* for the rent accrued due subsequent to the notice not followed by a promise by the tenant to pay cannot operate as a waiver of the notice, for want of the tenant's consent.[3] On the same principle, a claim in a suit for ejectment for the arrears of rent due is not a waiver of the notice.[4] So also mere abortive negotiations between the parties with regard to the payment of rent subsequent to the notice do not constitute a waiver.[5]

By virtue of the second proviso to S. 112 the acceptance of rent, even though subsequent to a forfeiture, does not constitute a waiver of the forfeiture if such acceptance is made after a suit for ejectment is instituted against the lessee on the ground of forfeiture. There is no provision corresponding to that proviso in this section and it has been held that the acceptance of rent due subsequent to the notice to quit, even after the institution of a suit for ejectment, will operate as a waiver of such notice.[6] In the undermentioned case[7] where, pending

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Note 2

1. (1853) 13 C B 178 (180) : 138 E R 1165 : 22 L J C P 79 :93 R R 480, *Blyth* v. *Denett.*
(1868) 37 L J Ex Ch 173 (174) : 16 W R (Eng) 1018 : L R 3 Ex 303 : 18 L T 655, *Tayleur* v. *Wildon.*
See also Halsbury, *Laws of England*, Volume 18, p. 454, paras. 922, 923.

Note 3

1. ('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneshwar Das* v. *Kamal Deb.*
2. ('26) 13 AIR 1926 Cal 763 (763) : 94 Ind Cas 156, *Manicklal* v. *Kadambini.*
3. (1853) 13 C B 178 (180, 181) : 138 E R 1165 : 22 L J C P 79 : 93 R R 480 (482, 483), *Blyth* v. *Dennett.*
4. ('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 : 42 Ind Cas 655 (DB), *Shah Wali Ahmad* v. *Hussaini Begum.* (1 Ind Cas 753; 6 Ind Cas 447 : 34 Mad 161 and *Penton* v. *Bornett* 67 L J Q B 11 followed.)
5. ('27) 14 AIR 1927 Rang 276 (276, 277) : 104 Ind Cas 335 (DB), *Thai Un Tung* v. *Mohamed Ajam Esmail.*
6. ('26) 13 AIR 1926 Cal 763 (763) : 94 Ind Cas 156, *Manicklal* v. *Kadambini.*
(1864) 1864 Suth W R (Sp. No.) 10 (10) (FB), *Peer Bux* v. *Mowzah Ally.*
7. ('34) 21 AIR 1934 Cal 837 (837, 838) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit Shaw.*

a suit for ejectment the Court passed an order by consent of parties by which certain payments were made by the defendant and accepted by the plaintiff, it was held that such acceptance would not constitute a waiver of the notice.

The fact that the lessor accepts the rent under protest as where he states that he accepts it as damages for use and occupation will not prevent it from operating as a waiver of the notice.[8]

Second notice to quit :

The giving of a second notice to quit is a waiver of the first notice to quit.[9] The consent of the lessee to the waiver is implied in this case by his continuing in possession in spite of the first notice to quit. A party who denies having given a first notice to quit, cannot on being found against on that point, plead that his second notice was a waiver of the first.[10]

Distress for rent :

A distress for rent due subsequent to the notice to quit is an act showing an intention to treat the lease as subsisting (see S. 112), and if acquiesced in by the tenant, will operate as a waiver of the notice.[11]

Acts not amounting to waiver :

The mere fact that the tenant is allowed to remain in possession, out of favour, after the expiry of the notice to quit[12] or the fact that no suit is filed for ejectment immediately on the expiry of the notice[13] does not operate as a waiver. The acceptance of rent by an unauthorised person does not bind the landlord and will not constitute a waiver of the notice.[14] In the case of cosharers, the acceptance of rent by *one* of them will operate as waiver only in so far as he is concerned. The others will not be affected thereby.[15]

4. **Effect of waiver.** — Under the English law, a withdrawal or abandonment of the notice to quit *before its expiry* does not nullify the notice but operates as evidence of an agreement for a *new tenancy* on the expiration of the old one. *After the expiry* of the notice, a waiver

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8. ('23) 10 AIR 1923 Cal 663 (664): 80 Ind Cas 200 (DB), *Bengal Nagpur Railway Co. Ltd.* v. *Firm Bal Mukund Biseswar Lall.*
9. (1812) 16 East 53 (56) : 104 E R 1009 : 14 R R 284 (286), *Doe d. Brierly* v. *Palmer.*
10. ('27) 14 AIR 1927 Pat 305 (308) : 102 Ind Cas 821 (DB), *Kamakhya Narain Singh* v. *Khalik Ahmad.*
11. (1790) 1 H & Bl. 311 (312) : 2 R R 770 (772), *Zouch* v. *Willingale.*
12. (1808) 10 East 13 (16) : 103 E R 680 : 10 R R 224 (226), *Whiteacre d. Boult* v. *Symonds.*
(1862) 11 C B (N S) 520 (525) : 5 L T (N S) 841 : 132 R R 648 (651), *Gray* v. *Bompas.* (Notice to quit duly given — The tenant quitted before time but inadvertently or accidentally retained the key of the house for 2 days more after the expiration of the notice — *Held* that this inadvertent holding over for two days could not amount to an intention to continue the tenancy and did not constitute waiver of notice.)
13. ('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeshwant* v. *Shiwappa.*
14. (1810) 2 Camp 387 (388) : 11 R R 745 (746), *Doe d. Ash* v. *Calvert.*
15. ('32) 19 AIR 1932 Pat 259 (260, 261) : 140 Ind Cas 14 (DB), *Lachmi Lal* v. *Ganesh Chamar.*

Section 113 Note 4

of it operates by creating a *new tenancy*, the old tenancy being determined by the notice.[1] Under this section, it has been held that the effect of waiver is that the tenancy is not regarded as having been at all determined, but is regarded as continuing.[2] A guarantor for rent under a tenancy would not, under the English law, be liable after the expiry of a notice to quit even if, subsequently, the notice is waived.[3] It is doubtful *whether* this principle is applicable where a notice to quit is waived under this section.

Section 114

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

Synopsis

1. Scope.
2. Law before the Transfer of Property Act of 1882.
3. "Lessor."
4. "Lessee."
5. "At the hearing of the suit."
6. "Rent in arrear."
7. "The Court may pass an order."
8. Relief where period of grace is provided for the payment of the rent.
9. Consent decree creating relation of lessor and lessee and providing for forfeiture on non-payment of rent—Relief.
10. Suit for ejectment on forfeiture — Court, if can pass decree for arrears of rent only.
11. Relief against forfeiture for breaches of other conditions.
12. Forfeiture under decree — Construction of decree.

Other Topics (miscellaneous)

Conditions of relief. See Notes 6 and 7.
Relief after decree. See Note 5.
Which Court can grant relief. See Note 5.
Who can claim relief under this section. See Note 4.
Sub-lessee. See Note 4.
Transferee from lessee. See Note 4.

1. Scope. — It is a general principle that wherever a penalty is provided to secure the performance of an act, the latter is considered as the principal intent of the instrument and the penalty is deemed only as necessary and intended only to secure such performance.[1] On this

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Note 4

1. Halsbury, *Laws of England*, Volume 18, p. 454, paragraph 922.
2. ('23) 10 AIR 1923 Cal 663 (665): 80 Ind Cas 200 (DB), *Bengal Nagpur Railway Co. Ltd.* v. *Firm Bal Mukund Biseswar Lall.*
3. Halsbury, *Laws of England*, Volume 18, p. 454, para. 922, foot-note (c).

Section 114—Note 1

1. Snell's *Principles of Equity*, 11th Edition, page 361.
Story, *Equity Jurisprudence*, 1920 Edition, paragraphs 1314, 1315, 1316.

Section 114 Note 1

principle where the forfeiture of a lease and an entry for the forfeiture is stipulated for in a lease, in case of non-payment of rent, the right of re-entry is deemed merely as a security for the payment of the rent.[3] So that if the lessee makes adequate compensation to the landlord and puts him in the same position as if the rent had been paid to him when it was due, the purpose of the clause of forfeiture, namely to secure the rent is served and lessee would be relieved from the forfeiture by a Court of Equity.[3]

This section is based on the abovementioned principles. It is, however, limited to forfeiture of *leases*[4] for *non-payment of rent*.

By virtue of S. 117, this section does not apply to agricultural leases. The section is not also applicable to the Punjab to which the Transfer of Property Act does not apply. But in all such cases, the general principle on which this section is based will be applicable and Courts can grant relief against forfeiture on such conditions and in such circumstances as may appear equitable,[5] but are not bound by the

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('24) 11 AIR 1924 Lah 49 (51) : 71 Ind Cas 837 (DB), *Kallan* v. *Jowahar Singh*.

2. Story, *Equity Jurisprudence*, 1920 Edition, paragraph 1315.

3. ('31) 18 AIR 1931 Cal 457 (457, 458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties Ltd.* v. *Dhunbai*.
(1721) 1 Str 447 (453) : 93 E R 626 : 2 White & Tud L. C. 3rd Edn. p. 1008 : Prec Ch 568 : 2 Eq. Cas Abr 227, *Peachy* v. *Duke of Somerset*.
(1895) 64 L J Ch 666 (670) : (1895) 2 Ch 581 : 43 W R (Eng) 645 : 73 L T 77, *Howard* v. *Fanshawe*.
('16) 3 AIR 1916 Mad 680 (682) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appaya Shetty* v. *Mahammade Beari*.
('83) 6 Mad 327 (330) (DB), *Narayana Sanabhoga* v. *Narayana Nayak*.
('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan*.
('07) 34 Cal 358 (368) : 5 Cal L Jour 208 (DB), *Megh Lal* v. *Raj Kumar*.
(1806) 12 Ves 475 (476) : 33 E R 180, *Davis* v. *West*.
(1893) 62 L J Q B 187 (188) : 41 W R (Eng) 297 : 68 L T 223 : (1893) 1 Q B 604, *Hare* v. *Elms*.
('87) 1887 Bom P J 154 (DB), *Shivram Bapuji* v. *Gangadhar Laxman*.
('88) 1888 Bom P J 304, *Ramchandrarao* v. *Sidu*.
('83) 1883 Bom P J 104 (DB), *Vishvanath* v. *Yakub*.
('95) 1895 Bom P J 206 (DB), *Gangadhar* v. *Savitribai*.
[*See* (1864) 1864 Suth W R (Gap No. Act X) 31 (32) (DB), *Alum Chunder* v. *Moran & Co.*]

4. *See* ('31) 18 AIR 1931 Nag 60 (63) : 132 Ind Cas 450 : 27 Nag L R 24, *Bana Bai* v. *Chandrabhaga*. (Section has no application to maintenance grants.)

5. ('28) 15 AIR 1928 Mad 250 (252): 108 Ind Cas 273, *Ramabrahman* v. *K. Rami Reddi*.
('36) 160 Ind Cas 1012 (1013) (Nag), *Shrideo Jankiramji* v. *Ramchand*.
('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto*.
('83) 6 Mad 159 (167) (DB), *Subbaraya* v. *Krishna*.
('10) 7 Ind Cas 565 (565) (DB) (Mad), *Parapurath Kalliani Amma* v. *A. Chinnan*.
('92) 15 Mad 125 (126) (DB), *Vaguran* v. *Rangayyangar*.
('16) 3 AIR 1916 Mad 680 (684) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Chetty* v. *Mahammad Beari*.
('27) 14 AIR 1927 Mad 239 (239) : 98 Ind Cas 851, *Ramakrishna Martoba* v. *I. P. Fernandez*.
('12) 17 Ind Cas 991 (992) : 1912 Pun Re No. 6 (Rev), *Aziz-ud-din* v. *Bhagwan Das*.
('24) 11 AIR 1924 Lah 49 (52) : 71 Ind Cas 837 (DB), *Kallan* v. *Jowahar Singh*.

Section 114 Notes 1-4

conditions laid down in this section.[6]

2. **Law before the Transfer of Property Act of 1882.** — The principle on which this section is based was applied even before the passing of this Act.[1]

The second paragraph of S. 78 of the Bengal Rent Act (X of 1859) provided for relief against forfeiture and ran as follows :

> "In all cases of suits for the ejectment of a raiyat or a cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount together with interest and costs of the suit be paid into Court within fifteen days from the date of the decree, execution shall be stayed."

See also the undermentioned cases under the Bengal Rent Act.[2]

3. **"Lessor."** — The word "lessor" includes an assignee of the lessor's rights. As has been seen in Notes on S. 111 an assignee of the lease can also enforce a forfeiture of the lease for non-payment of rent and if, in a suit by him for ejectment on the ground of forfeiture, the tenant pays up the rent in arrears the Court can grant relief against forfeiture.[1]

4. **"Lessee."** — In England an under-tenant is entitled to claim relief from forfeiture in the same way as the tenant can, a liberal construction being placed on the word "tenant."[1] It has been held by the Allahabad High Court[2] that the word "lessee" in this section must similarly be liberally construed as including transferees from him and that such transferees also can claim relief under this section.[3]

('83) 6 Mad 327 (330) (DB), *Narayana Sanabhoga* v. *Narayana Nayak.* (Section 114 inapplicable under S. 2, cl. (c)—Contract before 1882.)

6. ('27) 14 AIR 1927 Mad 239 (240) : 98 Ind Cas 851, *Ramakrishna Martoba* v. *I. P. Fernandez*

Note 2

1. ('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan.*
('81) 7 Cal 566 (570) : 9 Cal L R 185 (DB), *Mahomed Ameer* v. *Peryag Singh.*
(1865) 2 Bom H C R 66 (69) (DB), *Timmarsa Puranik* v. *Badiya.*
('79) 4 Cal L R 469 (472) (DB), *Mothoora Mohun* v. *Ram Lal.*
(1867) 2 Agra (Ex O C J) 1 (15), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*
('83) 1883 Bom P J 104 (DB), *Vishvanath* v. *Yakub.*
('69) 11 Suth W R 201 (201) (DB), *Kumla Sahoy* v. *Ramruttun Neogy.*

2. (1864) 1864 Suth W R (Gap. No. Act X) 31 (32) (DB), *Allum Chunder* v. *Moran & Co.*
('67) 7 Suth W R 374 (374) (DB), *Mahomed Hossein* v. *Boodhun Singh.*

Note 3

1. ('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.*

Note 4

1. (1811) 3 Taunt 402 (403): 128 E R 160, *Doe d. Whitfield* v. *Roe.* (Mortgagee of a lessee is entitled to relief.)
(1905) 74 L J Ch 370 (373) : 53 W R (Eng) 552 : (1905) 1 Ch 739 : 92 L T 834, *Humphreys* v. *Marten.* (Mortgagee of an assignee from lessee is entitled to relief.)
(1907) 76 L J K B 658 (660, 661) : (1907) 2 K B 8 : 96 L T 594, *Moore* v. *Smee & Cornish.*

2. ('14) 1 AIR 1914 All 411 (413):25. I C. 186, *Ahmad Hussain* v. *Rias Ahmad.*

3. *See also* ('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan.*

Where there are *several* transferees from the lessees and only some of them claim relief against forfeiture, they must pay the *whole of the amount due* to the lessor with interest and costs.[4]

5. "At the hearing of the suit." — The payment or tender mentioned in this section must be made "at the hearing of the suit." The word "suit" would include an appeal also, and consequently the payment or tender may be made at the hearing of the appeal and relief claimed under this section.[1]

In England the lessee is entitled, even after the trial and judgment, to apply for relief within six months of such judgment.[2] This rule has not been adopted in this Act, and no relief can be granted to the tenant under this Act after an order for ejectment has been passed.[3]

6. "Rent in arrear." — As already seen in Note 1, this section is based on the principle of equity that where the object of the clause of forfeiture, namely to secure the rent, is fulfilled and the tenant puts the landlord in the same position as if no default in payment had been made, the forfeiture should be relieved against. If the tenant seeks equity by asking for this equitable relief he must do equity: he must pay *all* that is due to lessor. Hence, the words "rent in arrear" must be taken to mean all the rent *due up to the date of relief* and not merely the rent for the non-payment of which the forfeiture of the lease had occurred.[1] The expression "rent in arrear" will also include the rent which the lessor may be unable to recover under the law relating to limitation. The reason is that though the lessor's *remedy* under the law to recover the rent is lost, the tenant's *liability in equity* to pay the rent subsists; and if this duty is not discharged the tenant is not entitled to the equitable relief under this section.[2]

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4. (1689) 2 Vern 103 (103, 104) : 23 E R 676, *Webber* v. *Smith.*

Note 5

1. ('13) 21 Ind Cas 405 (406) (DB) (Mad), *Vidyapurna Thirtha Swamiar* v. *Rangappayya.*

2. ('16) 3 AIR 1916 Mad 680 (681) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Mahammade Beari.*

(1725) 8 Mod Rep 345 (345) : 88 E R 247, *Phillips* v. *Doelittle.*

(1885) 54 L J Q B 277 (278) : 14 Q B D 347 : 52 L T 374, *Croft* v. *London and County Banking Co.*

See O. 14, R. 10, Supreme Court Rules, as amended after 1902.

3. ('31) 18 AIR 1931 Cal 457 (458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties, Ltd.* v. *Dhunbai.*

('16) 3 AIR 1916 Mad 680 (681, 682): 39 Mad 834: 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Muhammade Beari.*

('28) 15 AIR 1928 Mad 193 (194): 51 Mad 157: 107 Ind Cas 792 (DB), *Giridharadoss Co.* v. *Para Appadurai.*

Note 6

1. ('31) 18 AIR 1931 Cal 457 (458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties, Ltd.* v. *Dhunbai.*

(1895) 64 L J Ch 666 (671) : (1895) 2 Ch 581 : 73 L T 77 : 43 W R (Eng) 645, *Haward* v. *Fanshawe.*" (Quoted in AIR 1931 Cal 457 : 58 Cal 311.)

2. ('21) 8 AIR 1921 Mad 418 (419): 44 Mad 629 : 62 Ind Cas 593 (DB), *Vasudeva Udpa* v. *Krishna Udpa.*

('36) 23 AIR 1936 Mad 116(117):160 I.C. 530, *Vamana Pai* v. *Venkatu Naika.*

Section 114
Note 7

7. "The Court may pass an order." — The word "may" shows that the Court has a *discretion* in the matter which it may exercise according to the circumstances of the case.[1] In the absence of special circumstances which would go against the lessee, the Court will generally exercise its discretion in *favour* of granting relief.[2] The mere fact that the lessee sets up a plea of payment which he fails to prove will not, in itself, disentitle him to relief.[3] But such a fact may, along with other circumstances, disentitle him to the relief.[4]

A lessee who wants relief under this section must come to the Court with clean hands. Where the conduct of a tenant *qua* tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, relief against forfeiture will not be granted.[5]

The relief is also subject to other equities that may have arisen between the date of the forfeiture and the application for relief.[6] Thus,

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Note 7

1. ('31) 18 AIR 1931 Cal 457 (457) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties Ltd.* v. *Dhunbai.*

2. ('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
('14) 1 AIR 1914 All 305 (306) : 24 Ind Cas 79, *Kundan Lal* v. *Kallu.*
('25) 12 AIR 1925 Mad 919 (921) : 85 Ind Cas 964, *Elagan* v. *Nanjappan.*
('14) 1 AIR 1914 Mad 706 (708): 24 Ind Cas 139 (DB), *Ramkrishna* v. *Baburaya.*
('93) 17 Mad 216 (218) : 4 Mad L Jour 70 (DB), *Krishnasami Chetti* v. *Natal Emigration Board.*
(1806) 12 Ves 475 (476) : 33 E R 180, *Davis* v. *West.*
('69) 11 Suth W R 201 (201) (DB), *Kumla Sahoy* v. *Ram Ruttun.*
(1905) 74 L J Ch 370 (372) : 53 W R (Eng) 552 : (1905) 1 Ch 739 : 92 L T 834, *Humphreys* v. *Marten.*
('87) 1887 Bom P J 154 (DB), *Shivram Bapuji* v. *Gangadhar Laxman.*
('88) 1888 Bom P J 304, *Ramchandrarao* v. *Sidu.*
('95) 1895 Bom P J 206 (DB), *Gangadhar* v. *Savitribai.*

3. ('14) 1 AIR 1914 Mad 706 (708) : 24 Ind Cas 139 (DB), *Ram Krishna* v. *Babu Raya.*
(1865) 2 Bom H C R 66 (70) (DB), *Timmarsa Puranik* v. *Badiya Kuppagooda.*
('88) 13 Bom 323 (325) (DB), *Jamsetji Sorabji* v. *Lakshmiram Rajaram.*

4. ('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 445, *Arjun* v. *Narayan.*
('05) 15 Mad L Jour 210 (210) (DB), *Narayana Kamti* v. *Handu Shetty.*
('11) 12 Ind Cas 456 (456) (DB) (Mad), *Mahalakshmi Amma* v. *Lakshmi.*

5. ('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 445, *Arjun* v. *Narayan.* (Tenant unsuccessfully pleading discharge—Failing to pay arrears in lower Court—Rent not paid in spite of long period of grace.)
(1886) 3 T L R 34 (35), *Stanhope* v. *Haworth.* (Tenant making delay in asking relief—Relief refused.)
(1841) 1 Hare 109 (138) : 11 L J Ch 132 : 66 E R 969, *Bowser* v. *Colby.*
[*See* ('98) 1898 Bom P J 339 (DB), *Yamunabai* v. *Mathurabai.* (Tenant not dealing honestly with the landlord.)]

6. ('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
(1895) 43 W R (Eng) 89 (89) : 72 L T 852 : 14 R 526, *Newbolt* v. *Bingham.* (Referred in AIR 1927 Cal 908 : 54 Cal 485.)

where the landlord, during that period, has re-let the premises to a third party or otherwise dealt with them, relief under this section will not be given.[7] The reason is that the equities in favour of the third party or the transferee are greater than those in favour of the tenant who has committed a default in payment giving rise to forfeiture.

Relief against forfeiture will not be given also where the landlord and other interested parties cannot be put in the same position as if no default in payment had been made. In *Stenhope* v. *Hawworth*[8] there was a forfeiture of a lease of a colliery, for non-payment of rent. The lessee applied for relief against forfeiture just before the expiry of the period allowed by the law to make such applications. In the meantime the landlord had to maintain the colliery and third parties had offered to take it and had incurred expenses. It was held that relief could not be given against forfeiture inasmuch as the parties could not be put back in the same position as they were in before.

The question whether the lessor has or has not entered and dispossessed the tenant is immaterial in deciding whether relief should or should not be granted under this section.[9]

Where the discretion has been exercised by the Court one way or the other, it will not be interfered with by the appellate Court unless it is clear that the first Court had not exercised its discretion on proper judicial principles.[10]

8. Relief where period of grace is provided for the payment of the rent. — Where the lease itself provides for a period of grace for payment of the rent which may become due, there is a difference of opinion on the question whether the Court can grant relief against the forfeiture.

On the one hand, it has been held that relief should not be granted in such cases.[1] This view proceeds on the ground that the principle of granting relief against forfeiture is that a clause for forfeiture is regarded in equity as merely being *in terrorem* intended merely to safeguard the due payment of rent, that where the lessee is given a period of grace after default, for making the payment, it cannot be said that the clause

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7. ('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
(1886) 3 T L R 34 (35), *Stenhope* v. *Haworth.* (Referred in AIR 1927 Cal 908 : 54 Cal 485.)

8. (1886) 3 T L R 34 (35).

9. ('06) 34 Cal 358 (368) : 5 Cal L Jour 208 (DB), *Meghalal* v. *Raj Kumar.*

10. ('28) 15 AIR 1928 Mad 250 (253) : 108 Ind Cas 273, *Ramabrahman* v. *Rami Reddi.*

Note 8

1. ('11) 12 Ind Cas 456 (456) (DB) (Mad), *Mahalakshmi Amma* v. *Lakshmi.*
('10) 6 Ind Cas 438 (438) (DB) (Mad), *Adiraya Shetty* v. *Billa Tyampu.*
('05) 15 Mad L Jour 210 (210) (DB), *Narayana Kamti* v. *Handu Chetty.*
('05) 28 Mad 389 (391) : 15 Mad L Jour 208 (DB), *Narayana Naicka* v. *Vasudeva Bhatta.*
('12) 16 Ind Cas 803 (803) (DB) (Mad), *Tungama Shettiti* v. *Korattia Shettiti.*

Section 114
Notes 8–10

of forfeiture was intended to be merely *in terrorem*, and that therefore relief need not be given in such cases.

On the other hand, the contrary view has been taken in other cases,[2] namely that, the equitable principle being to grant relief against forfeiture, it is not affected by the insertion of a clause granting a period of grace.

It is submitted that the latter view is to be preferred. The clause providing days of grace is inserted for the benefit of the lessee, and as pointed out by Napier, J., in the undermentioned case[3] it is difficult to see how what was intended as a benefit to the lessee can be made use of to deprive the Court of its power to grant relief.

9. Consent decree creating relation of lessor and lessee and providing for forfeiture on non-payment of rent—Relief. In *Wentworth* v. *Bullen*[1] Baron Parke observed :

> "The contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge."

Where, therefore, a consent decree creates the relation of landlord and tenant and provides for forfeiture on non-payment of rent, the Court can give relief against the forfeiture in the same way as it can do in a lease created by act of parties.[2]

10. Suit for ejectment on forfeiture — Court, if can pass decree for arrears of rent only. — It is clear from the section that unless the lessee pays or tenders the rent in arrear or gives security therefor at the hearing of the suit, the suit for ejectment will be decreed. In the undermentioned case,[1] however, it was held that in appropriate

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2. ('21) 8 AIR 1921 Bom 403 (404): 45 Bom 300: 59 Ind Cas 769 (DB), *Krishnaji* v. *Sitaram.*
('28) 15 AIR 1928 Mad 250 (253) : 108 I.C. 273, *Ramabrahmam* v. *Rami Reddi.*
('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 445, *Arjun* v. *Narayan.*
('16) 3 AIR 1916 Mad 680 (683) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Mahammade Beari.*
('17) 4 AIR 1917 Mad 182 (183) : 32 Ind Cas 526 (DB), *Narayana* v. *Kashappaya.*
('14) 1 AIR 1914 Mad 706 (707): 24 I. C. 139 (DB), *Ram Krishna* v. *Babu Raya.*

3. ('16) 3 AIR 1916 Mad 680 (683) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Mahammade Beari.*

Note 9

1. (1829) 9 B & C 840 (850) : 9 L J K B 33 : 33 R R 353 : 109 E R 313.

2. ('06) 31 Bom 15 (24, 25): 8 Bom L R 813 (FB) *Krishna Bai* v. *Hari Govind.* (10 Bom 435 overruled.)
('11) 12 Ind Cas 334 (335) (DB) (Mad), *Theyyammalachi* v. *Rajali.*
(1866) 35 L J C P 351 (353) : 15 L T 386 : L R 1 C P 570, *Lievesley* v. *Gilmore.*
(1900) 24 Mad 265 (271) (DB), *Nagappa* v. *Venkatrao.*
('02) 26 Mad 31 (33) (DB), *Laxmanaswami Naidu* v. *Rangamma.*
('11) 10 Ind Cas 746 (746) : 35 Bom 239 (DB), *Balambhat Ravjibhat* v. *Vinayak Ganpatrao.*
('21) 8 AIR 1921 Cal 565 (567) : 66 Ind Cas 766 (DB), *Gopal Krishna* v. *Hari Nath.*

Note 10

1. ('28) 15 AIR 1928 All 716 (717): 110 Ind Cas 872, *Bhagwati Prasad* v. *Peglar.*

cases, the Court may refuse a decree for ejectment, and may merely pass a decree for the arrears of rent. It is submitted that this view is not correct. The provisions of this section were not referred to in the said decision.

11. Relief against forfeiture for breaches of other conditions. — This section is limited to forfeiture for *non-payment of rent*. There is no provision for relief being granted against forfeiture for breaches of conditions other than non-payment of rent. No relief can therefore be granted in such cases.[1] But in cases of conditions other than conditions against assigning, subletting, parting with possession, or disposing of the property leased, S. 114A requires that the lessor should give notice to the lessee requiring him to remedy the breach if it is capable of remedy, and if the breach is remedied within a reasonable time of notice, the lessee cannot be ejected.

A forfeiture for breach of a condition against *alienation* cannot be relieved against under this section;[2] nor does S. 114A apply to the case.

12. Forfeiture under decree—Construction of decree. — Where the first Court decreed relief against forfeiture on payment of a certain amount which was paid, and the appellate Court thereafter granted an additional amount to the plaintiff to be paid within "one month from this date," confirming the first Court's decree in other respects, it was held that in construing the decree the Court ought to have acted in favour of the tenant against forefeiture rather than in the landlord's favour and that the failure to pay the additional amount within one month of the first Court's decree did not cause forfeiture of the tenancy, in view of the doubtful wording of the decree.[1]

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[a]**114A.** Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing —

Relief against forfeiture in certain other cases.

(a) specifying the particular breach complained of; and

Note 11

1. ('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Dayal Singh* v. *Promatha Nath.*

2. ('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.*

('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Dayal Singh* v. *Promatha Nath.*

Note 12

1. ('24) 11 AIR 1924 Mad 649 (650) : 78 Ind Cas 1007 (DB), *Akkamma Shetti* v. *Chandro Shetti.*

Section 114A
Note 1

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

a. Section 114A was inserted by Section 58 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Scope of the section.
2. Notice before suit for ejectment.
3. Contents of notice.

1. Scope of the section. — Under the English law as it stood prior to 1881, Courts of Equity granted relief against forfeiture of leases only in cases of *non-payment of rent* and not in other cases.[1] By the Conveyancing Act of 1881 (44 & 45 Vict., Ch. 41) S. 14, provision was made for the grant of relief against every forfeiture for the breach of any condition whatsoever in a lease other than conditions against assigning, underletting, parting with possession or disposing of the property leased, conditions for forfeiture on the bankruptcy of the lessee and conditions for forfeiture on the taking in execution of the lessee's interest.[2]

The Indian Legislature in enacting S. 114 enabling Courts to grant relief against forfeiture for non-payment of rent, and in not providing for other cases, preferred to adhere to the old English law and not

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Section 114A — Note 1

1. Snell, *Principles of Equity*, 11th Edition, page 365.
Also Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edition, page 118.

2. Sub-section (1) of S. 14 of the Conveyancing Act of 1881 runs as follows :

"*Section 14 (1).* A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Sub-section 6 (1) of S. 14 of the said Act runs as follows :

"6. This section does not extend —

(1) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest;"

Section 114A Note 1

to the provisions of the Conveyancing Act of 1881.[3] No relief could therefore be granted under the Act against forfeiture of leases except in cases of non-payment of rent. In cases not governed by the Act (e. g., agricultural leases), however, the Courts granted relief on equitable principles against forfeiture even in cases other than non-payment of rent.[4]

Section 146 of the English Law of Property Act, 1925, (15 Geo. V, Ch. 20) which replaced the old S. 14 of the Conveyancing Act, 1881, gave much wider powers of granting relief against forfeiture of leases. Even breaches of conditions against assignment, sub-letting, etc., could be relieved against if the breach occurred after the passing of the Act.[5]

The present S. 114A was introduced in this Act by the amending Act of 1929 and is modelled on S. 14 of the English Conveyancing Act, 1881.

The words "where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter" show that the section applies only to cases falling within cl. (1) of S. 111 (g). It thus excludes from its operation forfeitures on the ground of denial of title and forfeiture on the insolvency of the lessee falling within cls. (2) and (3) of S. 111 (g).

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3. ('19) 6 A I R 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.* (In the absence of any special reason, there is no ground for applying a different rule to agricultural leases.)

4. ('26) 13 AIR 1926 Bom 304 (305):50 Bom 450:94 Ind Cas 1054 (DB), *Janardan* v. *Maallappa.* (Covenant against alienation.)

('71) 3 N W R H C R 322 (322) (DB), *Koora* v. *Dick.* (Forfeiture incurred by planting trees relieved against.)

('71) 3 N W P H C R 282 (302) (DB), *Ramjuthun Singh* v. *Mehdee.* (Forfeiture incurred by digging a temporary well relieved against.)

(1879) 2 All 437 (442, 443) (DB), *Ablakh Rai* v. *Salim Ahmad.* (Do.).

('35) 22 AIR 1935 Bom 41 (46):59 Bom 194:155 I.C. 516 (DB), *Rachotappa* v. *Konher.* (Denial of title—Forfeiture can be relieved against on equitable principles.)

[*See also* ('19) 6 AIR 1919 Mad 1106 (1107) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komalukutti* v. *Muhamad.* (Forfeiture by disclaimer of title will be relieved only if the disclaimer was occasioned by fraud, mistake or accident on the part of the landlord and the tenant was not careless or negligent.)]

[But see ('20) 7 AIR 1920 Mad 312 (312):55 Ind Cas 781 (DB), *Vittappa Kudva* v. *Durgamma.* (Forfeiture incurred by alienating land not relieved against.)

('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654:50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.* (Covenant against alienation cannot be relieved against.)]

5. Sub-section (1) of S. 146 of the Law of Property Act, 1925, runs as follows :

"*146.* (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice —

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach ;

and the lessee fails, within a reasonable time thereafter, to remedy the breach if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Section 114A Notes 1–3

Even in cases falling within cl. (1) of S. 111 (g), the last paragraph of this section excludes from its operation a forfeiture for non-payment of rent (which is separately provided for by S. 114) and forfeiture for breach of a condition against assigning, sub-letting, parting with possession or disposing of the property leased.

The section is not retrospective in its operation.[6]

2. Notice before suit for ejectment. — Under S. 111 (g) it is necessary for the *determination of the lease* for breach of a condition that the lessor should give a notice in writing to the lessee of his *intention to determine* the lease. This section provides that *after the determination* of the lease under S. 111 (g), it is necessary for the lessor, before suing for ejectment to serve on the lessee a notice containing the particulars mentioned in the section. The object of this notice is merely to give the lessee an opportunity *even after the determination of the lease* to remedy the breach if he can and continue the lease. It seems to be clear, therefore, that in cases of breaches of conditions referred to in this section, *two* notices are necessary to be given before the lessor can maintain a suit for ejectment. He must first give a notice of his intention to determine the lease and, after the determination of the lease in pursuance of such notice, he must give a further notice as required by this section before suing for ejectment. It has, however, been held by the High Court of Calcutta in the undermentioned case[1] that a single notice is sufficient. According to the decision this section merely defines the *form* in which the notice under S. 111 (g) is to be issued in cases where the breach of the condition is capable of being remedied. It is submitted that this view is not correct for the reasons stated above.

3. Contents of notice. — The provisions as to the particulars required to be given in the notice have been reproduced from S. 14 of the Conveyancing Act, 1881, and S. 146 of the Law of Property Act, 1925, with this difference, however, that the notice under the latter provisions should also require the lessee, in any case, to make *reasonable compensation for the breach.*

The object of the notice is to give the lessee precise information of what is alleged against him and what is demanded of him.[1] The notice 'specifying the particular breach complained of,' therefore, must not specify the breach complained of merely by reference to the particular covenant broken but must give sufficient details to enable the lessee to understand with reasonable certainty, what he is required to do to remedy the breach. Where a number of houses were let with a covenant to 'keep them in good condition and complete tenantable repairs' and on a breach thereof a notice was served upon the lessee in the following

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6. ('39) 26 A I R 1939 Lah 330 (338) : 186 Ind Cas 45 (DB), *Mohammad Hussain* v. *Secy. of State.*

Note 2

1. ('38) 25 AIR 1938 Cal 589 (593) : ILR (1938) 2 Cal 434 : 181 Ind Cas 657 (DB), *Pravat Chandra* v. *Bengal Central Bank Ltd.*

Note 3

1. (1899) 47 W R (Eng) 644 (646) : (1899) 2 Q B 79 : 80 L T 857 : 68 L J Q B 743, *Horsey Estate, Ltd.* v. *Steiger.*

Section 114A Note 3

words "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the houses contained in the lease and I require you to repair them forthwith," it was held that there was nothing in the notice to show in respect of which house the breach had been committed and that the notice was, therefore, not a valid one.[2]

Where a breach of more conditions than one is complained of, a notice to remedy those breaches is not bad merely because in respect of one or more of them the breach cannot be established.[3]

Where two covenants are broken and a notice in respect of only one of them is given and afterwards that breach is waived, the lessor cannot take advantage of the notice in respect of the other breach.[4]

As to what time will be "reasonable" for remedying the breach complained of will depend upon circumstances of each case. In the undermentioned case[5] where a vast number of repairs were to be made and a suit for ejectment was filed only two days after the service of notice upon the lessee, it was held that reasonable time had not been allowed to remedy the breach.

Section 115

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

Synopsis

1. Scope of the section.
2. Surrender for obtaining new lease.
3. Sub-lease put an end to by forfeiture.
4. Agricultural leases.

Other Topics (miscellaneous)

Effect of forfeiture on under-leases. See Note 3.
Effect of surrender on under-leases. See Notes 1 and 2.

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2. (1897) 45 W R (Eng) 471 (472) : (1897) 1 Ch 271 : 66 L J Ch 177:76 L T 107, *Fletcher* v. *Nokes*.
3. (1900) 48 W R (Eng) 264 (265, 266) : (1900) 1 Ch 496 : 69 L J Ch 244 : 82 L T 53, *Pannell* v. *City of London Brewery Co.*
4. (1900) 48 W R (Eng) 441 (442, 443) : (1900) 2 Ch 156 : 69 L J Ch 493: 83 L T 191, *Jacob* v. *Down*.
5. (1899) 47 W R (Eng) 644 (646) : (1899) 2 Q B 79 : 80 L T 857:68 L J Q B 743, *Horsey Estate, Ltd.* v. *Steiger*.

Section 115 Note 1

1. Scope of the section. — A lease is a transfer of an interest in immovable property. Under section 108, cl. (j) the lessee can, in the absence of a contract or local usage to the contrary, transfer his interest by way of sub-lease. The sub-lessee's interest being carved out of the lessee's interest, it will as a general rule be determined by the determination of the lease itself[1] in accordance with the maxim *cessante statu primitivo, cessat derivativus* (the derived estate ceases on the determination of the original estate). Thus, if the lease is determined by efflux of time or by forfeiture or by operation of law the sub-lease will also be determined.[2]

A determination by *surrender* of the lease by the lessee is an exception to this general rule. A surrender being a voluntary act on the part of the lessee, the principle that a man cannot derogate from his own grant will come into play, and the lessee's action will not be allowed to prejudice the sub-lessee.[3] This principle was recognised in England from very early times.[4] Lord Coke, after noticing that as between the parties to a surrender the estate is absolutely drowned, said: "But having regard to strangers who were not parties or privies thereunto (lest, by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender), the estate surrendered hath, in consideration of law, a continuance."

Section 115 — Note 1

1. ('23) 10 AIR 1923 Cal 691 (691) : 50 Cal 419 : 77 Ind Cas 910, *Ramkissendas* v. *Binjraj.* (A lessee cannot give to a sub-tenant what he does not possess himself.)

2. ('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sobharam.*
('33) 20 AIR 1933 Nag 255 (256) : 30 Nag L R 25 : 148 Ind Cas 257, *Shivlal* v. *Abdul Husein.*
('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 872, *Govindrao* v. *Sarja Bai.*
('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93 : 139 Ind Cas 369, *Baldeo Prasad* v. *Prem Narain.*
(1876) 2 Ch D 235 (253) : 24 W R (Eng) 443 : 45 L J Ch 235 : 34 L T 267, *Great Western Rly. Co.* v. *Smith.*
('04) 31 Cal 1021 (1024) : 8 Cal W N 860, *Ram Kumar* v. *Ram Newaz.*
('32) 19 AIR 1932 Cal 241 (242) : 59 Cal 739 : 137 Ind Cas 139 (DB), *Sheikh Yusuf* v. *Jyotish Chandra.*
('04) 27 Mad 401 (404) (DB), *Ekambara Ayyer* v. *Meenatchi Ammal.*
('20) 7 AIR 1920 Cal 706 (707) : 60 Ind Cas 969 : 47 Cal 907, *D. E. D. J. Ezra* v. *J. E. Gubbay.*
('74) 22 Suth W R 274 (275) (DB), *Hurish Chunder Roy* v. *Sree Kalee Mookerjee.* (A lessee cannot create an under-lease to last for a longer time than his own lease.)
('76) 25 Suth W R 347 (350) (DB), *Ranee Shoorut Soondry* v. *Charles Binny.* (No farmer can create a sub-tenure so as to last beyond his lease to the prejudice of the owner.)

3. (1859) 28 L J C P 297 (300) : 7 W R (Eng) 611 : 120 R R 380, *London and Westminster Loan and Discount Co., Ltd.* v. *Drake.*
(1875) 44 L J Ex Ch 33 (35, 36) : L R 10 Ex Ch 137 : 33 L T 93 : 23 W R (Eng) 753, *Saint* v. *Pilley.*
(1816) 105 E R 1005 (1008) : 5 M & S 146 : 17 R R 296, *Doe* v. *Pyke.*
('26) 13 AIR 1926 Nag 62 (62) : 89 Ind Cas 872, *Govindrao* v. *Sarjabai.*
('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sobharam.*

4. See Halsbury, *Laws of England*, Volume 18, p. 551, paragraph 1064.
(1876) 2 Ch D 235 (253) : 24 W R (Eng) 443 (449) : 45 L J Ch 235 : 34 L T 267, *Great Western Railway Co.* v. *Smith.*

Section 115 Notes 1–4

This section is based on the above mentioned principle. The surrender of a lease does not destroy or prejudice the rights of under-lessees.[5] Its operation is merely to bring the under-lessees into direct contact with the lessors except where the surrender is made for the purpose of obtaining a new lease.[6]

The High Court of Bombay has doubted whether the exception in the second paragraph of the section would apply to leases by Government in view of the Crown Grants Act, 1895.[7]

2. Surrender for obtaining new lease. — It has been seen already that a valid surrender of a head lease obliterates it and establishes direct contact between the under-lessee and the original lessor. The exception to this rule is, where the surrender is made for the purpose of obtaining a new lease. In the latter case, the benefits of the contract of under-lease and the right to the rent thereunder vest in the new lessee whether he is the original lessee or his nominee.[1]

3. Sub-lease put an end to by forfeiture. — A *forfeiture* of a lease will, unlike a *surrender* thereof, destroy the sub-lease on the general principle that a derivative estate will fall with the determination of the original estate. (See Note 1.) But where such forfeiture is procured by the lessor in *fraud* of the under-lessee it will not have any operation against the under-lessee.

An implied surrender under S. 35 (4) of the C. P. Tenancy Act, 1898, has been held to be analogous to a forfeiture which would put an end to the sub-lease in the absence of fraud or collusion.[1]

Where relief against forfeiture is granted under S. 114, the rights of lessee remain as if the forfeiture had not occurred. Consequently, the under-lessee's rights also are not affected. The section does not refer to cases where a forfeiture is relieved under S. 114A. There does not seem to be any reason why the same principle should not apply to such cases.

4. Agricultural leases. — The section does not in terms apply to agricultural leases. The effect of a surrender or of a forfeiture of such

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5. ('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sobha Ram*.
('17) 4 AIR 1917 Nag 86 (87) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram*.

This view was held even before the Act, see.
('69) 11 Suth W R 485 (487) (DB), *Rushton* v. *Atkinson*.
('68) 10 Suth W R 384 (384) (DB), *Heeramonee* v. *Gunga Narain*.
('70) 13 Suth W R 281 (281) (DB), *Nehaloonissa* v. *Dhunnoo Lall*.

6. ('39) 26 AIR 1939 Bom 98 (100) : I L R (1939) Bom 144 : 180 Ind Cas 945 (DB), *Suleman Haji* v. *Darabshaw*.

7. ('24) 11 AIR 1924 Bom 212 (216) : 85 Ind Cas 1038, *Rahimtulla* v. *Hasan Ali*.

Note 2

1. ('39) 26 AIR 1939 Bom 98 (100): ILR (1939) Bom 144 : 180 Ind Cas 945 (DB), *Suleman Haji* v. *Darabshaw*.

Note 3

1. ('17) 4 AIR 1917 Nag 86 (87) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram*.

Section 115 Note 4

leases on under-leases must be determined by reference to the local laws, or custom, if any, governing the particular transaction[1] and in the absence thereof, by reference to the general principles underlying this section.[2] On the principles stated in Note 1 a voluntary surrender, even in the case of an agricultural lease will not put an end to a valid under-lease,[3] while a forfeiture will put an end to it.[4]

Section 116

116. Effect of holding over. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C's* lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A's* assent. *B's* lease is renewed from year to year.

Note 4

1. ('71) 3 N W P H C R 63 (65) (FB), *Hoolasee Ram* v. *Pursotum Lal.* (Sub-lease only for the duration of the head lease — Relinquishment of lease puts an end to sub-lease.)

2. ('20) 7 AIR 1920 All 128 (129) : 57 Ind Cas 589 (DB), *Gobind Prasad* v. *Parmanand.* (Lessor will be entitled to benefit of covenants by sub-lessee.)

3. ('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarika Nath* v. *Mathura Nath.*

('96) 18 All 354 (356) : 1896 All W N 109 (DB), *Badri Prasad* v. *Sheodhian.*

('95) 1895 Bom P J 545 (DB), *Manager, Rangappa* v. *Shambhatta.*

('21) 8 AIR 1921 Cal 444 (448) : 48 Cal 605 : 61 Ind Cas 443 (FB), *Mohsenuddin* v. *Baikuntha Chandra.*

('14) 1 AIR 1914 Cal 376 (377) : 21 Ind Cas 58 (DB), *Asgar Ali* v. *Gouri Mohan.*

('36) 23 AIR 1936 Mad 422 (423) : 162 Ind Cas 873, *Lakshmi* v. *Kalu.*

('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93 : 139 Ind Cas 369, *Baldeo Prasad* v. *Prem Narain.*

('98) 11 C P L R 5 (10), *Diwan Maharajsha* v. *Abheram Gujar.*

('09) 4 Ind Cas 325 (325) (DB) (Cal), *Nabadip Chandra* v. *Bhairab Chandra.*

4. ('30) 17 AIR 1930 All 352 (352) : 126 Ind Cas 362 (DB), *Shahzad Singh* v. *Bachoo Singh.*

('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.*

('24) 11 AIR 1924 Mad 776 (777) : 84 Ind Cas 625 (DB), *Gopala Kuduva* v. *Hamza Sahib.*

('04) 27 Mad 401 (406) (DB), *Ekambara Ayyar* v. *Meenatchi Ammal.*

('90) 14 Bom 384 (386) (DB), *Vishnu* v. *Anant.*

Synopsis

1. Scope of the section.
2. Remains in possession.
3. More lessees than one — Only some remaining in possession— Effect of.
4. Effect of lessee's legal representative remaining in possession.
5. Legal representative of the lessor.
6. "Accepts rent or otherwise assents to his continuing in possession."
7. More lessors than one—Acceptance by one only.
8. Clause for enhancement of rent in a quit notice — Whether amounts to an assent.
9. Suit for rent for the period of lessee's possession after determination—Whether amounts to assent.
10. Clause for renewal.
11. "In the absence of an agreement to the contrary."
12. Effect of renewal.
13. Nature of possession of tenant holding over without consent.
14. Possession under a lease valid for a part of the term only.

Other Topics (miscellaneous)

Holding over. See Note 1.
Holding over in case of oral lease. See Note 14.
Implied terms of holding over. See Notes 1 and 12.
Suit for possession against tenant holding over—Limitation. See Note 13.
Tenancy-at-sufferance and tenancy-at-will—Distinction. See Note 1.

1. Scope of the section. — Whenever after the determination of a lease the lessee remains in possession, he is said to "hold over".[1] This section deals with the effect of "holding over" by a lessee with the *consent* of the lessor.

Before the passing of this Act, it had been held that a tenant holding over after the expiration of his tenancy must be presumed to hold on the same terms as those of the original lease.[1a]

Under the English law, a tenant who continues in possession after the determination of the tenancy without the agreement or disagreement of the person in whom the right of possession resides is said to be a tenant-at-sufférance.[2] The difference between a *tenancy-at-sufferance* under the English law and a tenant holding over under this Act, is this: In the former case the consent of the lessor to such possession converts the lessee into a *tenant-at-will* except in cases where the original lease was itself for a year, in which case the tenant becomes a tenant from year to year.[3] In this country, the consent of the lessor does not convert

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Section 116 — Note 1

1. Wharton, *Law Lexicon*, 14th Edn., 1938.

1a. (1864) 1864 Suth W R Act X, Rul 42 (43) (DB), *Sheik Enayutoollah* v. *Sheik Elaheebuksh.*
('76) 25 Suth W R 234 (235), *Altab Bibee* v. *Joogul Mundul.*
('74) 22 Suth W R 31 (32) (DB), *Sheo Sahoy Singh* v. *Bechun Singh.*
('74) 22 Suth W R 394 (395) (DB), *Tara Chunder* v. *Ameer Mundul.*
('98) 2 Cal W N 303 (304) (DB), *Kishore Lal* v. *Administrator-General of Bengal.*
('66) 3 Bom H C R (A C) 27 (30) (DB), *Sayaji* v. *Umaji.*
[*See also* ('74) 12 Beng L R 263 (265), *Nocoordass* v. *Jewrdaj.* (The nature of the terms depends upon the facts of the particular case.)]

2. Wharton, *Law Lexicon*, 14th Edn., 1938, *sub voce* "Sufferance. Tenancy at."

3. Odger, *The Common Law of England*, Vol. 1, page 870.
(1893) 1 Q B 736 (743): 62 L J Q B 462: 68 L T 699 : 41 W R (Eng) 484, *Dougal* v. *McCarthy.* (Per A. L. Smith, L. J.)

Section 116 Note 1

the tenant holding over into a tenant-at-will but converts him into a tenant from year to year or from month to month as the case may be. Except for this distinction the nature of a tenancy by sufferance in English law and the nature of the possession of a person holding over appears to be the same.

A tenancy by holding over or a tenancy-at-sufferance is merely a fiction to avoid continuance of possession operating as a trespass. It cannot therefore be created by contract, and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled.[4]

The effect of holding over with the consent of the lessor under this section is, firstly, that in the absence of an agreement to the contrary the lease is renewed as to all terms except the *duration* of the lease, and, secondly, that the duration of the renewed lease is from year to year or from month to month according to the purpose for which the property is leased as specified in section 106.[5]

It is the assent of the *lessor or his legal representative* that effects a renewal of the lease under this section.[6] The lessee's assent is not necessary.[7]

This chapter, and therefore this section, does not apply to leases for agricultural purposes (see S. 117) but the principle underlying it has been applied to such leases on the ground of justice, equity and good conscience, in the absence of any special reason for not doing so.[8]

(1907) 2 Ch 137 (143): 76 L J Ch 548: 97 L T 445, *Morgan* v. *William Harrison Ltd.*

(1916) 2 K B 91 (98, 99) : 85 L J K B 1298 : 115 L T 243, *Wedd* v. *Porter.*

('08) 31 Mad 163 (166) : 18 Mad L Jour 26 (DB), *Vadapalli Narasimham* v. *Dronamraju.*

('23) 10 AIR 1923 Pat 201 (202) : 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*

('25) 12 AIR 1925 Pat 357 (361) : 86 Ind Cas 387 (DB), *Charan Mahton* v. *Kamakhya Narayan.*

('30) 17 AIR 1930 Cal 262 (263): 125 Ind Cas 654 (DB), *Gopal Chandra* v. *Khater Karikar.*

[*See also* (1930) 142 L T 299 (305): 99 L J Ch 201 : (1930) 1 Ch 304 : 46 T L R 171, *Ladies' Hosiery and Underwear Ltd.* v. *Parker.* (On facts tenancy held not renewed as there was no payment of rent to the landlord.)]

4. ('42) 29 AIR 1942 Cal 341 (341) : 200 Ind Cas 660 (DB), *Mozam Shaikh* v. *Annada Prasad.*

5. ('34) 21 AIR 1934 Mad 458 (459, 460) : 58 Mad 75 : 155 Ind Cas 838 (DB), *Gnanadesikam* v. *Antony.*

6. ('24) 11 AIR 1924 Bom 322 (323, 324) : 48 Bom 341 : 80 Ind Cas 507, *Meghji Vallabhdas* v. *Dayalji Lal & Co.*

('26) 13 AIR 1926 Mad 566 (567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*

('29) 16 AIR 1929 Cal 553 (555) : 123 Ind Cas 268 : 57 Cal 538 (DB), *Solaiman Moosaji* v. *Jatindra Nath.*

7. ('24) 11 AIR 1924 Bom 322 (323, 324) : 48 Bom 341 : 80 Ind Cas 507, *Meghji Vallabhdas* v. *Dayalji Lal & Co.*

8. ('26) 13 AIR 1926 Mad 1071 (1072): 97 Ind Cas 933 (DB), *Venkatachalamayya* v. *Simhadri Naidu.*

The Act has not been made applicable to the Punjab but the principle of this section has been applied to cases arising in that Province.[9]

2. Remains in possession.—It is not necessary that the lessee should, after the determination of the tenancy, remain in possession for

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('19) 6 AIR 1919 Nag 88 (89) : 53 Ind Cas 212, *Nathu* v. *Gangadhar.*
('21) 8 AIR 1921 Mad 284 (284) : 69 Ind Cas 282 (DB), *Ramappa* v. *Abdulla Beari.*
('17) 4 AIR 1917 Low Bur 37 (38) : 39 Ind Cas 125 (DB), *Vellatappa Pillai* v. *Maung Po Hmyin.*
('21) 8 AIR 1921 Pat 463 (464) : 80 Ind Cas 568 (DB), *Mathura Prasad* v. *Naju Khan.*
('24) 11 AIR 1924 Pat 560 (563) : 3 Pat 403 : 83 Ind Cas 741 (DB), *Harnarayan Singh* v. *Darshan Deo.* (Per Jwala Prasad, J.)
('17) 4 AIR 1917 Mad 689 (690) : 35 Ind Cas 421 (DB), *Laxmipathaya* v. *Ramachendra.* (Chalgeni lease in South Canara.)
('10) 6 Ind Cas 937 (938) : 6 Nag L R 95, *Sheoram* v. *Abdul Wahidkhan.*
('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda.* (31 Mad 163 followed.)
('12) 14 Ind Cas 817 (817, 818) (DB) (Cal), *Baijnath Proshad* v. *Raghunath Rai.*
('13) 18 Ind Cas 448 (449) (DB) (Cal), *Chaturbhuja Nanda* v. *Gopal.*
(1864) 1864 Suth W R Act X Rul, 42 (43) (DB), *Sheik Enayutoollah* v. *Sheik Elaheebuksh.*
('02) 27 Bom 262 (265) : 4 Bom L R 972 (973) (DB), *Balaji* v. *Ramchandra.*
(1900) 28 Cal 227 (233) (DB), *Administrator-General of Bengal* v. *Asraf Ali.* (Agricultural lease is renewed from year to year—2 Cal W N 303 doubted on this point.)
('17) 40 Ind Cas 116 (117) (Oudh), *Rameshar* v. *Abbas Ali.* (Agricultural lease is renewed from year to year.)
('98) 2 Cal W N 525 (528) (DB), *Ali Mamud* v. *Bhagabati Debya.* (Agricultural lease is renewed from year to year. 2 Cal. W. N. 303 disapproved for this point.)
('26) 13 AIR 1926 Cal 1239 (1239) : 97 Ind Cas 412 (DB), *Krishna Charan* v. *Nitya Sundari.* (When lessees hold over after the expiry of the lease they must be considered to hold on the terms stipulated for in the lease.)
('10) 7 Ind Cas 721 (722, 723) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.* (Though the renewal is on same terms as contained in the old lease, such terms may be affected by any statutory provision which comes into existence in the meanwhile.)
[*See also* ('10) 6 Ind Cas 339 (340) : 37 Cal 674 (DB), *Ram Chandra Singh* v. *Bhikambar Singh.* (Agricultural lease is renewed from year to year.)
('96) 1896 Bom P J 518 (518), *Manohar* v. *Moro.* (Miras tenancy.)
('81) 7 Cal 710 (712) : 9 Cal L R 240 (DB), *Chaturi Singh* v. *Makund Lall.* (There is no difference in law between the position of a ryot holding without a patta and that of one holding over after the expiry of the term of a patta.)
('75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Pershad.*
('71) 16 Suth W R 185 (186) (DB), *Jumaut Ali* v. *Chutturdharee Sahee.*
('67) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.*
('21) 8 AIR 1921 Cal 300 (301) : 64 Ind Cas 118 (DB), *Chandra Nath* v. *Sheik Inamdi.* (Provisions regarding interest in Bengal Tenancy Act prevailed over those contained in the original lease.)
('22) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mahammad Ali.* (Tenancy after renewal is a new tenancy coming into existence after the expiration of the old one.)
('17) 4 AIR 1917 Cal 219 (220) : 37 Ind Cas 201 (DB), *Paramananda Singh* v. *Syjou Singh.* (Where there is no assent of the lessor there is no renewal—The lessee can be ejected without notice.)]

9. ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*

Section 116 Notes 2–4

any *particular number of days*. Where the lessee remained in possession for six days after the determination of the lease, it was held that he had become a lessee from month to month and liable for the rent of the whole month.[1] There must however be a *continuity* of possession by the lessee without any break at the determination of the original lease.[2] If after the determination of the lease, the lessee is dispossessed by the lessor and is again afterwards admitted on the property by him, there can be no renewal of the old lease under this section.[3]

3. More lessees than one — Only some remaining in possession—Effect of.—Where there are more lessees than one and only some of them remain in possession without the consent of others, the lease is renewed only in favour of such of them as remain in possession. There is no renewal in favour of the rest and consequently they are not liable for rent for the period during which the others remained in possession after the determination of the lease.[1]

4. Effect of lessee's legal representative remaining in possession. — This section will apply only when the *lessee* remains in possession after the determination of the lease and such possession is assented to by the lessor. Where, therefore, the lease *terminates* by the death of the lessee the latter's legal representative cannot be said to be a lessee and the consent of the lessor to his remaining in possession will not, under this section, operate as a renewal of the lease in his favour.[1] The position will, however, be different where the lessee dies *during the continuance* of the lease and his legal representative enjoys the lease for the rest of the period of the lease, and after its determination remains in possession with the assent of the lessor. In such a case, the position of the legal representative would be that of the lessee himself and there would be a renewal in his favour as provided

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Note 2

1. ('24) 11 AIR 1924 Bom 322 (322, 324) : 80 Ind Cas 507 : 48 Bom 341, *Meghji Vallabhdas* v. *Dayalji Lal and Co.* (There is no justification for holding that any days or months of grace can be allowed in regard to tenant's possession.)

2. ('26) 13 AIR 1926 Cal 696 (697) : 91 Ind Cas 312 (DB), *Ekabbar Ali* v. *Sheikh Alim.*

3. ('12) 15 Ind Cas 445 (452) (FB) (Mad), *Chengiah* v. *Damara Kumara.*

Note 3

1. ('05) 9 Cal N W 340 (342), *Brojo Lal* v. *Belchambers.* ((1846) 15 L J Ex 92 followed.)

Note 4

1. ('38) 25 AIR 1938 Nag 506 (510) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB). *Abdul Razak* v. *Nandlal Sheolal.* (Tenancy-at-will — Lease determined at the death of the lessee — His son entering in possession — Son's possession held wrongful.)

('25) 12 AIR 1925 Pat 357 (361, 362) : 86 Ind Cas 387 (DB), *Charan Mahton* v. *Kamakhya Narayan.* (*Estemarari mukarari* lease. Affirmed in appeal in A I R 1928 P C 146 : 7 Pat 649.)

('25) 12 AIR 1925 Pat 216 (224) : 4 Pat 139: 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain.* (*Estemarari mukarari* lease—The kind of tenancy under S. 116 of the T. P. Act is only created by law in favour of the original lessee — Affirmed in appeal in AIR 1928 P C 146 : 7 Pat 649.)

[*See also* ('98) 1898 Bom P J 357 (365) (DB), *Shivabasaya* v. *Totad Swami.*]

for by this section.[1a] Again where, there has already been a renewal of the expired lease in favour of the lessee himself and afterwards his representative comes in possession of the property, there is nothing in the section to preclude him from getting the benefit of the renewal.[2]

In *Vadappalli Narasimham* v. *Sitarammurti*,[3] A continued in possession after the expiry of his lease but without the consent of the lessor. He then died and his legal representative continued in possession. It was held that the legal representative of A was a mere trespasser when he entered into possession and the lessor could not by his assent effect a renewal of the original lease under this section.

5. Legal representative of the lessor. — The term "legal representative" is not defined in the Act. But it clearly implies a person who occupies the same position as the lessor.[1] A grants a lease to B who in turn sub-lets the property to C. After the determination of B's lease, C continues in possession. A leases the same property to D who accepts rent from C. D, who holds only a fraction of the interest held by A, cannot be called his legal representative as he (D) is not in the same position as A. Acceptance of rent by him from C, therefore, does not renew the lease of C.[2]

6. "Accepts rent or otherwise assents to his continuing in possession." — The acceptance of rent is only one form of the assent of the lessor to the lessee's remaining in possession of the property.[1] But the acceptance must be of rent as such[2] and must be voluntary.[3] Further, the payment of the rent by the lessee must be in the capacity which he held under the original lease. If he pays rent in the assertion of some other capacity, then the acceptance of such payment will not have the effect of renewing the lease.[3a]

1a. *See* ('21) 8 AIR 1921 Cal 741 (747) : 61 Ind Cas 503 : 48 Cal 359 (DB), *Ayejuddin Mea* v. *P. K. Tagore.*

2. ('33) 20 AIR 1933 Cal 822 (824) : 147 Ind Cas 209 (DB), *Asutosh Pramanik* v. *Jibandhan.*

[*See also* ('27) 14 AIR 1927 Cal 725 (730, 733) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.* (Lessee holding over under renewal clause—Mortgagee from such lessee is liable to lessor for rent.)]

3. ('07) 31 Mad 163 (166, 167) : 18 Mad L Jour 26 (DB). (8 Mad 424 not followed.)

Note 5

1. ('15) 2 AIR 1915 Cal 64 (66) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*

2. ('15) 2 AIR 1915 Cal 64 (66) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*

Note 6

1. ('67) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.*

('34) 21 AIR 1934 Mad 458 (459) : 58 Mad 75 : 155 Ind Cas 838 (DB), *Gnanadesikam* v. *Antony.*

2. ('21) 8 AIR 1921 Cal 789 (791, 792) : 81 Ind Cas 744 (DB), *Mukbusor Rahman* v. *Raj Lakhi Debya.* (Where money is accepted from lessee only provisionally in case there should be a fresh settlement the landlord cannot be deemed to have elected to treat the person paying the money as tenant.)

3. ('09) 3 Ind Cas 100 (100) (Cal), *Gangaram Patra* v. *Sasi Sekhar.*

3a. ('02) 26 Mad 535 (537) (DB), *Parameswaram Mumbannoo* v. *Krishnan.*

Section 116
Notes 6–9

Mere delay[4] or passive failure[5] on the part of the lessor in taking steps to eject a lessee who remains on the property after the determination of the lease does not *by itself* amount to an assent on the part of the lessor to the lessee's remaining in possession of the property.

A notice desiring the tenant "to quit the premises which you hold under me, your term therein having long since expired" does not indicate that the lessee was in possession with the assent of the lessor after the expiry of his lease.[6]

7. **More lessors than one — Acceptance by one only.** — Where there are more lessors than one and one of them accepts rent from the tenant with respect to his share in the property, the lease is renewed in respect of that lessor's share only.[1]

8. **Clause for enhancement of rent in a quit notice — Whether amounts to an assent.**—If in a notice to quit, the lessor *alternatively* asks the lessee to pay an enhanced rent, there can be no doubt that the lessor assents to the lessee remaining in possession on payment of the enhanced rent ; but if he asks for an enhanced rent not alternatively but by way of *penalty*, such demand for an enhanced rent cannot be construed to be an assent on his part to the possession of the lessee on payment of such rent. Thus, where the clause in the quit notice was : 'In default of so vacating I write this, with a pure mind, that Rs. 75 per month will be collected from the tenancy along with the costs of Court,' it was held that no consent on the part of the lessor could be inferred from the clause.[1]

9. **Suit for rent for the period of lessee's possession after determination — Whether amounts to assent.** — Where after the determination of a lease, the lessee remains in possession and there is nothing to indicate that the lessor declined to consent to the continuance of possession, the institution by him of a suit for the rent of such period amounts to an assent on his part ;[1] but where there are clear indications to show the dissent of the lessor, no consent on his part can be inferred from a suit for rent of such a period.[2]

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4. ('07) 34 Cal 396 (398) : 11 Cal W N 826 (DB), *Ratan Lal* v. *Farshi Bibi.*

5. ('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy.*

6. (1810) 3 Taunt 54, *Doe D.Godsell* v. *Inglis.*

Note 7

1. ('19) 6 AIR 1919 Cal 110 (110) : 49 Ind Cas 245 (DB), *Mon Mohan* v. *Md. Hatim.*

Note 8

1. ('26) 13 AIR 1926 Mad 566 (566, 567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*

Note 9

1. ('35) 22 AIR 1935 Pat 271 (272) : 155 Ind Cas 367, *Ramsunder* v. *Bataso Kuer.*

('40) 27 AIR 1940 Pat 555 (556) : 190 Ind Cas 733, *Bachu Narain* v. *Mohammad Umrao.*

2. ('40) 27 AIR 1940 Pat 555 (556) : 190 Ind Cas 733, *Bachu Narain* v. *Mohammad Umrao.*

10. Clause for renewal. — If there is a clause for renewal in the original lease but after the determination thereof no fresh lease is formally executed under the covenant for renewal, but the lessee remains in possession with the assent of the lessor, he can claim the benefit of this section.[1] The agreement to grant a further lease is not an "agreement to the contrary" within the meaning of this section. At the same time, the section does not mean that the continuance in possession by the lessee with the lessor's consent will cause a renewal of the lease for the period mentioned in the renewal clause. The renewal under the section is only from month to month or from year to year, as the case may be, according to the purpose of the lease. What then is the effect of the renewal clause when the lessee continues in possession with the lessor's consent? If the lessee has exercised his option of obtaining a further lease (no particular form is necessary for exercising the option unless the agreement provides otherwise) he will have, besides his rights under S. 116, all the rights of a person who has been let into possession of the property under an agreement to grant a lease of such property for the period mentioned in the renewal clause. His rights in the latter role will not amount to an *actual lease* in his favour like the one that is created under this section. But, nevertheless, the lessee may, in certain circumstances, be entitled, under such rights, to retain possession of the property for the period of the lease agreed to be granted (and not only to a lease from month to month or from year to year terminable by notice under this section). As to the rights of a person in possession of property under an agreement for the transfer of such property, see S. 53A and Notes thereunder. If, for any reason, the agreement has to be disregarded, the lessee can fall back upon his rights under this section.[2]

11. "In the absence of an agreement to the contrary." — The agreement to the contrary may be express or implied.[1] The expression "in the absence of an agreement to the contrary" must be taken to mean an agreement as to the terms of the *holding over*. Where there has been no such agreement inconsistent with the tenancy by holding over being from month to month or from year to year, then such tenancy is created whatever the terms of the *original* lease. Thus, the fact that the original lease reserves an annual rent is no objection to holding that the tenancy by holding over under this section is one from month to month where the purpose of the lease is not agricultural or manufacturing. Nor does this fact imply an agreement that the tenancy by holding over should be one from year to year.[2] Similarly, the fact that

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Note 10

1. ('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank, Ltd.* v. *Janoki Nath.*
   [*See also* ('05) 30 Bom 250 (268) : 6 Bom L R 995, *Macleod* v. *Kissan.*]
2. ('27) 14 AIR 1927 Cal 725 (730) : 104 Ind Cas 484 : 54 Cal 813 (DB), *Bengal National Bank, Ltd.* v. *Janoki Nath.*

Note 11

1. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Matilal* v. *Darjeeling Municipality.*
2. ('04) 32 Cal 123 (127) : 8 Cal W N 901 (SB), *Troilokya Nath* v. *Sarat Chandra.*

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the original lease contains a clause that the lessee may be ejected without notice is no ground for holding that notice as per Ss. 106 and 116 is not necessary for determining the new tenancy by holding over that arises by the tenant continuing in possession with the lessor's assent.[3] The argument that the reservation of annual rent in the original lease implies an agreement that the tenancy by holding over is one from year to year is based on the rule that 'the mode in which rent is expressed to be reserved affords the presumption that the tenancy is of a character corresponding thereto,' i. e., if rent is to be paid annually there is the presumption of annual tenancy.[4] But this rule is not of universal application and the presumption of yearly lease does not always arise from the fact of an annual payment of rent.[5]

See also Note 10.

12. Effect of renewal. — The effect of a renewal under the section is that there comes into existence a new lease between the parties[1] but the renewal is, in the absence of an agreement to the contrary, on the same terms as those contained in the expired lease[2] except as to the

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('13) 18 Ind Cas 844 (846) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality.*
('15) 2 AIR 1915 Cal 313 (314) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('33) 20 AIR 1933 Cal 260 (261) : 141 Ind Cas 833 (DB), *Secretary of State* v. *Madhu Sudan.*
('19) 6 AIR 1919 Cal 212 (214) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*

3. ('34) 21 AIR 1934 Cal 135 (135) : 149 Ind Cas 722 (DB), *Dasarathi Kumar* v. *Sarat Chandra.*

4. ('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa Bibi* v. *Satya Sebak.*

5. ('15) 2 AIR 1915 Cal 64 (67) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*
('15) 2 AIR 1915 Cal 313 (314) : 26 Ind Cas 962 (963) (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('19) 6 AIR 1919 Cal 212 (214) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*

Note 12

1. ('22) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mahammad Ali.*
('34) 21 AIR 1934 Cal 135 (136) : 149 Ind Cas 722 (DB), *Dasarathi Kumar* v. *Sarat Chandra.*
('31) 18 AIR 1931 Lah 675 (675), *Har Nath* v. *Mohar Singh.* (Lessor's representative accepting rent from lessee.)

2. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa.* (12 Oudh Cas 279 and A. I. R. 1925 Oudh 173 : 27 Oudh Cas 224 followed.)
('17) 40 Ind Cas 41 (42) (Oudh), *Parmeshar* v. *Bisheshar.*
('34) 21 AIR 1934 Mad 458 (460) : 58 Mad 75 : 155 Ind Cas 838 (DB), *Gnanadesikam* v. *Antony.*
('01) 11 Mad L Jour 186 (187) (DB), *Kutti Umma* v. *Madhava Menon.*
('35) 37 Pun L R 765 (765), *Allah Ditta* v. *Kartar Singh.*
('26) 13 AIR 1926 Cal 1239 (1239, 1240) : 97 Ind Cas 412 (DB), *Krishna Charan* v. *Nitya Sundari.*
('19) 6 AIR 1919 Pat 254 (255) : 53 Ind Cas 180 (DB), *E. W. C. Moore* v. *Makhan Singh.* (Tenant holding over occupies the same character as he did under the expired lease and cannot set up any title adverse to that of the lessor.)
('14) 1 AIR 1914 Cal 754 (755) : 23 Ind Cas 318 (DB), *Fakira Mahton* v. *Leakut Hussain.* (Liable to pay the same rent as before.)
('70) 2 N W P H C R 204 (205) (DB), *Shib Sahae* v. *Mukbool Ahmud.* (Do.)

duration of the lease. This is, however, subject to one qualification that, if any statutory provisions have come into existence in the meanwhile (i.e., before the renewal) the terms of the renewed lease may be affected thereby.[3] Also if the lessor had waived any of the conditions in the old lease during its existence he will not be entitled to enforce such a condition against the lessee after renewal.[4]

The duration of a renewed lease by virtue of this section will be from year to year or from month to month according to the purpose of it and not that of the original lease.[5] Thus, if a land is leased for three years for keeping a shop and after the expiry of the period the lease is renewed under this section, the renewal will be not for three years more but only from month to month.[6]

The renewal being from year to year or from month to month according to the purpose of the lease, as specified in S. 106, it will be necessary for either party to the renewed lease, if he desires to determine it, to give notice to the other party according to the provision of S. 106.[7]

13. Nature of possession of tenant holding over without consent.—Where after the determination of a lease, the lessee continues to remain in possession and the lessor has not assented to such holding

('29) 16 AIR 1929 Rang 55 (56) : 6 Rang 691 : 117 Ind Cas 52 (DB), *G. Bhandari* v. *R. Nihalchand.*

('10) 8 Ind Cas 1049 (1050) (DB) (Bom), *Sidick Haji Hoosein* v. *Bruel & Co.*
[*See also* ('06) 9 Oudh Cas 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.* (Liable to pay the same rent as before.)]

3. ('10) 7 Ind Cas 721 (723) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.*

4. ('15) 2 AIR 1915 Cal 68 (69) : 25 Ind Cas 880 (DB), *Haldhar Jha* v. *Md. Ashraf Alam.*

5. ('09) 3 Ind Cas 873 (874) : 12 Oudh Cas 279, *Khuda Bakhsh* v. *Abid Husain.*
[*See also* ('25) 12 AIR 1925 Oudh 173 (173) : 27 Oudh Cas 224 : 81 Ind Cas 592, *Lalman* v. *Mt. Mullo.*]

6. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality.*

7. ('14) 1 AIR 1914 All 460 (461) : 26 Ind Cas 107 (108), *Chattar Singh* v. *Nand Kishore.*
('23) 10 AIR 1923 Cal 524 (526, 527) : 72 Ind Cas 98 (DB), *Bijoi Chandra* v. *Howrah Amta Light Rly. Co. Ltd.*
('15) 2 AIR 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('04) 32 Cal 123 (128) : 8 Cal W N 901 (SB), *Troilokya Nath* v. *Sarat Chandra.*
('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.*
('23) 10 AIR 1923 Pat 201 (202): 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*
('23) 10 AIR 1923 Pat 340 (340, 341) : 71 Ind Cas 1022 (DB), *Stonewigg* v. *Kameshwar Narayan.*
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('27) 14 AIR 1927 Cal 279 (280) : 100 I. C. 614 (DB), *Safar Ali* v. *Abdul Majid.*
[*See also* ('24) 11 AIR 1924 Bom 115 (115) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks & Co.* v. *Joossab Mahomed.*
('26) 93 Ind Cas 643 (643) (DB) (Cal), *Khosal Chandra* v. *Brindarani.*
('95) 20 Bom 759 (761, 763) (DB), *Ambabai* v. *Bhau.* (Lease before the Act—Quit notice necessary on general principles.)
('10) 7 Ind Cas 721 (722) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.*
(1867) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.* (Lease before the Act — Quit notice necessary on general principles.)]

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over by receipt of rent or otherwise, there is no renewal of the lease under this section and no relation of lessor and lessee exists between the parties.[1] The possession of the person holding over under such circumstances becomes *wrongful* from the date of the termination of the old lease.[2] As was observed by Sir Lawrence Jenkins, C. J., in *Chandri* v.

Note 13

1. ('04) 1 All L Jour 201 (206) (DB), *Lachman* v. *Gulzari Lal.*
('28) 15 AIR 1928 P C 146 (149) : 55 Ind App 212 : 7 Pat 649 : 109 Ind Cas 663 (PC), *Kamakhya Narayan* v. *Ram Raksha.* (Appeal from AIR 1925 Pat 357.)
('25) 12 AIR 1925 Mad 446 (446) : 86 Ind Cas 933, *Sudalaimuthu Thevan* v. *Sappani Thevar.*
('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
('35) 22 AIR 1935 Pat 271 (272) : 155 Ind Cas 367, *Ramsunder* v. *Bataso Kuer.*
('25) 12 AIR 1925 Pat 17 (19): 81 I. C. 535 (DB), *Gita Prasad Singh* v. *Emperor.*
('21) 8 AIR 1921 Pat 463 (464) : 80 Ind Cas 568 (DB), *Mathura Prasad* v. *Naju Khan.*
('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda.* (31 Mad 163 followed.)
('10) 7 Ind Cas 8 (9) (DB) (Mad) *Nandikolla Gopalan* v. *Manyam Mahalakshmi.*
('26) 13 AIR 1926 Mad 566 (567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*
('08) 31 Mad 163 (166) : 18 Mad L Jour 26 (DB), *Vadapalli Narasimham* v. *Dronamaraju.*
('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap.*
[*See also* ('22) 9 AIR 1922 Bom 197 (197, 198) : 67 Ind Cas 130, *Sugan Chand* v. *Motilal.* (After termination of head lease, sub-tenant's right to possession terminates and the position of such sub-tenant holding over is that of a trespasser.)

2. ('26) 98 Ind Cas 911 (912) (DB) (Bom), *Shravan Shahasing* v. *Fattu.*
('25) 12 AIR 1925 Pat 17 (19) : 81 Ind Cas 535 (DB), *Gita Prasad* v. *Emperor.*
('98) 21 Mad 153 (163) : 8 Mad L Jour 92 (DB), *Ittappan* v. *Manavikrama.*
('98) 22 Bom 893 (898) (DB), *Kantheppa* v. *Sheshappa.*
('27) 14 AIR 1927 All 821 (821, 822): 102 Ind Cas 231, *Iaitqad Ali* v. *Md. Bakhsh.*
('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
('27) 14 AIR 1927 Bom 192 (193, 194) : 51 Bom 149 : 101 Ind Cas 35 (DB) *Maganlal* v. *Bhudar.*
('22) 9 AIR 1922 P C 184 (185) : 74 Ind Cas 561 (PC), *Ramanuj* v. *Ramkrishna.* (A tenancy by sufferance by a tenant holding over whose lease has expired does not apply in this country—Per Fletcher, J., in the judgment appealed from.)
('09) 1 Ind Cas 208 (208, 209) : 31 All 318 (DB), *Khunni Lal* v. *Madan Mohan.*
('28) 15 AIR 1928 Cal 753 (753) : 116 Ind Cas 374, *Gobinda Ram* v. *Dulu Pada.*
('09) 3 Ind Cas 566 (567) : 31 All 514 (DB), *Pusa Mal* v. *Makdum Bakhsh.*
('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu.* (The mere fact that there is a clause in the lease deed providing for damages by way of enhanced rent for use and occupation after the term fixed does not mean that the relation of landlord and tenant continues.)
('24) 11 AIR 1924 Cal 445 (446) : 69 Ind Cas 504 (DB), *Reajuddin Patwari* v. *Abdul Jobbar.* (There is no such thing as tenancy on sufferance in India.)
('24) 11 AIR 1924 Cal 240 (242) : 50 Cal 667 : 83 Ind Cas 757, *Sundermull* v. *Ladhuram.* (Lessor can claim damages for use and occupation.)
('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.* (Do.)
('17) 4 AIR 1917 Mad 735 (736) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy.* (Do.)
('32) 19 AIR 1932 Lah 275 (276) : 13 Lah 216 : 138 Ind Cas 290 (DB), *Narain Das* v. *Dharam Das.* (Do.)

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Dajibhau,[3] a tenant holding over "is only in by the laches of the owner, so that there is no privity between them."[4] It is not necessary in such cases to give a notice to him according to the provisions of S. 106 before filing a suit for ejectment against him.[5]

But notwithstanding that the possession of the tenant holding over is wrongful, it is not *adverse* to the owner.[6] In *Mt. Allah Rakhi*

('33) 20 AIR 1933 Lah 61 (64) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sundar Singh* v. *Ram Saran*. (Do.)
('33) 20 AIR 1933 Lah 509 (510) : 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari Lal*. (The compensation for use and occupation must be assessed on the basis of normal rent realizable during the period in question.)
('34) 21 AIR 1934 Lah 175 (175), *Gobind Ram* v. *Hari Mohan*. (Landlord is not entitled to damages for use and occupation beyond the time actually spent by the tenant on the premises.)
('24) 11 AIR 1924 Lah 643 (644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Mahomed*. (Lessor is entitled to damages for use and occupation.)
('28) 15 AIR 1928 Lah 554 (555) : 9 Lah 576 : 109 Ind Cas 90 (DB), *Mul Raj* v. *Indar Singh*. (Lessor is entitled to damages for use and occupation—Double the rent may sometimes be taken as a fitting standard.)
(1865) 4 Suth W R 24 (25) (DB), *G. P. Mackintosh* v. *Gopee Mohun Mojoomdar*. (Lessor is entitled to damages for use and occupation.)
('23) 10 AIR 1923 Bom 398 (398) : 73 Ind Cas 442 (DB), *Gulam Mohiuddin* v. *Dayabhai*. (Do.)
[*See also* ('19) 6 AIR 1919 Oudh 278 (282, 283) : 49 Ind Cas 80 (DB), *Deputy Commissioner, Partabgarh* v. *Kishan Dayal*. (Lease for the life time of the lessor— Lessee's possession after lessor's death held that of a trespasser.)
('27) 8 L R All (Rev) 359 (360) (DB), *Hansai Khan* v. *Fauzdar Khan*. (Agricultural lease.)
(1865) 2 Suth W R Act X Rul 73 (74)(DB), *George Tommy* v. *Sooba Curium Lall*. (Lessor is entitled to damages for use and occupation.)]
[But see ('30) 17 AIR 1930 All 177 (179) : 122 Ind Cas 865 (DB), *Onkar Prasad* v. *Dhani Ram*. (Submitted to be wrong in view of AIR 1922 P C 184.)]

3. (1900) 24 Bom 504 (508) (DB).
4. ('24) 11 AIR 1924 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *K. Kamakhya Narain*.
('27) 14 AIR 1927 Bom 192 (194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal* v. *Bhudar*.
('21) 8 AIR 1921 Pat 463 (464) : 80 Ind Cas 568 (DB), *Mathura Prasad* v. *Naju Khan*.
('25) 12 AIR 1925 Pat 216 (221) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narayan*.
5. ('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan*.
('09) 3 Ind Cas 566 (567) : 31 All 514 (DB), *Pusa Mal* v. *Makdum Bakhsh*.
('13) 20 Ind Cas 11 (13) (All), *Shyam Lal* v. *Bachchu Lal*. (*A* letting out land to *B*—*B* sub-letting it to *C* – *B* subsequently surrendering his right under lease to *A*—*C* held not tenant of *A* and not entitled to notice.)
('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (489, 490) (DB), *Bansidhar* v. *Ram Charan*.
('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmat Ullah* v. *Md. Husain*.
('27) 14 AIR 1927 Bom 192 (193) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal Dulabhdas* v. *Bhudar Purshottam*. (Where there are more than one owner of the property none of whom assents to holding over even one co-owner alone can maintain a suit for ejectment.)
('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deep Chand*.
('18) 5 AIR 1918 Cal 391 (392) : 39 Ind Cas 137 (DB) *Azimuddin* v. *Peer Mahomed*.
('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan*.
6. ('25) 12 AIR 1925 All 698 (699) : 85 Ind Cas 550, *Dalmir Singh* v. *Joti Prasad*.

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v. *Shah Mohammad*,[7] where the defendant in a suit for possession pleaded that his possession had been adverse to the plaintiff for the statutory period and at the same time relied upon Art. 139 of the Limitation Act[8] as barring the plaintiff's suit, their Lordships of the Privy Council observed as follows: "it may be noted at once that the appellant's plea of adverse possession is obviously inconsistent with the application of Article 139 which relates to the case of a landlord suing to recover possession from a tenant." It has accordingly been held that where a tenant holds over, for a period of twelve years from the determination of the tenancy, without the landlord's assent he acquires under S. 28 of the Limitation Act, a title to the property, not by reason of his possession having been *adverse* for a period of twelve years but by reason of the efflux of time limited under Art. 139 of the Limitation Act.[9] It has also

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('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy*.

('94) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan Daji*. (Manager of Math granting 'miras malki' which he could not grant beyond his lifetime — *Held* that after his death possession of mirasdar was not adverse in absence of a specific assertion.)

('08) 31 Mad 163 (167) : 18 Mad L Jour 26 (DB), *Vadappalle Narasimham* v. *Dronamaraju*.

('67) 4 Bom H C R (AC) 155 (163), *Radhabai* v. *Shama*.

('96) 19 Mad 437 (439) (DB), *Anantha Bhatta* v. *Holeya Deyyu*.

('22) 9 AIR 1922 All 423 (424) : 68 Ind Cas 750 (DB), *Debi Prasad* v. *Mt. Gujar*.

('22) 9 AIR 1922 All 318 (319) : 44 All 583 : 75 Ind Cas 454 (DB), *Bisheshar Nath* v. *Kundan*.

[*See also* ('84) 7 Bom 40 (41) (DB), *Tatia* v. *Sadashiv*. (Tenant by sufferance in possession for 12 years without paying rent—*Held*, mere non-payment of rent did not constitute adverse possession.)]

7. ('34) 21 AIR 1934 P C 77 (S0) : 56 All 111 : 61 Ind App 50 : 147 Ind Cas 887 (P C).

8. Article 139—By a landlord to recover possession from a tenant — Twelve years —When the tenancy is determined.

9. ('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshminarasayya*. (Per Sadashiva Iyer, J.)

('22) 9 AIR 1922 P C 184 (185) : 74 Ind Cas 561 (PC), *Ramanuj* v. *Ramakrishna*. (Per Fletcher, J., in the High Court judgment appeale d from.)

('25) 12 AIR 1925 All 698 (699) : 85 Ind Cas 550, *Dalmir Singh* v. *Joti Prasad*.

('13) 18 Ind Cas 899 (899, 900) (All), *Tulshi Ram* v. *Sunder Lal*.

('08) 7 Cal L Jour 615 (626) (DB), *Madan Mohan* v. *Rameswar*.

('27) 14 AIR 1927 Bom 650 (651) : 105 Ind Cas 859 (DB), *Purshottam* v. *Vishnu*. (18 Bom 256 must be considered to be overruled in view of 22 Bom 893; 24 Bom 504 and 98 Ind Cas 911, which have dissented from it.)

('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini*. (Affirming AIR 1939 Lah 455.)

('98) 22 Bom 893 (897, 898) (DB), *Kantheppa* v. *Sheshappa*.

(1900) 24 Bom 504 (508, 509) : 2 Bom L R 491 (DB), *Chandri* v. *Daji*.

('24) 11 AIR 1924 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *Kamakhya Narayan*. (18 Bom 256 held overruled by 24 Bom 504.)

('25) 12 AIR 1925 Nag 164 (164) : 82 Ind Cas 1031, *Tukaram* v. *Ganpat*. (8 Mad 424 not followed.)

('25) 12 AIR 1925 Mad 446 (446, 447) : 86 Ind Cas 933, *Sudalaimuthu Thevan* v. *Sappani Thevar*. (Suit against representatives of the lessee.)

('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy*.

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been held that a tenant holding over has a position recognised by law and can, unlike a trespasser, sue under S. 9 of the Specific Relief Act, if he is dispossessed otherwise than in due course of law.[10] The proposition that a tenant's possession after the determination of the tenancy is not adverse to the landlord would seem to be based on the ground that the principle set forth in *Bilaskunwar* v. *Deshraj Ranjitsingh*,[11] viz., that a tenant who has been let into possession cannot deny his landlord's title so long as he has not openly restored possession by surrender to his landlord, is applicable also to cases where the tenancy has determined.[12]

In the undermentioned cases[13] it has been held that possession of a tenant holding over is not *wrongful*. It has also been held in some cases[14] that such possession is *adverse* to the landlord. It is submitted that neither of these views is correct.

('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda*. (31 Mad 163 and 33 Mad 260 followed.)
('09) 4 Ind Cas 1080 (1080, 1081) : 33 Mad 260 (DB), *Subraveti Ramiah* v. *Gundala Ramanni*.
('10) 5 Ind Cas 907 (907) (DB) (Mad), *Sangila* v. *Maruthamuthu*.
('08) 31 Mad 163 (167) : 18 Mad L Jour 26 (DB), *Vadappalle Narasimham* v. *Dronamaraju*. (8 Mad 424 dissented from.)
[*See also* ('38) 25 AIR 1938 Nag 506 (510, 511) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal*. (Time once commenced to run against original lessee does not stop even if he dies and his representative comes in.)]

10. ('19) 6 AIR 1919 Bom 97 (98, 99) : 43 Bom 531 : 51 Ind Cas 193 (DB), *Gulam Mahomed* v. *Emperor*.
('14) 1 AIR 1914 Mad 296 (296) : 37 Mad 281 : 22 Ind Cas 789 (DB), *Bhogavalli Venkayya* v. *Kudapa Settya*.

11. ('15) 2 AIR 1915 P C 96 (98) : 37 All 557 : 42 Ind App 202 : 30 Ind Cas 299 (PC).

12. ('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshminarasayya*. (Observations to the contrary in 33 Mad 260 held should be reconsidered.)
('38) 25 AIR 1938 Mad 73 (74) : 176 Ind Cas 84, *Sitharamiah* v. *Ramaswamy*. (AIR 1928 Cal 546 : 56 Cal 15 and AIR 1917 Cal 498 followed.)

13. ('30) 17 AIR 1930 All 177 (179) : 122 Ind Cas 865 (DB), *Onkar Prasad* v. *Dhani Ram*.
[*See* ('22) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mahammad Ali*. (When a tenant holds over after the expiration of the term of tenancy, it is a new tenancy which comes into operation after the date of the expiration of the term of the previous tenancy.)]

14. ('26) 98 Ind Cas 911 (912) (DB) (Bom), *Shravan Shahasing* v. *Fattu*.
('04) 1 All L Jour 201 (206) (DB), *Lachhman* v. *Gulzari Lal*.
('02) 26 Mad 535 (536, 537) (DB), *Parameswaram Mumbannoo* v. *Krishnan Tengal*.
('98) 21 Mad 153 (163, 164): 8 Mad L Jour 92 (DB), *Ittapan* v. *Manavikrama*.
('29) 16 AIR 1929 Pat 18 (21) : 7 Pat 675 : 110 Ind Cas 494 (DB), *Rikhi Nath* v. *Rango Mahto*. (Upon the expiration of the term of a lease the lessee becomes a trespasser.)
('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandaswamy* v. *Sengoda*. (31 Mad 163 and 33 Mad 260 followed.)
('10) 4 Ind Cas 1080 (1081) : 33 Mad 260 (DB), *Subraveti Ramiah* v. *Gundala Ramanni*.
('10) 6 Ind Cas 339 (340): 37 Cal 674 (DB), *Ram Chandra* v. *Bhikambar*.
('09) 3 Ind Cas 566 (567): 31 All 514 (DB), *Pusa Mal* v. *Makdum Bakhsh*.

Section 116 Note 14

14. Possession under a lease valid for a part of the term only. — A granted a lease verbally for seven years to B and delivered possession to him. It was held that the lease being verbal was valid only for the first year, that thereafter, the possession of B was that of a lessee remaining in possession after the determination of his lease with the consent of the lessor and that therefore B became a lessee from year to year under the provisions of this section.[1]

Section 117

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the [a](Provincial Government) [b](* * *) may, by notification published in the [c](Official Gazette), declare all or any of such provisions to be so applicable [d][in the case of all or any of such leases] together with, or subject to, those of the local law, if any, for the time being in force.

Exemption of leases for agricultural purposes.

Such notification shall not take effect until the expiry of six months from the date of its publication.

a. Substituted by A. O. for "Local Government."

b. The words "with the previous sanction of the Governor-General in Council" were omitted by S. 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

c. Substituted by A. O. for the words "local official Gazette."

d. These words were inserted by S. 6 of the Transfer of Property (Amendment Act, 1904 (VI of 1904).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Agricultural purposes."
4. Agricultural leases may be made orally.

1. Legislative changes.

(1) The words "with the previous sanction of the Governor-General in Council" after the words "Local Government" were omitted by S. 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

(2) The words "in the case of all or any of such leases" after the words "so applicable" are new and were inserted by S. 6 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904).

('14) 1 AIR 1914 Mad 564 (568) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya.*

('16) 3 AIR 1916 Lah 353 (355): 1915 Pun Re No. 97: 32 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.*

Note 14

1. ('33) 20 AIR 1933 Pat 485 (488) : 144 Ind Cas 788, *Aziz Ahmad* v. *Alauddin Ahmad.* (Affirmed in Letters Patent Appeal in A I R 1934 Pat 369.)

(1854) 9 Ex 662 : 23 L J Ex 198 : 23 L T 198 (O S) 70 : 96 R R 903, *Lee* v. *Smith.* (Covenant to pay rent in advance incorporated in the new lease.)

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Note 2

2. Scope of the section. — Prior to this Act, no distinction was made between agricultural and non-agricultural leases[1] and the general principles of English law relating to leases were applied to them as being in consonance with justice, equity and good conscience.[1a] This section, however, exempts *leases for agricultural purposes* from the provisions of this chapter, unless they are made applicable by notification by the Provincial Government.[1b] The object of the Legislature, in

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1. ('99) 4 Cal W N 574 (576) (DB), *Madhab Chandra Pal* v. *Bejoy Chand Mahatab Bahadur*.

1a. ('02) 26 Mad 157 (160) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga*. (Principle of S. 111 (g) applied.)

('96) 20 Bom 354 (362) : 1895 Bom P J 135 (FB), *Venkaji Krishna* v. *Lakshman Devaji*. (Principle of S. 111 (g) applied—Disclaimer of landlord's title held worked forfeiture of the agricultural lease created at a time when the Transfer of Property Act was not applicable to Bombay Presidency.)

('01) 24 Mad 47 (56): 10 Mad L Jour 321 (FB), *V. Nambudripad* v. *Valia Chathu Achan*. (Principle of S. 108 (h) applied to a Kanom demise arising prior to Transfer of Property Act.)

1b. ('09) 4 Ind Cas 1124 (1124) (Mad), *Madurai Mudaly* v. *Masilamani Gramani*.

('97) 1897 Bom P J 182 (182) (DB), *Vithu Rakhmaji* v. *Durgabai*.

('33) 20 AIR 1933 Bom 168 (173) : 149 Ind Cas 293 (DB), *Nilaji* v. *Nagindas*. (Agricultural tenancy — S. 111 (e) held not applicable.)

('95) 20 Bom 354 (361) : 1895 Bom P J 135 (FB), *Venkaji Krishna Nadkarni* v. *Lakshman*.

('99) 4 Cal W N 792 (794) (DB), *Ram Narain Sahu* v. *Maangru Urao*.

('16) 3 AIR 1916 Cal 546 (547): 28 Ind Cas 267 (DB), *Paruchulla Shaikh* v. *Sital Chandra*.

('33) 20 AIR 1933 Cal 745 (745) : 60 Cal 771 : 146 Ind Cas 858, *Nabin Chandra* v. *Ramesh Chandra*.

(1900) 27 Cal 205 (209) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi*.

('16) 3 AIR 1916 Cal 454 (455) : 33 Ind Cas 98, *Sakayet Mollah* v. *Alam Mollah*.

('28) 15 AIR 1928 Pat 354 (355, 356): 7 Pat 496: 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad*. (Section 106 does not apply to agricultural leases — Notice to quit should be reasonable.)

('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Somakke*. (Section 106 does not apply to agricultural leases and hence six months' notice to quit not necessary—It is sufficient if it is reasonable.)

('19) 6 AIR 1919 Pat 254 (256) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh*. (Section 117 exempts agricultural leases from the operation of S. 106—Six months' notice to terminate lease held not necessary.)

(1900) 23 Mad 318 (321) (DB), *Cheekali Zamindar* v. *Ranasooru Dhora*. (Legislature has been careful to save tenancies for agricultural purposes from the immediate operation of S. 106.)

('15) 2 AIR 1915 Cal 182 (183) : 42 Cal 751 : 27 Ind Cas 271 (DB), *Aminunissa* v. *Jinnat Ali*.

('32) 19 AIR 1932 Lah 586 (587) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh*. (In the Punjab the provisions of the Punjab Tenancy Act apply in case of agricultural land.)

('37) 24 AIR 1937 Cal 695 (695) : 173 Ind Cas 602, *Panchanan* v. *Sam Atul Chandra*.

('26) 13 AIR 1926 All 432 (435) : 48 All 385 : 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain*. (Primary object not agriculture — S. 108 applies and not the Agra Tenancy Act.)

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Note 2

excepting agricultural leases from the operation of the provisions of this chapter was to retain in force the special provisions relating to the class of leases dealt with in the various local Rent Acts, and which may be compendiously described as leases for agricultural purposes.[2] In their Report of 1879, the Law Commissioners observed :

> "Local legislation as to the relations of zemindar and raiyat being so copious and elaborate, we think, that the provisions of this chapter should not apply to leases for agricultural purposes, except in so far as the Local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force."[3]

But, in the absence of any law, usage or custom to the contrary, the principles of this chapter, which merely reproduce the well-established rules of English law, have been held applicable to leases for agricultural purposes as rules of justice, equity and good conscience.[4] As observed by Wallis, C. J., in *Krishna Shetti* v. *Gilbert Pinto*[5] :

> " The Act (i. e., the Transfer of Property Act) was framed by eminent English lawyers to reproduce the rules of English law in so far as they are of general application and rest on principle as well as authority, and its provisions are, in my opinion, binding on us as rules of justice, equity and good conscience, when we have to deal with agricultural leases in the absence of any special reason for not applying them. The Legislature wisely, in my opinion, if I may say so, has refrained from making these sections, (i. e., ss. 105 to 116) applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the cases of agricultural leases."

Thus, the principles of the following provisions have been applied to agricultural leases :

[*See* ('11) 11 Ind Cas 924 (925) : 14 Oudh Cas 204 (DB), *Gobre Singh* v. *Jwala Prasad*. (Section 111 held inapplicable to agricultural tenancy.)]

2. ('35) 22 AIR 1935 Pat 508 (511) : 15 Pat 8 : 158 Ind Cas 399 (DB), *Ram Chandra Naik* v. *Ajodhya Singh*.
('25) 12 AIR 1925 Pat 421 (431) : 86 Ind Cas 597 : 4 Pat 404 (DB), *Broucke* v. *Chhatar Kumar Devi*.

3. See Report of the Second Law Commission, 1879 printed on page 5 (15).

4. ('10) 5 Ind Cas 437 (437) : 33 Mad 253 (DB), *Gangamma* v. *Bommakka*. (Principle of S. 108 applied.)
('18) 5 AIR 1918 Nag 155 (156) : 43 Ind Cas 970 : 14 Nag L R 188, *Narayandas* v. *Krishnarao*. (Do.)
('14) 1 AIR 1914 Mad 225 (225) : 22 Ind Cas 515 (DB), *Narayanan* v. *Krishna Pattar*. (Do.)
('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami*. (Do.)
(1900) 24 Mad 47 (56) : 10 Mad L Jour 321 (FB), *V. Nambudripad* v. *Valia Chathu Achan*. (Do.)
('16) 3 AIR 1916 Mad 680 (681) : 30 Ind Cas 596 : 39 Mad 834 (DB), *Appayya Setti* v. *Mahammade Beari*. (Per Seshagiri Aiyar, J., Napier, J., dissenting.)

5. ('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB).

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(A) Section 108, clauses (b),[5a] (c),[6] (e),[7] (g),[8] (h),[9] (i),[10] (j),[11] and (o).[12]

(B) Section 111, clause (g),[13] although the notice required by that clause has been held unnecessary.[14]

(C) Section 111, clause (h).[15]

5a. ('10) 5 Ind Cas 479 (480) : 33 Mad 499, *Narainsawmy Naidu* v. *Yerramali Ram Krishnaya.*

6. ('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.*

7. ('36) 23 AIR 1936 Mad 664 (665) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar.*

8. ('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami.*

9. ('10) 5 Ind Cas 437 (437) : 33 Mad 253 (DB), *Gangamma* v. *Bommakka.*
('22) 9 AIR 1922 Oudh 249 (249) : 77 Ind Cas 592 : 25 Oudh Cas 181, *Chatur* v. *Rukmangad.*

10. ('14) 1 AIR 1914 Mad 225 (225, 226) : 22 Ind Cas 515 (DB), *Narayanan* v. *Krishna Pattar.*

11. ('18) 5 AIR 1918 Mad 928 (930) : 40 Ind Cas 590 (592) (DB), *Bapiraju* v. *Narayanaswami.*
('18) 5 AIR 1918 Nag 155 (156) : 43 Ind Cas 970 (970) : 14 Nag L R 188, *Narayandas* v. *Krishnarao.*
('07) 30 Mad 410 (412, 413): 17 Mad L Jour 258 (DB), *Monica Kitheria Saldanha* v. *Subraya Hebbara.*

12. ('10) 5 Ind Cas 437 (437): 33 Mad 253 (DB), *Gangamma* v. *Bommakka.*
('42) 29 AIR 1942 Oudh 460 (462) : 201 Ind Cas 728 (DB), *Gur Prasad* v. *Mehdi Husain.*
[*See* ('36) 23 AIR 1936 Pat 111 (111) : 160 Ind Cas 114, *Ras Behari* v. *Jagadish Chandra.* (It was conceded that the lessee was not entitled to dig or quarry, though he was entitled to collect and remove lime stone on the surface.)]
[*See also* ('87) 1 C P L R 145 (145), *Mahomed Hoosain* v. *Damodar Prasad.* (In the absence of any agreement or custom, tenant would be entitled to fruits of trees standing on land covered by his tenancy.)]
[See however ('06) 33 Cal 54 (62, 63) : 3 Cal L Jour 59 (DB), *Sriram Chakravarti* v. *Hari Narain Singh.* (Permanent tenure-holders held entitled to underground rights.)]

13. ('19) 6 AIR 1919 Mad 1106 (1106) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komalukutti* v. *Muhamad.* (Per Seshagiri Aiyar, J.)
('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna* v. *Gilbert Pinto.*
[*See* ('19) 6 AIR 1919 Cal 132 (133) : 53 Ind Cas 545, *Brojobasi* v. *Sarat Chandra.* (Sub-lease in contravention of terms of lease is not void until forfeiture is enforced.)]
[*See also* ('01) 28 Cal 135 (138) : 5 Cal W N 263 (DB), *Nizamuddin* v. *Mamtazuddin.* (In a District where relations of landlord and tenant are regulated by provisions of Bengal Act, VIII of 1869, a tenant denying his landlord's title forfeits his tenancy.)]

14. ('13) 21 Ind Cas 405 (406) (DB) (Mad), *Vidyapurna Thirtha Swamiar* v. *Ranagpayya.*
('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445 : 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.*
[*See* ('15) 2 AIR 1915 Mad 85 (85, 86) : 25 Ind Cas 944 (DB), *Abbakka* v. *Seshamma.* (Besides breach of covenant in forfeiture clause, no further act is necessary.)]

15. ('17) 4 AIR 1917 Cal 37 (38) : 42 Ind Cas 262 (DB), *Paran Chandra* v. *Khazez Mandal.*

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Notes 2-3

(D) Section 114.[16]

(E) Section 116.[17]

3. "Agricultural purposes." — "Agriculture," according to the Oxford English Dictionary is "the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing live stock; tillage; husbandry; farming (in the widest sense)."[1] According to Webster's Dictionary, "agriculture" means "the act or science of cultivating the ground including harvesting of crops and rearing and management of live stock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man including to a variable extent the preparation of these products for man's use. In this broad use it includes farming, horticulture and forestry together with such subjects as butter and cheese making, sugarmaking, etc."[2] It is thus clear that the term has two meanings : one wide and the other limited. According to its wide meaning the term will include horticulture, forestry and even the use of land for pasture.[3] According to its limited but commonly understood meaning, it is confined to the raising of grain or other field crops. In this Act itself there is nothing to indicate that it is intended to limit the denotation of the term in any way[4] and the decisions have interpreted the term as including *horticulture*.[5]

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16. ('10) 7 Ind Cas 565 (565) (DB) (Mad), *Parapurath Kalliani Amma* v. *Chinnan.*

('16) 3 AIR 1916 Mad 680 (682) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetti* v. *Mahammade Beari.* (Per Seshagiri Aiyar, J., Napier, J., *contra.*)

[*See also* ('27) 14 AIR 1927 Mad 239 (239) : 98 Ind Cas 851, *Ramakrishna* v. *Fernandez.* (Agricultural lease—Court can relieve against forfeiture but while relieving, is not bound by conditions of S. 114.)]

17. ('19) 6 AIR 1919 Pat 254 (255) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh.*

('01) 28 Cal 227 (233) (DB), *Administrator-General of Bengal* v. *Asraf Ali.*

[*See* ('21) 8 AIR 1921 Cal 300 (301) : 64 Ind Cas 118 (DB), *Chandra Nath* v. *Shekh Inamdi.* (When agricultural tenant holds over his tenancy is from year to year.)]

Note 3

1. Murray, *Oxford English Dictionary*, cited in 25 Mad 627 (629) (DB), *King-Emperor* v. *Alexandor Allan.*

2. Webster, *New International Dictionary*, 1918 Edition.

3. ('37) 24 AIR 1937 Nag 289 (290) : ILR (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v. *Priyawati Devi.*

4. ('01) 24 Mad 421 (426) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.* (*Per*, Shephard J.)

5. ('01) 24 Mad 421 (424) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.*

('26) 96 Ind Cas 89 (89) (Cal), *Rakhya Mani Debi* v. *Paramesh Chakrabarti.*

('13) 20 Ind Cas 332 (335) (D B) (Cal), *Hedayet Ali* v. *Kalanand Singh.*

('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.*

('37) 24 AIR 1937 Nag 289 (290) : 171 Ind Cas 553 : ILR (1938) Nag 31, *Imamali* v. *Priyawati Devi.*

('22) 9 AIR 1922 Mad 351 (351) : 45 Mad 710 : 70 Ind Cas 657 (DB), *Pavadai Pathan* v. *Ramaswami.*

[*See also* ('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (Residential holding—Surplus land being planted with fruit trees —Transfer of Property Act applies.)]

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Note 3

In *Murgesa Chetti* v. *Chinnathambi Goundan*,[6] Bhashyam Ayyangar, J., defined "agriculture" as including "not only all field cultivation by tillage, but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury if not as an article of diet." This definition, while it is wide enough to include horticulture, excludes such useful cultivation as cotton, indigo, tobacco, jute, flower, etc. In *Raja of Venkatagiri* v. *Ayyappa Reddi*[7] and *Seshayya* v. *Raja of Pittapur*,[8] Sadashiva Ayyar, J., defined 'agriculture' as meaning "the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc." This definition too is very narrow as it excludes other field crops like sugarcane, indigo, cotton, etc. In *Pavadai Pathan* v. *Ramaswami Chetti*[9] Spencer, J., disapproved of the above definitions and observed :

> "Agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour; and thus it will include horticulture, arboriculture sylviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, manuring, watering, protecting, etc."

Even this definition, though wider than the other definitions, is not wide enough to include all that is suggested by the broader definition given by the Oxford Dictionary and Webster's Dictionary and which meaning it is conceived, has to be adopted for deciding what are and what are not agricultural purposes within the meaning of this section.

It is only a lease for *agricultural purposes* that is exempted from the operation of the provisions of this chapter. It is not the actual use of the land, but the original purpose of the tenancy which determines the question of applicability or otherwise of the Act.[9a] A lease which relates to *agricultural land* is not necessarily one for *agricultural purposes*. Thus, a lease granted to a rent farmer or middleman is not one for agricultural purposes though it relates to agricultural land.[10] On the

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6. (01) 24 Mad 421 (425) (DB).

7. ('15) 2 AIR 1915 Mad 781 (783) : 38 Mad 738 : 21 Ind Cas 532 (DB).

8. ('17) 4 AIR 1917 Mad 649 (651) : 34 Ind Cas 730 (DB).

9. ('22) 9 AIR 1922 Mad 351 (351, 352) : 70 Ind Cas 657 : 45 Mad 710 (DB).

9a. ('42) 29 AIR 1942 Cal 330 (331) : 200 Ind Cas 314 (DB), *Raj Kumari* v. *Samsuddin.*

10. ('01) 28 Cal 744 (746, 747) (DB), *Promotho Nath Mitter* v. *Kali Prasanna.*
('30) 17 AIR 1930 P C 13 (15) : 127 Ind Cas 749 (PC), *Satya Niranjan* v. *Surajubala Debi.*
('37) 24 AIR 1937 Oudh 151 (152) : 164 Ind Cas 830: 12 Luck 514, *Shiam Sunder* v. *Chootey Lal.*
('16) 3 AIR 1916 Cal 609 (610): 29 Ind Cas 797 (DB), *Rash Behari* v. *Tiluckdhari Lal.*
[*See also* ('27) 14 AIR 1927 All 78 (80) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.* (Lease of zamindari share entitling lessee to make collections to the extent of the share—*Held*, lease was not agricultural.)]

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Note 3

other hand a lease for agricultural purpose is not confined to one for *cultivation* of the land. A purpose may be connected with agriculture but not necessarily with cultivation.[11] Thus, a lease of land to be used as a yard for ploughing cattle, or stocking hay for such cattle, or for the purpose of storing manure, or crops, or for growing plants to be used as manure for agriculture, or as a habitation to agriculturists will be a lease for agricultural purposes.[12] So also a lease of land for the purpose of grazing the ploughing cattle.[13]

Whether a particular lease is for agricultural purpose must be determined with reference to what the *primary* object of the lease is. If the *primary* object of the lease is a purpose relating to agriculture, the lease will be one for an "agricultural purpose,"[14] otherwise not. Thus, a lease, the primary object of which is the user of the property for residential purposes, is not one for agricultural purposes merely because the lessee has also a right to cultivate or raise trees in the compound.[15] Similarly, where the primary object of a lease by a zamindar was merely to secure the proprietary rights of the lessor and not the user of any land for agriculture, though it was open to the lessee to cultivate

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[See however ('35) 22 AIR 1935 Pat 508 (511): 15 Pat 8: 158 Ind Cas 399 (DB), *Ram Chandra Naik* v. *Ajodhya Singh.* (Right to hold land for collecting agricultural rents constitutes tenure within Bengal Tenancy Act.)]

11. ('13) 20 Ind Cas 332 (334) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*

12. ('16) 3 AIR 1916 Cal 730 (732): 31 Ind Cas 16 (DB), *Dina Nath Nag* v. *Sashi Mohan Dey.*
('31) 18 AIR 1931 Cal 135 (136, 137) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.* (Lease of land for stacking grass.)
('01) 24 Mad 421 (424) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.*
('02) 25 Mad 627 (631) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexander Allan.* (Lease for rearing live stock is for agricultural purpose.)

13. ('13) 20 Ind Cas 332 (334) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*
('16) 3 AIR 1916 Cal 118 (120) : 29 Ind Cas 834 (DB), *Brojabasi Koer* v. *Ram Sankar.*
('31) 18 AIR 1931 Cal 135 (136, 137) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*

14. ('31) 18 AIR 1931 Cal 135 (138) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*
('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235 (DB), *Bir Bikram* v. *Amanaddin.*
('13) 20 Ind Cas 332 (335) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*
('16) 3 AIR 1916 Cal 118 (120) : 29 Ind Cas 834 (DB), *Brojabasi Koer* v. *Ram Sankar Das.*
('27) 14 AIR 1927 All 78 (79): 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*
('26) 13 AIR 1926 All 432 (434) : 48 All 385: 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain.*
('37) 24 AIR 1937 Oudh 151 (152): 164 Ind Cas 830 : 12 Luck 514, *Shiam Sunder* v. *Chootey Lal.*
[*See also* ('02) 25 Mad 627 (631) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexander.* (Case under Madras District Municipalities Act (IV of 1884), S. 63 (3) —Pasture lands are used for "agricultural purposes".)]

15. ('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.*
('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.*
('36) 164 Ind Cas 446 (447) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.*

the land if he so desired, it was held that the lease was not one for agricultural purposes.[15a]

The following have been held to be leases for agricultural purposes:

(1) A lease for growing casuarina trees.[16]

Under the Agra Tenancy Act, 1901,[17] and the Madras Estates Land Act, 1908,[18] however, a lease for growing timber or fuel or for a grove has been held to be not one for agricultural purposes.

(2) A reclamation lease granted for the purpose of removing the jungle and bringing the land under cultivation.[19]

(3) A lease for rearing tea plants. The fact that a small portion of the land leased is occupied by a factory for manufacturing tea does not change its character.[20]

(4) A lease for working of lac-bearing trees.[21]

(5) A lease for cultivation of indigo.[22] The manufacture of indigo cakes from the indigo plants is, however, not an agricultural purpose.[23] But when the land has been let generally for the cultivation of indigo, the erection of an indigo factory on part of the leased land, is not inconsistent with the agricultural purpose of the lease.[24]

15a. ('26) 13 A I R 1926 All 432 (434) : 48 All 385 : 95 Ind Cas 1048 (D B), *Ballabha Das* v. *Murat Narain.*

16. ('22) 9 AIR 1922 Mad 351 (351) : 45 Mad 710 : 70 Ind Cas 657 (D B), *Pavadai Pathan* v. *Ramaswamy.* (Dissenting from A I R 1917 Mad 787.)

17. ('13) 17 Ind Cas 656 (656) (DB) (All), *Muhammad Ismail* v. *Mithu Lal.*
('13) 19 Ind Cas 416 (417) : 35 All 280 (DB), *Hadi Hasan Khan* v. *Pati Ram.*
('21) 8 AIR 1921 All 168 (169) : 43 All 606 : 63 I. C. 437, *Jalesar* v. *Raj Mangal.*
('14) 1 AIR 1914 All 428 (430) : 25 Ind Cas 169, *Habibullah* v. *Kalyan Das.*
('24) 11 AIR 1924 PC 247 (249) : 46 All 831 : 51 Ind App 381 : 82 Ind Cas 962 (PC), *Kesho Prasad* v. *Sheo Pargash.*
[*See also* ('37) 24 A I R 1937 All 561 (562) : ILR (1937) All 588 : 171 Ind Cas 203 (DB), *Lachmi Narain* v. *Batuk Singh.* (Permanent lease giving right to plant grove—Lessee not planting grove—Lease is agricultural.)]

18. ('31) 18 A I R 1931 Mad 659 (662) : 54 Mad 900 : 134 Ind Cas 42 (DB), *Bharati Swamigal* v. *Duraiswami.*

19. ('10) 7 Ind Cas 864 (866) (DB) (Cal), *Jagdish Chandra* v. *Lal Mohan.*
('18) 5 AIR 1918 Nag 210 (211) : 48 Ind Cas 354, *Banmali* v. *Nihal Singh.*
('16) 3 A I R 1916 Cal 609 (611) : 29 Ind Cas 797 (D B), *Rash Behari* v. *Tiluckdhari Lal.*
[*See* ('35) 22 A I R 1935 Oudh 90 (92) : 153 Ind Cas 609 : 10 Luck 490 (D B), *Narain Singh* v. *Jagat Jit Singh.* (Lease providing that lessee should pay rent for first three years only for area he brings under cultivation but subsequently to pay rent fixed for whole area—*Held*, it was lease for agricultural purposes.)]

20. ('38) 25 A I R 1938 Cal 589 (592) : 181 Ind Cas 657 : ILR (1938) 2 Cal 434 (DB), *Pravat Chandra* v. *Bengal Central Bank Ltd.*

21. ('37) 24 A I R 1937 Nag 289 (290) : I L R (1938) Nag 31 : 172 Ind Cas 669, *Imamali* v. *Priyavati Devi.* (4 Nag L R 104 no longer good law.)

22. ('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra Narain Singh* v. *Hari Mohan Misser.* (Reversed on another point in 34 Cal 718 (PC).)

23. ('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra Narain Singh* v. *Hari Mohan Misser.*

24. ('07) 34 Cal 718 (722) : 34 Ind App 133 (PC), *Hari Mohan Misser* v. *Surendra Narayan Singh.*

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Note 3

(6) A lease of land for the cultivation of potatoes, grain, vegetables, etc.[25]

(7) A lease of land for coffee cultivation.[26]

For other instances, see the undermentioned cases.[27]

The following have been held not to be leases for agricultural purposes:

(1) A lease of a right to receive collections of a village.[28]

(2) A lease merely for gathering fruits from trees.[29]

(3) A lease of the land for building a shop in a bazar.[30]

(4) A *patni* lease in Bengal is generally not a lease for an agricultural purpose, as it is usually granted to a middleman with a view to his sub-letting. In such a case, it is not the *patnidar* but his sub-tenants who take the land for agricul-

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25. ('02) 25 Mad 627 (630) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexandar Allan.*

26. ('01) 24 Mad 421 (426) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.* (Dissenting from 17 Mad 98.)

27. ('29) 16 AIR 1929 Oudh 529 (533) : 118 Ind Cas 841 : 4 Luck 649 (DB), *Ambika Prasad* v. *Beni Madho.* (Lease of land on which grass grows spontaneously —Grass preserved and subsequently sold—Lease held for agricultural purposes.)

('25) 12 AIR 1925 Pat 421 (431) : 4 Pat 404 : 86 Ind Cas 597 (DB), *Broucke* v. *Chhatar Kumar Devi.* (In the case of a lease of zerait lands as well as lands settled with raiyats where the lease contemplates direct cultivation of the former by the tenants, the lease is one for an agricultural purpose.)

('35) 22 AIR 1935 All 382 (386) : 157 Ind Cas 261 (DB), *Makund Swarup* v. *Kishun Chand.* (Under S. 219 (2), Agra Tenancy Act, 1926, a theka shall be deemed to be a lease for agricultural purposes.)

('35) 22 AIR 1935 Pat 508 (511): 15 Pat 8 : 158 Ind Cas 399 (DB), *Ram Chandra Naik* v. *Ajodhya Singh.* (Lease covering entire mouza—Patta requiring lessees to cultivate parti and dih lands and entitling them to increase in rent roll — Fixed raiyati rents not to be reduced—Right to plant trees and sink wells given—Lease held to be a lease for agricultural purposes.)

('28) 15 AIR 1928 Pat 89 (94): 105 Ind Cas 172 (DB), *Damodar Prasad* v. *Masoodan Singh.* (A sub-lease of agricultural lands under which the sub-lessee was to hold possession of the property and by making cultivation and proper management to pay the fixed amount of rent regularly, held was one for agricultural purposes.)

('16) 3 AIR 1916 Cal 32 (32) : 28 Ind Cas 839 (DB), *Krishna Kanta* v. *Jadu Kasya.* (Where the holding of a raiyat consisted partly of agricultural and partly of homestead land, and the homestead portion was let out to a sub-tenant — *Held* that, having regard to the nature of the original tenancy, the incidents of the sub-lease would be governed by the provisions of the Bengal Tenancy Act and not by the Transfer of Property Act.)

('03) 8 CalWN 454 (456) (DB), *Babu Ram Roy* v. *Mahendra Nath Samanta.* (Do.)

('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahman.* (Do.)

('25) 12 AIR 1925 Cal 202 (203): 84 Ind Cas 743 (DB), *Rampado* v. *Atore.* (Do.)

('27) 14 AIR 1927 All 657 (658): 50 All 202: 104 Ind Cas 292 (DB), *Nisar Husain* v. *Sundar Lal.* (When specific areas are leased and express power is given to lessee to take actual possession of those areas and he has option to cultivate them himself, the lease is one for agricultural purposes.)

28. ('02) 5 Oudh Cas 222 (224), *Raja Jang Bahadur Singh* v. *Ehsan Ali.*

29. ('13) 20 Ind Cas 332 (335) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*

30. ('26) 13 AIR 1926 Cal 373 (374) : 90 Ind Cas 805 (DB), *Purusottam* v. *Panchanan.*

tural purposes.[31] Similarly, a *darpatni* lease is not one for an agricultural purpose.[32]

(5) A lease of a water-tank for sowing water-nuts.[33]

(6) A lease of a water-tank which does not appertain to an agricultural holding but is used only for the preservation and rearing of fish.[34] But the lease of a tank and of the land surrounding it for the purpose of rearing fish, stacking grass and grazing the ploughing cattle was held to be one for agricultural purposes.[35]

See also the undermentioned cases.[36]

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31. ('01) 28 Cal 744 (746, 747) (DB), *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry.*

32. ('38) 25 AIR 1938 Cal 172 (175) : 174 Ind Cas 790 (DB), *Bibhuti Bhusan* v. *Maya Debi.*

33. ('15) 2 AIR 1915 Nag 49 (51) : 11 Nag L R 49 : 28 Ind Cas 869, *Battoo* v. *Narain Prasad.*

('15) 2 AIR 1915 Nag 57 (58): 31 Ind Cas 294: 11 Nag L R 122, *Hari* v. *Vanu.*

[See however ('69) 1 N W P H C R 254 (255) (DB), *Moolchand* v. *Chutree.* (Right of occupancy can be acquired in a tank producing water-nuts, which do not grow spontaneously, but are the result of sowing or planting.)]

34. ('04) 31 Cal 937 (942): 8 Cal W N 804 (DB), *Mahananda* v. *Mongala Keotani.*

('73) 19 Suth W R 200 (201) (DB), *Siboo Jelya Chowdhry* v. *Gopal Chunder.*

('15) 2 AIR 1915 Nag 57 (58) : 31 Ind Cas 294: 11 Nag L R 122, *Hari* v. *Vanu.*

35. ('31) 18 AIR 1931 Cal 135 (137): 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*

[*See also* ('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235, *Bir Bikram* v. *Amanaddin.* (True purpose of lease preservation and rearing of fish — Grazing cattle on bank only subsidiary — Lease is for non-agricultural purposes.)

36. ('14) 1 AIR 1914 Cal 618 (621) : 22 Ind Cas 966 (969) (DB), *Hirendra Nath* v. *Hari Mohan.* (A lease of a mokarari described and registered as a taluk held not an agricultural lease.)

('06) 33 Cal 339 (340) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra.* (Ghatwali service lease.)

('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Land leased out for erecting houses and, if lessees liked, planting fruit trees — Lease held not for agricultural purposes.)

('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (Where the holding was mainly used for residential purposes, the fact that the surplus land was planted with fruit bearing trees, held did not alter the character of the holding.)

('33) 20 AIR 1933 Cal 643 (644) : 146 Ind Cas 540, *Banowari Lal* v. *Gopal Chandra.* (Lease created expressly for residential purposes in favour of non agriculturist—No indication that lands were put to agricultural use — Lease held not for agricultural purpose.)

('27) 14 AIR 1927 Cal 279 (279) : 100 Ind Cas 614 (DB), *Safar Ali* v. *Abdul Majid.* (Lease relating to home-stead land within municipal area—Record of rights showing land as *bagan*—Lessee enjoying home in one of the leased plots for a long time —Lease held not an agricultural lease and governed by the Transfer of Property Act.)

(1900) 27 Cal 205 (209) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.* (Lease for purpose of collecting rent.)

('33) 20 AIR 1933 Cal 822 (823) : 37 Ind Cas 209 (DB), *Asutosh Pramanik* v. *Jibandhan Ganguly.* (Lease in respect of garden land with fruit trees standing on part of which tenant is allowed to have his dwelling place — Lessee required to take care not to injure trees while plucking fruits—Stipulation that if tenant injured the orchard, he was liable to eviction—Lease also contained provision for raising crops—Lease held not for agricultural purposes.)

Section 117 Note 4

4. Agricultural leases may be made orally. — Section 107, like any other provision of this chapter, does not apply to leases for agricultural purposes. Therefore, an agricultural lease from year to year or for a term exceeding one year or reserving a yearly rent, is not required to be made by a registered instrument. Such a lease may be effected by an *oral* agreement.[1] But if it is made in writing, S. 17 of the Registration Act, 1908, requires that it should be registered,[2] unless the Provincial Government has exempted from its operation leases for a term exceeding five years and the annual rents reserved by which do not exceed fifty rupees.[3]

CHAPTER VI.

OF EXCHANGES.

Section 118

"Exchange" defined.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

Note 4

1. ('33) 20 AIR 1933 Mad 451 (452) : 144 Ind Cas 27 (DB), *Sivasubramania* v. *Theerthapathi.*
('32) 19 AIR 1932 Cal 715 (716):142 I.C. 81(DB),*Giribala Dasi* v. *Dwarka Nath.*
('29) 16 AIR 1929 Oudh 529 (533) : 118 Ind Cas 841 : 4 Luck 649 (DB), *Ambika Prasad* v. *Beni Madho.*
('37) 24 AIR 1937 Nag 289 (290) : I L R (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v. *Priyawati Devi.* (Agricultural lease for three years.)
('24) 11 AIR 1924 Pat 641 (643) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan.*
('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra Kumar.* (It may be even by conduct of parties.)
('10) 7 Ind Cas 864 (865) (DB) (Cal), *Jagdish Chandra* v. *Lal Mohan.* (Permanent agricultural lease.)
('15) 2 AIR 1915 Mad 1070 (1070) : 28 Ind Cas 599 (DB), *Raghava* v. *Secy. of State.* (Mulgeni lease.)
('26) 13 AIR 1926 Nag 9 (9) : 90 Ind Cas 51, *Mahadeo* v. *Shioram.*
[*See also* ('03) 13 Mad L Jour 137 (138) (DB), *Annammal* v. *Venkataragavachari.* (Oral agricultural lease from year to year.)
('13) 19 Ind Cas 930 (931) (DB) (Cal), *Krishna Chandra Jogati* v. *Abhiram Naik.* (Execution of *kabuliat* by tenant and its acceptance by landlord are sufficient to prove agricultural tenancy.)]
2. ('33) 20 AIR 1933 Mad 451 (452) : 144 Ind Cas 27 (DB), *Sivasubramania* v. *Theerthapathi.*
('24) 11 AIR 1924 Pat 641 (643) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan.*
('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra Kumar.*
('37) 24 AIR 1937 Nag 289 (290) : I L R (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v. *Priyawati Devi.*
('26) 13 AIR 1926 Nag 9 (9) : 90 Ind Cas 51, *Mahadeo* v. *Shioram.*
('41) 28 AIR 1941 Pat 577 (583) : 20 Pat 346 : 192 Ind Cas 451 (DB), *Md. Hanif* v. *Khairat Ali.*
3. ('01) 24 Mad 421 (426) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.*

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Section 118 Notes 1-2

Synopsis

1. Scope of the section.
2. Distinction between sale and exchange.
3. Transfer of property partly for money and partly for other property—Nature of.
4. Mutual transfer of ownership necessary.
5. Partition is not exchange.
6. Two sale deeds, if may constitute exchange.
7. "Ownership of one thing for the ownership of another."
8. "Both things being money only." See Note 2.
9. Mode of effecting exchange.
10. Remedy of parties to exchange.

Other Topics (miscellaneous)

Family arrangement is not exchange. See Note 4.
Pre-emption on exchange. See Note 3 and Section 120, Note 2.

1. Scope of the section. — The Contract Act, 1872, enacted in Chap. VII thereof provisions relating to the sale of goods. No provisions were enacted as to the *exchange* of goods. With a view to remedy this defect, this chapter on exchanges has been made to include not only exchanges of *immovable* property, but also *moveable* property. While, however, an *agreement* for *sale* of moveable property will, under the provisions of the Contract Act, transfer the title to the property in certain circumstances, an agreement for the exchange of immovable property will not, under this section, transfer the title in the property. There must be an actual transfer of ownership. "We would define 'exchange'," said the Law Commissioners in their Report of 1879, "not as an agreement, but as the fulfilment of an agreement by mutual transfer of dominion."

The definition of exchange given in this section has been founded on the provision contained in the New York Civil Code.[1]

2. Distinction between sale and exchange. — A *sale* is a transfer of ownership of property (not being money) for a *price*,[1] i. e., a sum of *money* which the transferor sets as the value of the property transferred.[2] In other words, a sale may be said to be a mutual transfer

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Section 118 — Note 1

1. See Statement of Objects and Reasons, dated 10th May 1877, printed on P. 1 (3).

Note 2

1. Section 77 of the Contract Act, defines sale as "an exchange of property for a *price*"; Section 4 of the Sale of Goods Act, 1930, defines a contract of sale of goods as a contract "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a *price*"; Section 54 of the Transfer of Property Act defines sale as the transfer of ownership for a *price* paid or promised or part paid and part promised.

2. Webster, *Dictionary*.

See also Section 2 (10) of the Sale of Goods Act, 1930, defining the word "price" as the *money consideration* for a sale of goods.

See also Bonvier, *Law Dictionary*, where "price" is defined as consisting of money to be paid down or at a future time.

Section 118 Note 2

of ownership of one thing for the ownership of another, *one* of such things being the *price* of the other. An *exchange*, as defined in this section, is similar to a sale in so far as it is also a mutual transfer of ownership of one thing for the ownership of another, but it differs from a sale in that *neither* of the things transferred is the price of the other.[3]

Illustrations.

(1) A transfers house x to B and B, in consideration thereof transfers field y to A. Neither field y nor house x can be said to be the *price* of the other. The transaction is an exchange. See the undermentioned cases.[4]

(2) A gives B one hundred-rupee currency note and B gives one hundred rupees in coins in return. In this case also neither of the things transferred can be said to be the *price* of the other.[5] For the word *price*, which the vendor can charge at his pleasure for his property which is capable of fluctuations according to the rise and fall of the market, cannot be applied to the change of one form of money into another form of money, both forms being legal tender. The transaction is therefore an 'exchange.'

(3) A transfers field x to B in consideration of B paying Rs. 1000 to A. This is a sale as the amount of Rs. 1000 is the *price* of field x.

The distinction between a transfer by way of sale and a transfer by way of exchange thus lies in the *nature of the consideration* for such transfer.[6] If the consideration is the *price* of the property

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('22) 9 AIR 1922 Mad 311 (312) : 45 Mad 612 : 68 Ind Cas 687 (FB), *Madam Pillai* v. *Badrakali Ammal.* (Overruling AIR 1914 Mad 489 (492): 37 Mad 483 where it was held that "price" will cover anything which the vendor accepts as tantamount to payment.)

('01) 25 Bom 696 (698):3 Bom L R 384 (SB), *Samaratmal Uttamchand* v. *Govind.* (Price is money paid or promised.)

('37) 24 AIR 1937 All 665 (667):171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir Singh.*

('86) 9 Mad 141 (141) : 1 Weir 645 (DB), *Queen-Empress* v. *Appavu.* (Payment of wages in liquor is not a 'sale' of liquor.)

('10) 5 Ind Cas 599 (600) : 34 Bom 287 (DB), *Madhavrao Moreshvar* v. *Kashibai Dattubhai.*

3. ('24) 11 A I R 1924 All 390 (391) : 46 All 359 : 79 Ind Cas 495 (DB), *Samar Bahadur* v. *Jit Lal.*

4. ('03) 30 Cal 921 (922) : 7 Cal W N 704 (DB), *Kedar Nath* v. *Emperor.* (Where *A*, a muktyar gave an eight anna court-fee stamp to *B*, his client, and was going to have another eight-anna stamp from *B* in exchange — *Held*, it was not a sale of stamp.)

('01) 25 Bom 696 (698):3 Bom L R 384 (SB), *Samaratmal Uttamchand* v. *Govind.* (Transfer of cotton for cotton seeds is an exchange.)

5. ('78) 3 Cal 379 (382) : 1 Cal L R 339 (DB), *Empress* v. *Jogessur Mochi.*

6. ('38) 25 AIR 1938 All 229 (230, 231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh.*

('20) 7 AIR 1920 Oudh 182 (183) : 60 Ind Cas 725, *Riazat Husain* v. *Ali Bandi.*

transferred it is a sale. But if it is property (not being price) then it is an exchange.

In all other respects an exchange is akin to a sale.[7]

3. Transfer of property partly for money and partly for other property — Nature of. — Where the consideration for a transfer of property is partly money and partly other property, and it is not possible to divide the transaction into separate transactions of sale and exchange, the question has arisen, especially in cases of pre-emption, whether the transaction is to be treated as a sale or an exchange, inasmuch as there is generally a right of pre-emption only where the transaction is a sale[1] though, if there is a custom to that effect, pre-emption is allowed even in cases of exchange.[1a] In the undermentioned cases,[2] it has been held that the transaction would be an *exchange* and not a sale for the purposes of pre-emption and that this would be so even if the purpose of adding the non-pecuniary portion of the consideration, is to defeat the right of pre-emption. According to the Lahore High Court, on the other hand, a permanent transfer of property for a sum of money *plus* something that is not money, does not, merely because of such addition, cease to be a sale.[3] The question must be decided by looking at the *substance* of the transaction. A transfer which is in substance a sale cannot, according to that Court, be converted into an exchange by the mere addition of a non-pecuniary consideration to the price, so as to defeat the right of pre-emption. If

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7. ('23) 10 A I R 1923 Lah 456 (457) : 73 Ind Cas 709, *Kundan Lal* v. *Anund Sarup*. (The provisions of Ss. 118, 119 and 120 show that the Legislature has put an exchange on the same footing with a sale in almost every respect.)

Note 3

1. ('24) 11 AIR 1924 All 390 (391) : 79 Ind Cas 495 : 46 All 359 (DB), *Samar Bahadur* v. *Jit Lal*. (No right in case of exchange.)

('15) 2 AIR 1915 Oudh 149 (151) : 18 Oudh Cas 109 : 30 Ind Cas 232 (DB), *Lachhman Prasad* v. *Fida Husain*. (Right of equity of redemption over property transferred for proprietary rights over another property — Transaction is not sale—No right of pre-emption.)

1a. ('85) 7 All 626 (630, 631, 632):1885 All W N 183 (FB), *Niamat Ali* v. *Asmat Bibi*.

('66) 1 Agra H C R 144 (146) (DB), *Sewa Ram* v. *Risal Chowdhry*.

('07) 4 All L Jour 756 (759), *Bhagwan Singh* v. *Kharag Singh*.

('09) 3 Ind Cas 903 (904) : 31 All 539 (DB), *Daryao Singh* v. *Jahan Singh*.

[*See also* ('17) 4 AIR 1917 All 302 (303) : 38 Ind Cas 157 (158) (DB), *Bhagwan Singh* v. *Rajwanta Kunwar*. (Wajib-ul-arz providing right of pre-emption only in case of absolute sale or mortgage by conditional sale—*Held* pre-emption cannot be allowed on an exchange.)]

2. ('38) 25 AIR 1938 All 229 (231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh*. (Rupees 6500 cash *plus* transfer of grove land.)

('37) 24 AIR 1937 All 665 (667) : 171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir Singh*.

('30) 17 AIR 1930 All 426 (427) : 124 Ind Cas 557 (DB), *Fateh Singh* v. *Prithi Singh*.

('07) 3 Nag L R 138 (139, 140), *Bapu* v. *Maruti*. (Principles of the section were applied to a case from Berar though the Act was not then extended to Berar.)

('28) 15 AIR 1928 All 204 (205) : 114 Ind Cas 43 (DB), *Rajjo* v. *Lajja*. (Property transferred for some cash *plus* charge against other property for maintenance.)

3. ('93) 1893 Pun Re No. 29, *Gul Mahomed* v. *Khan Ahmed*. (Per Plowden, J.)

Section 118 Notes 3–4

the value of the non-pecuniary consideration forms only a negligible portion of the total consideration, the transaction would be a sale.[4] If the parties, in substance, intended to make an exchange of properties, the mere fact that a small sum of money was paid by one to the other by way of adjusting the values, would not alter the nature of the transaction as an exchange.[5] In the undermentioned case[6] where a house worth really Rs. 1500 was transferred for land worth Rs. 500 and cash Rs. 500, the transaction was held to be an exchange.

It is submitted that the Lahore view does not appear to be sound on principle.

4. Mutual transfer of ownership necessary. — A transaction between A and B is not an exchange unless —

(1) there is a *transfer of ownership* by A to B, and

(2) there is a *transfer of ownership* by B to A.[1]

Where a transaction does not constitute a *transfer of property* at all it cannot be an exchange. Thus, a transaction which is a *family arrangement* is not an exchange.[2] As seen in Note 4 on section 5 such arrangements are merely acknowledgments of pre-existing titles and do not involve any transfer of property from one person to another. Where A allowed B to cultivate his occupancy holding x and B allowed A to cultivate his occupancy holding y, each finding the land of the other more conveniently situated than his own but the record remained unchanged and each paid rent for the land he cultivated in the name of the other, it was held that there was no transfer of *ownership*, by the one to the other and that the transaction was not an exchange.[3]

Where there is a transfer of ownership by *one* of the parties only, and not by the other the transaction is not an exchange, as there is no *mutual* transfer of ownership. Thus, where A and B hold decrees against each other and settle their claims by a document under which A transfers a property to B, and B merely gives up his claim against

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4. ('36) 23 AIR 1936 Lah 234 (234) : 162 Ind Cas 913, *Nihalu* v. *Bhagwana.* (Sale of an "ahat" for Rs. 900 plus a bigha of land worth Rs. 300—*Held* a sale.)
('34) 21 AIR 1934 Lah 823 (824) : 154 Ind Cas 643, *Allah Ditta* v. *Haji.* (Land worth Rs. 300 transferred for Rs. 140 due on account plus Rs. 142 cash plus land worth Rs. 18 only—*Held*, a sale.)
('15) 2 AIR 1915 Lah 218 (220) : 31 Ind Cas 221 : 1915 Pun Re No. 82 (DB), *Gul Muhammad* v. *Tota Ram.* (Rs. 3900 cash and land worth Rs. 1100—Not a sale.)

5. ('13) 19 Ind Cas 301 (302) (Lah), *Qazi* v. *Sharfa.*
(1900) 1900 Pun Re No. 97 : 1901 Pun L R No. 16, *Nathu Mal* v. *Har Dial.*

6. ('25) 12 AIR 1925 Lah 326 (327) : 86 Ind Cas 266, *Ismail Shah* v. *Saleh Mahomed.*

Note 4

1. ('07) 11 Cal W N 342 (344) (DB), *Dina Nath* v. *Matimala Dassya.*
('20) 7 AIR 1920 Oudh 182 (183) : 60 Ind Cas 725, *Riazat Husain* v. *Ali Bandi.*

2. ('28) 15 AIR 1928 All 641 (643) : 51 All 79 : 116 Ind Cas 861 (FB), *Ramgopal* v. *Tulshi Ram.*
('11) 10 Ind Cas 477 (480) : 33 All 356 : 38 Ind App 87 (PC), *Khunni Lal* v. *Gobind Krishna Narain.*

3. ('23) 10 AIR 1923 Nag 144 (144, 145) : 83 Ind Cas 946, *Chimna Patil* v. *Indraraj Singh.*

A under his decree, there is no mutual transfer of ownership and the transaction is not an exchange.[4] Similarly, where A *surrenders* his lease-hold interest to his landlord in consideration of another lease given by the latter of other property, there is no *mutual* transfer of ownership, inasmuch as a surrender is merely acceleration of the reversion and not a *transfer* of any interest.[5] So also, where a husband transfers land to his wife for use by her during her life-time, and she gives up her right to future maintenance.[6]

5. Partition is not exchange. — As seen in Note 4 on S. 5, a partition of undivided property between cosharers or co-owners operates as a 'transfer of property' within the meaning of this Act. Each sharer gives up in favour of the others his interests in the portions of the undivided property other than that which falls to his share. In this sense it may be said that a partition operates as a mutual transfer of property. But a partition is nevertheless not an 'exchange' within the meaning of this section.[1] The reason for this view has been given by Ameer Ali, J., in *Gyannessa* v. *Mobarakannessa*[2] as follows:

> "Section 118 .... is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their shares in all. Section 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other."

The reason so given does not, it is submitted, express the principle correctly. In the undermentioned case[3] where A and B were co-owners of property x, and B was the sole owner of property y, and B transferred to A property y in consideration for A giving up his rights in property x in favour of B, it was held by the same High Court that the transaction was an exchange. Though B in the case was the owner of the specific property y, A was not the owner of the property x and under the section as interpreted in *Gyannessa's case*, the transaction would not be an exchange.

The true reason seems to be that the transaction contemplated by the section is a mutual transfer brought about in pursuance of an *agreement between the parties*,[3a] and a partition is not such a transaction. The right to partition is a *legal incident* of undivided property and the

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4. ('07) 11 Cal W N 342 (344) (DB), *Dina Nath* v. *Matimala Dassya.*

5. (1900) 6 Cal W N 905 (910, 911) (DB), *Waliul Hassan* v. *Gopal Sarun.*

6. ('22) 9 AIR 1922 Mad 311 (313) : 45 Mad 612 : 68 Ind Cas 687 (FB), *Madam Pillai* v. *Badrakali Ammal.*

Note 5

1. ('98) 25 Cal 210 (215) : 2 Cal W N 91 (DB), *Gyannessa* v. *Mobarakannessa.*
('09) 3 Ind Cas 247 (250) (DB) (Cal), *Satya Kumar* v. *Satya Kirpal.*
('15) 2 AIR 1915 Mad 103 (104) : 43 Mad 849 : 26 Ind Cas 455 (DB), *Alamelu Ammal* v. *Balu Ammal.*

2. ('98) 25 Cal 210 (215) : 2 Cal W N 91 (DB).

3. ('01) 5 Cal W N 724 (726) (DB), *Raj Narain* v. *Khobdari Rai.*

3a. ('20) 7 AIR 1920 Oudh 182 (183) : 60 I. C. 725, *Riazat Husain* v, *Ali Bandi.*

Section 118 Notes 5-6

effect of the definition and specification of the shares in pursuance of that right operates as a mutual transfer between the parties. The mutual transfer of property in such cases is brought about as a consequence of the definition and specification of shares which is a legal incident of undivided property, and not as a consequence of an agreement to transfer property.

Where, under a compromise decree, co-owners of undivided property took specific portions therein in lieu of their undivided interest in the whole property, it was held by the Patna High Court that the compromise did not amount to any transfer of property at all and was therefore not an exchange.[4] Their Lordships purported to follow the decision in *Gyannessa's case* referred to above, though, actually, in that case, it was held that a partition was not an exchange, *notwithstanding it was a transfer of property*.

6. **Two sale deeds, if may constitute exchange.** — The fact that two deeds, one by A in favour of B and the other by B in favour of A, are described as sale deeds, is not conclusive on the question whether they are really sale deeds or constitute an exchange. The question must be decided having regard to all the circumstances of the case.[1] Where the deeds form part of the *same transaction*, and no cash consideration passes between the parties, the deeds really constitute only a mutual transfer of ownership of *one property for another*, and therefore constitute only an *exchange*.[2] The fact that the *value* of the properties mutually transferred were fixed by the parties does not necessarily make the transaction mutual sales of property, for exchanges of property are made always only having regard to their value.[3] It has been held by the High Court of Allahabad, that S. 92 of the Evidence Act does not, in view of the decision of their Lordships of the Privy Council in *Hanif-un-nissa* v. *Faiz-un-nissa*,[4] preclude the admissibility of extrinsic evidence to show that two documents purporting to be separate sale deeds are in reality part and parcel of the same transaction.[5] A contrary view has been held by the High Court of

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4. ('37) 24 AIR 1937 Pat 232 (234) : 169 Ind Cas 741 (DB), *Mahomed Yahia* v. *Bibi Soghra*.

Note 6

1. ('19) 6 AIR 1919 Lah 246 (247) : 50 Ind Cas 288, *Prabhu Dial* v. *Shadi Ram*.

2. ('38) 25 AIR 1938 All 229 (230) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh*.
(1900) 1900 Pun Re No. 97 : 1901 Pun L R No. 16, *Nathu Mal* v. *Har Dial*.
('19) 6 AIR 1919 Lah 246 (247) : 50 Ind Cas 288, *Prabhu Dial* v. *Shadi Ram*.

3. ('38) 25 AIR 1938 All 229 (231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh*.
('19) 6 AIR 1919 Lah 246 (247) : 50 Ind Cas 288, *Prabhu Dial* v. *Shadi Ram*.
[But see ('14) 1 AIR 1914 Mad 489 (492) : 15 Ind Cas 343 : 37 Mad 423 (DB), *Ariyaputhira Padayachi* v. *Muthukumarasawmy*. (Where values are fixed it is a sale—This decision is no longer good law in view of the Full Bench decision in AIR 1922 Mad 311 : 45 Mad 612.)]

4. ('11) 11 Ind Cas 398 (399) : 33 All 340 : 38 Ind App 85 (PC).

5. ('27) 14 AIR 1927 All 696 (697): 50 All 59 : 103 Ind Cas 399 (DB), *Kishen Lal* v. *Ram Lal*.

Bombay in the undermentioned case.[6] It is submitted that the Allahabad view is correct.

7. **"Ownership of one thing for the ownership of another."** — A thing is not necessarily "property." Things which are *res nullius* are not property. It is only a thing which is the subject of *ownership* by a person that is, in law, "property." The words "ownership of a thing" in the section are merely equivalent to "property." But the expression "ownership of a thing" is used instead of the word "property" in view of the words "neither *thing* or both *things* being money only." It would be an inappropriate use of words to say "neither *property* or both properties being money only."

The word "thing" includes both *tangible* and *intangible* things. Thus; the transfer of a proprietary interest in certain land for the equity of redemption in respect of another land is an 'exchange' within the meaning of this section.[1] So is the transfer of a debt in consideration of the transfer of the equity of redemption in certain property.[2] So also is the transfer of a right to enforce a charge for maintenance for the transfer of ownership of the property.[3] A right to sue or to take proceedings cannot be the subject of ownership and cannot be transferred. A transfer of property in consideration of the transferee forbearing to sue to set aside a certain sale is not therefore a mutual transfer of property and is therefore not an exchange.[4]

8. **"Both things being money only."** — See Note 2.

9. **Mode of effecting exchange.** — The second paragraph of the section provides that an exchange of property can be made in the same manner as a *sale* of such property. Thus, where the property is "goods" as defined in the Sale of Goods Act, 1930, an exchange can be effected in the same manner as a sale of goods under that Act, namely, by a *contract* for the exchange of the goods. Such a contract may be made in writing, or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Where the property sought to be transferred in completion of exchange is *immovable property*, the formalities necessary to be observed under S. 54 for a *sale* of such property must be observed. Otherwise no title will pass to the transferee under the transfer. The

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[*See also* ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan*. (On the completion of the transaction of exchange, right to property becomes vested in the parties.)]

6. ('06) 8 Bom L R 283 (287) (DB), *Hanmant* v. *Gobind*. (Case before Transfer of Property Act applied to Bombay.)

Note 7

1. ('15) 2 AIR 1915 Oudh 149 (150) : 18 Oudh Cas 109 : 30 Ind Cas 232 (DB), *Lachhman Prasad* v. *Fida Husain*.
2. ('14) 1 AIR 1914 Mad 489 (492) : 15 Ind Cas 343 : 37 Mad 423 (DB), *Ariyaputhira Padayachi* v. *Muthukumarasawmy*.
3. ('28) 15 AIR 1928 All 204 (205) : 114 Ind Cas 43 (DB), *Rajjo* v. *Lajja*.
4. ('31) 18 AIR 1931 Mad 140 (143) : 54 Mad 163: 135 Ind Cas 17 (DB), *Venkata Jagannatha* v. *Venkata Kumara*.

Section 118
Note 9

use of the word "only" in the section excludes the possibility of title being acquired to immovable property within the statutory period by any other process than that laid down in the section.[1] Thus, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, the transfer by way of exchange can be made only by a registered instrument.[2] And in the case of tangible immovable property of a value less than one hundred rupees, a transfer by way of exchange can be made either by a registered instrument or by delivery of the property.[3] Under the old rule of Hindu law, a transfer of property need not be in writing.[4] The Act has, in this respect, abrogated the said rule.

An exchange may be effected by a *single* instrument. It is not necessary that there should be two separate deeds of transfer of property.[5] Where, however, two separate documents are executed, each party acquires a good title as soon as the particular document in his favour is executed and, where necessary, registered. Thus, if A and B agree to execute separate sale deeds by way of exchange, title will pass to B as soon as A has duly executed his deed in favour of B, notwithstanding that B has not executed a similar deed in favour of A.[6]

A deed which simply recites a transaction of exchange that has already taken place and provides for a penalty for failure to carry out the arrangement as agreed, is not itself a deed of exchange required to be executed in the manner provided for by this section.[7]

Note 9

1. ('16) 3 AIR 1916 Mad 214 (217) : 32 Ind Cas 5 (DB), *Ramanathan Chitty* v. *Ramasami Chetty.*
('11) 12 Ind Cas 109 (110) : 33 All 728 (DB), *Rustam Ali* v. *Gaura.* (Where the law prescribes a particular mode of transfer, such transfer can be effected only in that mode.)

2. ('16) 3 AIR 1916 Mad 821 (821) : 38 Mad 519 : 30 Ind Cas 408 (DB), *Chidambara Chettiar* v. *Vaidilinga Padayachi.*
('25) 12 AIR 1925 Mad 1174(1174):90 Ind Cas 331, *Made Gouda* v. *Chenne Gouda.* (Formalities under the section cannot be avoided by calling a transaction by a particular name under Hindu law.)
('14) 1 AIR 1914 Lah 108 (108) : 24 Ind Cas 894, *Dalip Singh* v. *Munshi.* (Unregistered deed of exchange ineffective.)
('09) 4 Ind Cas 1004 (1004) (Lah), *Mir Haidar Shah* v. *Hussain Shah.* (Do.)
('27) 14 AIR 1927 Lah 90 (91) : 93 Ind Cas 843, *Jawala* v. *Wariyaman.* (Do.)
('40) 27 AIR 1940 Lah 311 (312), *Babu* v. *Dalip Singh.* (Do.)
See clause 2 of S. 54. (Intangible property—Registered document necessary.)
('14) 1 AIR 1914 Mad 489 (492, 493) : 37 Mad 423 : 15 Ind Cas 343 (DB), *Ariyaputhira Padayachi* v. *Muthukumarasawmy.* (Do.)

3. ('26) 13 AIR 1926 Mad 543 (544) : 92 Ind Cas 672, *Kondayya* v. *Veeranna.*
('32) 19 AIR 1932 Oudh 135 (136) : 135 Ind Cas 689 (DB), *Indar Gir* v. *Balrampur Estate.*

4. (1862) 1 Mad H C R 100 (100) (DB), *Mantena Rayaparaj* v. *Chekuri Venkataraj.*

5. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*

6. ('20) 7 AIR 1920 Oudh 182 (184): 60 Ind Cas 725, *Raizat Husain* v. *Ali Bandi.*
('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*

7. ('91) 1891 Pun Re No. 26, *Amiruddin Jamal-ud-din.*

Section 118 Note 10

10. Remedy of parties to exchange. — On the completion, by mutual transfer, of the transaction of exchange, the right to the properties respectively transferred, becomes vested in the parties to whom they have been transferred, and the party who has failed to obtain *possession* must sue for possession of the property and not for the specific performance of a contract, for a completed transaction of exchange is an *executed* contract and not an *executory* one.[1]

Where A, one of the parties to a contract of exchange, has performed his part of the contract by executing a transfer of his property to B, the other party, but the latter has not done his part of the contract by executing a transfer of his property to A, A's remedy is only to sue B for the *specific performance* of the contract or for damages for breach of the contract. He cannot sue B for *recovery of possession* of the property transferred to B.[2]

Where *neither* party has performed his part of the contract by executing a transfer of his property in favour of the other, it is open to either of them to sue for the specific performance of the contract. But they are not obliged to sue for specific performance, and if one of the parties has been deprived of possession of his property by the other, the former is entitled to sue for a declaration of title to and for possession of the property.[3]

Section 119

Right of party deprived of thing received in exchange.

[a]**119.** If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

a. This section was substituted for the original section by Section 59 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The original section ran as follows :

"In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

Note 10

1. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan*.
2. ('67) 3 Agra H C R 394 (395) (DB), *Nasir Ali* v. *Government*.
3. ('16) 3 AIR 1916 Cal 325 (326) : 33 Ind Cas 762 (DB), *Jaharaddi Mandal* v. *Debnath Nath*.

Section 119
Notes 1–2

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Is by reason of any defect in the title of the other party deprived of the thing."
4. Defect in title does not ipso facto render completed exchange inoperative.
5. Party deprived of the thing obtained in exchange—Nature of remedy.
6. Party failing to get possession of property exchanged—Nature of remedy.
7. Exchange void—Property transferred if can be got back.
8. A contrary intention appearing from the terms of the exchange.
9. Limitation for enforcement of remedy.
10. Retrospective operation of new section.

Other Topics (miscellaneous)

Consequence of defective title. See Notes 4 and 5.
Measure of compensation. See Note 5.
Right against *bona fide* transferee. See Note 10.
Rule provided by the section is subject to express contract. See Note 8.
Undertaking as to title. See Note 2.

1. Legislative changes. — The old section ran as follows :

"In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

The provision was defective in several respects. It related to the rights of a party deprived of the thing received in exchange, but did not provide for the rights of *transferees* from such party. Nor did it state whether the right could be exercised by the *heirs* of the party. It did not expressly state whether a return of the thing could be claimed by a party to the exchange against a *transferee* from the other party to the exchange. It gave a right to a party to a return of the thing transferred by him, but obviously the thing could not be returned unless the other party was in possession of it. The new section has now been framed so as to remove these defects.[1]

2. Scope of the section. — Under the old Common Law of England, there was implied in every exchange both a *condition* and a *warranty* as to title. The breach of the *condition* as to title gave a right of *re-entry* on the thing exchanged, and the breach of the warranty gave rise to a right to compensation for the damages sustained.[1] Further, the use of the word "give" or the word "grant" in any deed implied a covenant for title. By the Real Property Act, 1845,[2] it was provided that "an *exchange* or a *partition* of any *tenements or hereditaments*, made by deed executed after the 1st day of October 1845 shall not imply any condition in law; and the word 'give' or the word

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Section 119 — Note 1

1. See Report of the Special Committee, 1927, printed at page 22 (68).

Note 2

1. (1572-1616) 76 E R 1114 (1115) : 4 Coke 121, *Bustard's case.* (Cited in A I R 1917 Mad 390.)
2. 8 and 9 Victoria, Ch. 106, S. 3. (Referred in AIR 1917 Mad 390.)

'grant' in a deed, executed after the same day shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any Act of Parliament, imply a covenant." The Law of Property Act, 1925 (15 Geo. V, Ch. 20), has re-enacted the above provision in a wider form, so as to include *all* conveyances of land.[3]

So far as *sales* of immovable property are concerned, the law in this country does not differ from the English law. No *conditions* are implied in a sale, and S. 55, sub-section (2) provides for statutory *covenants* of title somewhat similar to those provided for by S. 76 of the Law of Property Act, 1925, in England. So far, however, as *exchanges* are concerned, this section has adopted the old English Common Law rule and implies both a *condition* and a *warranty* of title, the one giving rise to a right of *re-entry* on the thing exchanged and the other giving rise to compensation for damages sustained.[4]

A sale of *moveable* property in this country as well as in England, implies both a *condition* and a *warranty* as to title.[5]

This section is not applicable to the Punjab as the Transfer of Property Act has not been extended to it. But the principles of this section have been applied to cases arising in that Province.[6]

3. "Is by reason of any defect in the title of the other party deprived of the thing."— The deprivation contemplated by the section is an eviction by a title paramount.

It has been held in the undermentioned case[1] by the Lahore High Court that the deprivation must be a *complete and permanent* dispossession of the thing. Where, therefore, A and B exchanged certain properties, and the property got by A was entered upon by a *mortgagee* from B's brother under a mortgage given before the date of exchange, it was held that A's dispossession was not complete and permanent, that A was still owner of the property and that the section had therefore no application.

4. Defect in title does not ipso facto render completed exchange inoperative. — The mere fact that there is a defect in the title of one of the parties to the exchange, does not render a completed exchange inoperative. If the other party is deprived of the property by reason of such defect, he would have the remedy provided for by this section, namely, to the return of the thing transferred by him or to

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3. See Section 59 of that Act.

4. ('17) 4 AIR 1917 Mad 390 (392) : 35 Ind Cas 92 (DB), *Balusu Veeraghavalu* v. *Boppana Manikyam.*

5. See Section 14 of the Sale of Goods Act, 1930.
Sale of Goods Act, 1893 (56 & 57 Vict. Ch. 71).
Halsbury, *Laws of England*, Vol. 25, pp. 153, 154.

6. ('34) 21 AIR 1934 Lah 934 (935), *Ganga Singh* v. *Ragho Ram.*
('17) 4 AIR 1917 Lah 164 (165) : 41 Ind Cas 248 : 1917 Pun Re No. 51 (DB), *Salabat* v. *Abdul Rahman.*

Note 3

1. ('34) 21 AIR 1934 Lah 934 (935), *Ganga Singh* v. *Rago Ram.*

Section 119
Notes 4–5

compensation, but until such deprivation the exchange remains valid.[1] Where the manager of a joint Hindu family exchanged family property with a third person, it was held that, assuming that the manager was not authorised to make the exchange by reason of its not being advantageous to the family, the exchange could not be considered to be inoperative as long as the transaction was not challenged by other members of the family.[2]

Where the title of a party to an exchange is initially defective, but subsequent to the exchange, such party acquires a full title to the property, the other party is, by virtue of S. 43, entitled to the benefit of such acquisition.[3]

5. Party deprived of the thing obtained in exchange — Nature of remedy. — The party deprived of the thing obtained by him in exchange, by reason of the defect of title of the other party, is entitled to two remedies in the alternative.

(A) *Compensation* from the other party for the loss caused by the deprivation of the property.

(B) *Return of the thing* transferred by him, if it is still in the possession of the other party or his legal representative or a transferee from him without consideration.

(A) Compensation :

The *amount* of compensation would ordinarily be the value of the property of which the party was deprived. If the property has been valued in the deed of exchange itself, such value would furnish a basis for fixing the amount of compensation.[1]

(B) Return of the thing :

The right to a return of the thing transferred by way of exchange implies a *cancellation of the bargain*, so as to place the parties in the position they were before the transaction. Where a party is deprived of a *portion* of the property got by him, he must, if he wishes to obtain return of the thing transferred by him, *give up* the portion of the thing got by him of which he was not deprived. He cannot retain such portion and ask for other property equivalent to the portion lost, for he cannot in such a case be said to have cancelled the bargain. If he retains such portion, his only remedy is to claim *compensation* for the loss of the other portion.[2]

Note 4

1. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
('40) 27 AIR 1940 All 478 (480) : 191 Ind Cas 385, *Alimullah* v. *Mahammad Khalil.*
2. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
3. ('21) 8 AIR 1921 Cal 748 (749) : 60 Ind Cas 819 (DB), *Bhairab Chandra* v. *Jiban Krishna.*

Note 5

1. ('17) 4 AIR 1917 Lah 164 (166) : 41 Ind Cas 248 : 1917 Pun Re No. 51 (DB), *Salabat* v. *Abdul Rahman.*
2. ('99) 9 Mad L Jour 137 (138) (DB), *Veera Pillai* v. *Ponnambala Pillai.* (Obiter.)

Where the guardian of a minor exchanges his property for another, and he is subsequently deprived of the property got by him, the remedy of the minor is not *to set aside* the alienation, but to claim under this section that the thing transferred by the guardian should be returned to him or that he should be compensated for the loss.[3]

6. Party failing to get possession of property exchanged — Nature of remedy.— Where a transaction of exchange is completed, the right to the property exchanged becomes vested in the party to whom it has been transferred. His remedy, if the other fails to give him possession thereof is to *sue for possession* on the basis of his title. He cannot sue for the specific performance of a contract, as, after a completed exchange, there is no *executory* contract of which specific performance can be ordered.[1]

7. Exchange void — Property transferred if can be got back.— Where properties have been mutually transferred by parties by way of exchange, and the exchange is for some reason void, either of them can ordinarily recover from the other the property transferred by him. But where the exchange is void as being prohibited by law, the parties are *in pari delicto* and the Court will help neither party in getting back his property from the other, the maxim applicable in such a case being "*in pari delicto potior est conditio possidentis*" (in equal fault the condition of the possessor is more favourable).[1]

8. A contrary intention appearing from the terms of the exchange. — The condition and warranty as to title is by virtue of this section implied in an exchange only where *no contrary intention* has been expressed in the terms of the exchange. In fact, the general rule regarding covenants in law is that they are intended to be operative only when the parties themselves have omitted to enter into any contract respecting the matters to which such covenants relate. The moment such a contract is entered into by the parties, the covenants in law cease to have any effect, even though the contract between the parties expressly provides only for *some* of the matters covered by the covenants in law and is silent as to the rest.[1] The principle that 'an express covenant will do away the effects of all implied ones'[2] applies

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('17) 4 AIR 1917 Lah 164 (165, 166) : 1917 Pun Re No. 51 : 41 Ind Cas 248 (DB), *Salabat* v. *Abdul Rahman.*

3. ('24) 11 AIR 1924 Bom 517 (518) : 76 Ind Cas 636 (DB), *Irangauda* v. *Ningappa.*

Note 6

1. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*

Note 7

1. ('21) 8 AIR 1921 Oudh 132 (132) : 61 Ind Cas 985, *Bisheshwar* v. *Rachcha Ram.*

Note 8

1. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar.*
[*See also* (1838) 44 R R 819 (823) : 4 Bing (NC) 678.]

2. 4 Co. Rep. 80, *Nokes* v. *James.* (Cited in 21 Mad 69.)
(1799) 5 R R 521 (531) : 2 Bos & P. 13.

Section 119
Notes 8-9

in such a case and the contract alone will regulate and govern the liabilities of the parties.[3] In *Aspdin* v. *Austin*[4] Lord Denman observed:

> "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument . . . . . It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written, the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

Thus, where in an exchange between X and Y, Y executed a security bond in favour of X binding himself to pay an amount not exceeding Rs. 4014-8-6 at the rate of Re. 1-4-0 per kuli for the land that might go out of X's possession, and X, being deprived of the land transferred to him, sued Y to recover his own land, it was held that the express terms of the above security bond superseded the rights of the parties under this section and hence X was not entitled to claim the return of the land given by him.[5]

The intention to abrogate the statutory implied covenant must, however, be clear and unambiguous. Where a clause in a deed of exchange was to the effect that 'neither party would have any claim against the other contrary to the terms of the exchange,' it was held that the clause did not amount to a clear expression of a contrary intention and did not take away the warranty implied by the section.[6]

9. Limitation for enforcement of remedy. — As has been seen in Note 2, this section implies a *condition* and a *warranty* as to title. A suit for a *return of the thing* exchanged can only be based on a breach of the *condition* as to title implied in the exchange, and will consequently be governed by Art. 143 of the Limitation Act.[1] A suit for

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('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar.*

3. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminath Ayyar.*

4. (1844) 114 E R 1402 : 5 Q B (N S) 671.
[*See* ('80) 2 Mad 239 (262) : 7 Ind App 83 (PC), *Marcar* v. *Sigg.*

5. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar.*

6. ('17) 4 AIR 1917 Lah 164 (165) : 1917 Pun Re No. 51 : 41 Ind Cas 248 (DB), *Salabat* v. *Abdul Rahman.*

Note 9

1. ('07) 30 Mad 316 (319) : 17 Mad L Jour 149 (DB), *Rajagopalan* v. *Somasundara Thambiran.*

compensation for the loss suffered by the deprivation of the thing exchanged is really a suit on a *contract to indemnify* and is governed by Art. 83 of the Limitation Act, or, where the exchange is by a registered document, by Art. 116 read with Art. 83 of that Act.[2]

Where there is an *express* contract in the deed of exchange between A and B that each should make good to the other any loss that may be sustained by the other, by giving him other property of equal value, a suit by A, on being deprived of his property, against B for compelling the latter to give him other property in performance of the contract is one for the *specific performance* of a contract and will be governed by Art. 113 of the Limitation Act.[3]

10. Retrospective operation of new section. — This section is not retrospective in its operation. It does not affect the terms and incidents of any exchange made or effected before the 1st April 1930 or any right, title, or obligation or liability acquired, created or incurred before such date.[1] Where the exchange was effected before 1st April 1930, but the deprivation of the thing exchanged, by a party took place after 1st April 1930, the section that would govern the rights of parties would be the old section and not the new.[2]

In cases where the old section applies, it has been held by the Madras High Court that the remedy for return of the thing is available even against a *bona fide* purchaser for value from the other party to the exchange, on the ground that the transferee could have no better title than his transferor.[3] A contrary view has been taken by the Judicial Commissioner's Court of Nagpur[4] and by the High Court of Lahore,[5] namely that even under the old section, the remedy was not available against a *bona fide* purchaser for value.

('20) 7 AIR 1920 Mad 812 (812) : 42 Mad 690 : 51 Ind Cas 939 (DB), *Srinivasa Ayyangar* v. *Kottappakki Johnsa.*

2. ('09) 4 Ind Cas 1121 (1121) : 31 Mad 452 (453) (DB), *Srinivasa Raghava* v. *Rangaswami Aiyangar.*

3. ('99) 9 Mad L Jour 137 (140) (DB), *Veera Pillai* v. *Ponnambala Pillai.*
('88) 11 All 27 (31): 1888 All W N 254 (FB), *Hari Tiwari* v. *Raghunath Tiwari.*

Note 10

1. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*

2. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*

3. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*
('20) 7 AIR 1920 Mad 812 (812) : 42 Mad 690 : 51 Ind Cas 939 (DB), *Srinivasa Ayyangar* v. *Kottappakki Johnsa.*

4. ('34) 21 AIR 1934 Nag 61 (62) : 148 Ind Cas 733 : 30 Nag L R 208, *Sujatkhan* v. *Nazafali.*

5. ('34) 21 AIR 1934 Lah 934 (935, 936), *Ganga Singh* v. *Ragho Ram.*

Section 120

120. Rights and liabilities of parties. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Synopsis

1. Principle and scope.
2. Right of pre-emption on exchange.
3. Lien for the purchase money.

1. Principle and scope. — As has been seen in Note 1 on S. 118, an exchange is, except in certain respects, akin to a sale. Each party to an exchange can be regarded as a buyer in respect of the thing he receives and as a seller in respect of the thing he parts with. It, therefore, naturally follows that each party should have the rights and be subject to the liabilities of a buyer in respect of the thing he receives and those of a seller in respect of the thing he parts with. The present section accordingly defines the rights and liabilities of each party to an exchange in terms of buyer and seller.[1]

Where the subject-matter of the exchange is *immovable* property, the rights and liabilities of the parties will be governed by section 55. Where the subject-matter of the exchange is *moveable* property, the rights and liabilities of the parties will be governed by Chapter VII of the Contract Act (IX of 1872), which is now substituted by the Sale of Goods Act (III of 1930).

The rights and liabilities of the buyer and the seller under S. 55 are subject to *contracts to the contrary*, and the rights and liabilities of the buyer and seller under the Sale of Goods Act are subject not only to express contracts to the contrary but also to the *course of dealing* or *usage* to the contrary. (See S. 62 of the Sale of Goods Act.)

Where, in the city of Tuticorin, there was a custom among cotton dealers that dealers delivering cotton to owners of cotton presses with or without a special contract were entitled to get in return the same quality and weight of duly pressed clean cotton, it was held that so soon as the cotton was delivered to the owners of the press, the property in the cotton passed to them and that if it was destroyed by fire thereafter, they should bear the loss, and should pay to the dealers the price of the cotton delivered by them.[2]

2. Right of pre-emption on exchange. — It has been seen in Note 3 on S. 118 that an exchange is not a 'sale' and that consequently no right of pre-emption can be claimed on the basis that the transaction is a sale. But the question arises whether the fact that under this section

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Section 120 — Note 1

1. ('23) 10 AIR 1923 Lah 456 (457) : 73 Ind Cas 709, *Kundan Lal* v. *Anund Sarup*. (Stamp duty on an exchange is same as that on a sale.)

2. ('88) 11 Mad 459 (468, 469) (DB), *Volkart Brothers* v. *Vettivelu Nadan*.

Section 120 Notes 2-3

the liability of a party who takes in an exchange is the same as that of a *buyer* in a sale, will enable a third person to claim a right of pre-emption against such party. It has been held that it will not.[1] The reason is that the rights and liabilities of the buyer and seller, referred to in the section are those which are enforceable *inter se* between them and not those which *third parties* may have against the parties to the sale. Consequently, the liability of a party who takes in an exchange is his liability *to the other party to the exchange* and not to any third party.[2]

3. Lien for the purchase-money. — Under S. 55, sub-s. (6), clause (b) a buyer is entitled to a charge on the property sold, for the amount of the purchase-money he has paid to the seller in anticipation of delivery. But in an exchange there cannot arise any question of payment of purchase-money and therefore no party can claim under this section a charge over other's property as provided for in section 55, sub-section (6), clause (b).[1]

For the same reason a party to an exchange cannot invoke the principle of section 55, sub-section (4), cl. (b) and claim a charge for any money that may be due under such exchange.[2]

Exchange of money.

Section 121

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Synopsis

1. Scope of the section.
2. "Money."

1. Scope of the section. — The general principle is that a person cannot convey to another any better title to a *thing* than he himself has to it.[1] The principle does not, however, apply to money which is legal tender. The mere delivery of money to a person conveys

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Note 2

1. ('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 Ind Cas 495 (DB), *Samar Bahadur* v. *Jit Lal.*

('37) 24 AIR 1937 All 665 (667) : 171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir Singh.*

2. ('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 Ind Cas 495 (DB), *Samar Bahadur* v. *Jit Lal.*

Note 3

1. ('16) 3 AIR 1916 Mad 821 (822) : 38 Mad 519 : 30 Ind Cas 408 (DB), *Chidambara Chettiar* v. *Vaidilinga Padayachi.*

2. ('12) 16 Ind Cas 109 (109) (DB) (Mad), *Krishna Nair* v. *Kundu Nair.*

[*See also* ('37) 24 AIR 1937 All 39 (42) : 166 Ind Cas 619 : I L R (1937) All 153 (DB), *Mt. Razina Khatun* v. *Mt. Abida Khatun.* (Provisions of Ss. 120 and 55 (4) (b) apply to private transfers and not to decrees based on award which itself contains no charge.)]

Section 121 — Note 1

1. See Section 27 of the Sale of Goods Act, 1930.

Section 121 Notes 1–2

a perfectly valid and indefeasible title to it.[2] There is, therefore, no question, in an exchange of money, of any party being deprived of the thing by reason of any defect in the title of the other party, and there is, therefore, no scope for the applicability of S. 119 to such a case.

But a person who gives money as legal tender is, on general principles, answerable for the money being really a legal tender as it purports to be.[3] This is the principle that is found enacted in this section.

2. "Money."—"Money" does not include anything which is not *legal tender*. It includes *current* coin of the realm and all things which are "accustomably transferable in the country in the same manner as *cash*."[1] *Badashahi* coins of Baroda have not by law been made legal tender in British India and are therefore not 'money' in British India.[2]

It has been held in the undermentioned case[3] that it is not necessary in order to constitute a thing 'money' that it should be a legal tender *receivable at a value in rupees fixed by law*. Where a coin has a *current value*, attaching to it as coin, and not merely by weighing them as lumps of gold or silver, it is money.

CHAPTER VII.

Of Gifts.

Section 122

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

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2. ('01) 25 Bom 702 (705) : 3 Bom L R 392 (DB), *In re Mathur Lalbhai.*

('78) 1878 Pun Re No. 73, *Mathra Das* v. *Ramanand.* (The title of the *bona fide* holder for consideration of a currency note does not become defective by reason of a defect in the title of a previous holder.)

('90) 1890 Pun Re No. 83, *Kanshi Ram* v. *Secy. of State.*

[*See also* ('78) 3 Cal 379 (382) : 1 Cal L R 339 (DB), *Empress* v. *Jogessur Mochi.* (The change of Government currency note for money is not sale.)]

3. (1814) 15 R R 561 (564, 566) : 5 Taunt 488.

Note 2

1. ('01) 25 Bom 702 (705) : 3 Bom L R 392 (DB), *In re Mathur Lalbhai.*

2. ('01) 25 Bom 702 (705, 706) : 3 Bom L R 392 (DB), *In re Mathur Lalbhai.*

3. ('73) 5 N W P H C R 187 (188) (DB), *Queen* v. *Kunj Beharee.*

Synopsis

1. Scope of the section.
2. "Without consideration."
2a. Agreement to give.
3. Competency to give.
4. Competency to receive.
5. "Person."
5a. Gift to Hindu idol.
6. "Existing moveable or immoveable property."
7. "Accepted by or on behalf of the donee."
8. Donor dying before acceptance.
9. Accepted gift is complete though deed is registered later. See Note 6 on S. 123.
10. Donee dying before acceptance.
11. Advancement.
12. Gift to a persona designata.
13. Gift for unlawful objects.
14. What passes under a gift. See Notes on S. 8.
15. Gift or trust.
16. Gift or sale.
17. Gift or will.
18. Gift is irrevocable. See S. 126.
19. Muhammadan law.
20. Hindu law.

Other Topics (miscellaneous)

Acceptance, when to be made. See Notes 8 and 10.
Conditional gift. See Note 1.
Donee, who can be. See Note 3.
Donor, who can be. See Notes 4 to 5a.
Gift of actionable claim. See Note 6 and S. 123 Note 14.
Imperfect gift—Donor not a trustee for donee. See Note 15 and S. 123 Note 13.
Subject matter of gift. See Note 6.
What is sufficient acceptance. See Note 7.

1. Scope of the section. — This section deals with gifts *inter vivos*. A gift is a *gratuitous* transfer of property from one person to another.[1] It is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.[2] But a gift like any other transfer may be made either absolutely or conditionally. Where it is made conditionally the property can be recovered back by the donor on breach of the condition.[3] As to the validity of conditions against alienation, see S. 10. A gift which is complete and absolute at the time it was made cannot, however, be modified by conditions subsequently added.[4]

Section 122 — Note 1

1. "*Gifts* are always gratuitous; *Grants* are upon some consideration or equivalent"—2 Blackstones Commentaries 440.

2. Halsbury, *Laws of England*, Vol. 15, page 399, Para. 791.
[*See also* ('29) 16 A I R 1929 P. C. 77 (80) : 114 I C 565 (P.C.), *Hari Ram* v. *Madan Gopal*. (In a gift the donor divests himself of property which passes away to the donee.)]

3. ('27) 14 AIR 1927 P C 123 (124, 127) : 101 Ind Cas 363 (P C), *Mahant Rai* v. *Lachhmina Kunwar*.
('11) 11 Ind Cas 634 (635) (D B) (Cal), *Shayama Charan* v. *Naba Chandra*.
('36) 23 A I R 1936 All 197 (199) : 58 All 687 : 161 Ind Cas 507 (D B), *Harish Chandra* v. *H.D. Sewak Mandal*. (Performance of conditions rendered impossible —Gift fails.)
('28) 15 A I R 1928 All 699 (702) : 117 Ind Cas 351 (D B), *Hira Mani* v. *Anmol Singh*. (Gift can be made with defeasance clause—Consent of donee is unnecessary for the validity of the clause.)

4. ('84) 6 All 313 (321) : 11 Ind App 44 (P C.), *Ram Sarup* v. *Bela*.

Section 122
Notes 1–2

A *release* of a security in favour of the mortgagor is not a *transfer* of property and is not a gift within the meaning of this section.[5]

A gift of the income of a certain property without any limitation is equivalent to a gift of the property itself.[6]

2. **"Without consideration."** — This is an essential characteristic of a gift. The word 'consideration' is not defined in this Act, but is defined in the Contract Act, 1872. Section 4 provides that the chapters and sections of this Act which relate to *contracts* shall be taken as part of the Contract Act. A gift cannot be said to relate to contracts inasmuch as there cannot be a contract without consideration. The definition of "consideration" in the Contract Act will not therefore necessarily apply to interpret the word "consideration" in this section by virtue of S. 4.[1] But it has been held that it has the same meaning under this section as it has under the Contract Act. Thus, it has been held that a transfer in consideration of natural love and affection (which is excluded from the definition of 'consideration' under the Contract Act) is only a gift. So also is a transfer in consideration of an expectation of spiritual and moral benefit.[2] But the abandonment of a person's right to future maintenance is a "consideration" within the meaning of the Contract Act and a transfer for such consideration is not a gift.[3]

A transfer purported to be made *for a consideration* will not be a gift by reason merely of the fact that the consideration did not pass or that it is void. The transfer in such cases is void. But a transfer which purports to be a sale may be shown to be only really a gift.[4]

The *motive* for a transfer is not the same thing as the consideration for it. A transfer for services rendered will, if the services are merely the motive for the transfer, be a gift.[5] A settlement on a wife will be a gift even if the marriage proves to be invalid.[6]

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5. ('26) 13 AIR 1926 Cal 170 (171): 91 Ind Cas 757 (DB), *Mahim Chandra* v. *Ram Dayal.*
('21) 8 A I R 1921 Mad 563 (566) : 68 Ind Cas 631 (DB), *Vaithinatha Iyer* v. *Thyagaraja Iyer.*
6. ('26) 13 AIR 1926 Mad 250 (251) : 92 Ind Cas 516, *Venkatachariar* v. *Pachayyappa.*
See also Note 12 on S. 8.

Note 2

1. *See* Note 3 on S. 4.
2. ('29) 16 AIR 1929 Pat 591 (592, 593) : 125 Ind Cas 127 (DB), *Debi Saran* v. *Nandalal.*
3. ('22) 9 AIR 1922 Mad 311 (311) : 68 Ind Cas 687 : 45 Mad 612 (FB), *Madam Pillai* v. *Badrakali Ammal.* (See the Order of Reference.)
4. ('11) 11 Ind Cas 398 (399) : 38 Ind App 85 : 33 All 340 (PC), *Hanif-un-nissa* v. *Faiz-un-nissa.* (27 All 612 overruled.)
5. ('28) 15 AIR 1928 Bom 250 (252) : 109 Ind Cas 149 (DB), *Hiralal* v. *Gaurishankar.*
[*See also* ('28) 109 Ind Cas 562 (563) (Lah), *Farangi* v. *Sukha.*
('09) 5 Ind Cas 599 (600): 34 Bom 287 (DB), *Madhavrao Moreshwar* v. *Kashibai Dattubhai.*
('18) 5 AIR 1918 Mad 458 (458) : 42 Ind Cas 265 (DB), *Ranga Rao* v. *Kitori Ammal.*]
6. ('32) 19 AIR 1932 P C 34 (35) : 135 Ind Cas 753 (PC), *Gopal Saran Narain Singh* v. *Sita Devi.*

Where there is any consideration for a transfer it is not a gift.[7]

2a. Agreement to give. — An agreement to make a gift, being one without consideration is not enforceable as a contract. Consequently, the intended donee cannot compel the donor to make the gift, or, where the gift is incomplete, to complete the gift.[1] "If you want the assistance of the Court," said Lord Eldon in *Ellison* v. *Ellison*,[2] "to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust* ; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant."

3. Competency to give. — Prima facie every one who is *sui juris* can dispose of by way of gift any property to which he is absolutely entitled.[1] An alien can dispose of his property in the same way as a British subject.[2] A corporation though a person in the eye of the law is the creature of and derives its power from the statute creating it and cannot make gifts except in conformity with the provisions of such statute.[3]

By virtue of S. 7, it is only a person *competent to contract* that can make *any* transfer of his property. Consequently, a minor,[4] or other person incompetent to contract, cannot make a valid gift.

Persons in fiduciary positions such as trustees cannot, unless they are authorised to do so, make gifts of the property vested in them on behalf of others.[5]

A *pardanashin* lady is not a person incompetent to contract, and is not incompetent to make a gift. But it is necessary to show very clearly that the lady fully understood the transaction when she made the gift.[6]

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7. ('28) 15 AIR 1928 All 500 (503) : 50 All 818 : 115 Ind Cas 114 (DB), *Anrudh Kumar* v. *Lachmi Chand.*

Note 2a

1. Halsbury, *Laws of England*, Vol. 15, para. 852.
(1886) 55 L J Q B 462 (463): 17 Q B D 442: 34 W R (Eng) 775, *Harding* v. *Harding.*
(1856) 52 E R 1078 (1081) : 22 Beav 184 : 4 W R (Eng) 523 : 111 R R 323, *Denning* v. *Ware.*
(1845) 50 E R 79 (83): 8 Beav 201: 14 L J Ch 145 : 9 Jur 384, *Ward* v. *Audland.*
2. (1802) 31 E R 1243 (1246) : 6 Ves 656 : 6 R R 19 : 2 Wh & Td 7th Ed. 835.

Note 3

1. Halsbury, *Laws of England*, Vol. 15, para. 792.
2. Halsbury, *Laws of England*, Vol. 15, para. 793.
3. Halsbury, *Laws of England*, Vol. 15, para. 795.
4. ('03) 30 Cal 539 (547) : 30 Ind App 114 (P C), *Mohori Bibee* v. *Dhurmodas Ghose.*
5. Halsbury, *Laws of England*, Vol. 15, para. 800.
6. ('22) 9 A I R 1922 P C 14 (15) : 64 Ind Cas 559 : 43 All 525 : 48 Ind App 381 (P C), *Kamawati* v. *Digbijai Singh.*
('34) 21 A I R 1934 PC 208 (209) : 151 Ind Cas 45 (P C), *Kalyan Mal* v. *Ahmad Uddin Khan.*
('13) 21 Ind Cas 985 (989) : 36 All 81 : 41 Ind App 23 (PC), *Kali Bakhsh* v. *Ram Gopal.*

Section 122
Notes 3–4

In the undermentioned case,[7] where a gift was alleged to have been made by an old and infirm woman, it was held that the burden of proving that it was executed with full knowledge of its contents and that she did so willingly without any pressure or undue influence is on the donee.

A leper is not incompetent to make a gift under the Hindu law.[8]

As to the powers of a father or manager or of a coparcener of a Hindu family or of a woman having a limited estate under the Hindu law to make a valid gift, see NOTE 7 on section 7.

4. Competency to receive. — In general all persons whether *sui juris* or not are competent to take a transfer of property[1] though a person who is not *sui juris* at the time of the gift may, after he becomes *sui juris*, avoid the gift.[2] A person who is *legally disqualified* from being a transferee cannot however take a transfer.[3]

The donee must be alive at the date of the gift. The representatives of a person dead at the date of the gift cannot take under it.[4] Under the Hindu law also the donee must be in existence at the time the gift takes effect.[5]

An agent of a person is not incapacitated from taking a gift from his principal[6] nor is there any prohibition in law against a gift being validly made to an idiot.[7]

Where a gift is made to a class, some of whom are not in existence at the date of the gift, it enures to the benefit of such of them as are capable of taking.[8]

('91) 14 All 8 (12) : 1891 All W N 213 (DB), *Mariam Bibi* v. *Sakina.*
('12) 16 Ind Cas 110 (115) : 39 Cal 933, *Kamini Dossee* v. *Krishna Chandra.*
('35) 22 AIR 1935 Cal 671 (673) : 159 Ind Cas 133 (DB), *Benoy Krishna* v. *Panchanan.*
('25) 12 AIR 1925 Lah 196 (198) : 5 Lah 465 : 85 Ind Cas 169 (DB), *Sri Ram* v. *Nand Kishore.*
('25) 12 AIR 1925 P C 204 (209) : 89 Ind Cas 649 : 28 Oudh Cas 338 : 47 All 703 : 52 Ind App 342 (PC), *Farid-un-nissa* v. *Mukhtar Ahmad.*
See also Note 3 on S. 7.
7. ('12) 15 Ind Cas 529 (532) (DB) (Bom), *Rajaram* v. *Khandu Balu.*
8. ('66) 6 Suth W R 68 (68) (DB), *Samachurn Audicaree Byragee* v. *Roopdass Byragee.*

Note 4

1. See S. 6 Note 36 and S. 7 Note 8.
Halsbury, *Laws of England* Vol. 15, Para. 801.
2. Halsbury, *Laws of England* Vol. 15, Para. 803.
3. See Note 36 on Section 6.
4. Halsbury, *Laws of England* Vol. 15, Para. 806.
5. ('72) 18 Suth W R 359 (367) (P C), *Tagore* v. *Tagore.* (Child in embryo is a person in existence.)
('70) 4 Beng L R (OC) 103 (191) (DB), *Tagore* v. *Tagore.*
('33) 20 AIR 1933 Cal 529 (531) : 60 Cal 706 : 146 Ind Cas 312, *Kandarpamohan* v. *Akshayachandra.*
('25) 12 AIR 1925 Lah 648 (649):89 I.C. 326 (DB), *Bhagwan Singh* v. *Kirpa Ram*
See Section 13 Notes 2 and 5.
6. ('03) 25 All 358 (365) : 1903 All W N 70 (DB), *Phul Chand* v. *Lakhu.*
7. Marsh 357 (360), *Kooldeb Narain Shahee* v. *Wooma Coomaree.*
8. See Notes on Section 15.

Section 122 Notes 5–5a

5. "Person."—The donee must be an ascertained or ascertainable person.[1] The 'public' cannot be a donee under this section, though apart from this section, there may be a dedication in favour of the public.[3] An unregistered society is not a 'person' and gift cannot be made in its favour.[3]

The word 'person' will include "persons." A gift can therefore be made to two or more persons. Under the English law a gift in favour of two or more persons makes them *joint* tenants. In this country, the presumption is that they take only as tenants in common.[4] Where a gift is to two persons one of whom is capable of taking and the other is not, the former will take the whole of the property.[5]

5a. Gift to Hindu idol.—It is settled that a gift or dedication can be validly made to a Hindu idol whether consecrated or to be consecrated. [1] But there is a conflict of opinion as to whether such a gift or dedication is a gift within the meaning of this Act, and several views have been expressed. The first view is that though a Hindu idol is a *juristic* person capable of holding and acquiring property,[1a] it is not a "living" person within the meaning of S. 5 and, consequently, the gift is not a "transfer of property" at all and is therefore not within this

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Note 5

1. ('03) 13 Mad L Jour 364 (366-367) (DB), *Pallaya* v. *Ramavadhanulu.*

2. ('03) 13 Mad L Jour 364 (366, 367) (DB), *Pallaya* v. *Ramavadhanulu.*

3. ('17) 4 AIR 1917 All 94 (94) : 38 Ind Cas 183 (DB), *Mathura Kuer* v. *Dharam Samaj.*

[But see ('35) 22 AIR 1935 All 872 (873) : 158 Ind Cas 762, *Mahabir* v. *Anjuman Wazifatul Muslimin.* (Gift to Anjuman held valid especially where it was made to a definite person on behalf of the Anjuman. AIR 1917 All 94 disting.]

4. See Note 6 on Section 45.

('17) 4 AIR 1917 Mad 484 (484) : 34 Ind Cas 744 (DB), *Kapini Gowndan* v. *Sarangapany.*

('26) 13 AIR 1926 Nag 48 (49) : 89 Ind Cas 991, *Mt. Jirabai* v. *Mt. Ramdularibai.*

[*See also* ('21) 8 AIR 1921 Cal 175 (176) : 62 Ind Cas 436 (DB), *Hemantha Kumar Bahaduri* v. *Sudhansu Gobinda Choudhury.* (Although an annuity to two persons should ordinarily be construed to mean that on the death of one of them the other should get a proportionate amount, where there are indications of a contrary intention the gift may be taken as a joint gift.]

5. ('89) 16 Cal 677 (682) : 16 Ind App 44 (PC), *Nandi Singh* v. *Sita Ram.*

Note 5a

1. ('09) 3 Ind Cas 642 (647, 656, 660) : 37 Cal 128 (FB), *Bhupati Nath* v. *Ram Lal.*

('14) 1 AIR 1914 Cal 200 (201) : 20 Ind Cas 78 : 41 Cal 57 (DB), *Mohatap* v. *Kali Pada.*

('81) 6 Cal 106 (118), *Rajender Dutt* v. *Sham Chand.*

('24) 11 AIR 1924 All 357 (359) : 78 Ind Cas 1018 : 46 All 130 (DB), *Sarab Sukh* v. *Ram Prasad.*

('10) 8 Ind Cas 832 (832) : 33 All 253 (DB), *Chaturbhuj* v. *Chatterjit.*

('23) 10 AIR 1923 Cal 60 (62) : 72 Ind Cas 1026 (DB), *Rambrahma* v. *Kedar Nath.*

1a. ('98) 25 Cal 112 (127), *Bhuggobutty* v. *Gooroo Prosonno.*

('88) 12 Bom 247 (263) (DB), *Manohar* v. *Lakhmiram.*

('14) 1 AIR 1914 Oudh 255 (259) : 24 Ind Cas 72 (DB), *Sitaramji* v. *Jadunath.*

See also Note 3 on Section 5.

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Note 5a

section.[2] The second view is that the notion of *acceptance* by a deity of worldly goods is contrary to Hindu religion and that, therefore, a gift to an idol is not a gift within the meaning of this section as it lacks the element of acceptance, which is an essential requisite for a valid gift.[3] A third view is that a gift or dedication to an idol operates only as *renunciation* by the donor of the property and not as a *transfer* by the donor. Consequently, it is not a gift within the meaning of this section.[4] A fourth view is that a gift to an idol is a gift under this section, the acceptance being made by the shebait of the idol.[5]

A gift must be for definite purpose. A gift to *dharam*[6] or *anna-*

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2. ('19) 6 AIR 1919 Mad 809 (811) : 42 Mad 440 : 49 Ind Cas 742 (DB), *Ramalinga* v. *Shivachidambara.*
('27) 14 AIR 1927 Mad 636 (638): 50 Mad 687 : 103 Ind Cas 302 (FB), *Narasimha* v. *Venkatalingum.*

3. ('26) 13 AIR 1926 Nag 469 (470) : 96 Ind Cas 1004, *Bhopat Rao* v. *Shri Ramchandra.*
('19) 6 AIR 1919 Mad 809 (810, 811) : 42 Mad 440 : 49 Ind Cas 742 (DB), *Ramalinga* v. *Sivachidambara.*
('09) 3 Ind Cas 642 (648) : 37 Cal 128 (155) (FB), *Bhupati Nath* v. *Ram Lal.* (25 Cal 405; 29 Cal 260; 30 Cal 521 overruled.)
('24) 11 A I R 1924 Nag 254 (255) : 79 Ind Cas 173 : 20 Nag L R 60, *Vithal Das Marwari* v. *Goma.* (A I R 1919 Mad 809 referred.)

4. ('09) 3 Ind Cas 642 (659) : 37 Cal 128 (155) (FB), *Bhupati Nath* v. *Ram Lal.*
('34) 21 A I R 1934 Pat 612 (614) : 13 Pat 356 : 155 Ind Cas 756 (DB), *Birendra Keshri* v. *Bahuria Saraswati.* (Dedication to temple.)
[*See* ('30) 17 A I R 1930 Pat 610 (612, 613) : 128 Ind Cas 791 (DB), *Harihar Prasad* v. *Sri Gurunath Saheb.* (Oral dedication of immovable property in favour of an idol—In order to constitute a valid gift and dedication, there must be real sankalp and samarpan, that is, the endowed property must be completely given away and the owner must completely divest himself of its ownership.)
('25) 12 A I R 1925 Cal 996 (1001) : 88 Ind Cas 616 (DB), *Gopal Jew* v. *Radha Benode.*]

5. ('42) 29 A I R 1942 Cal 386 (389) : 201 Ind Cas 557 (DB), *Purna Chandra* v. *Kali Pada.*
('36) 23 A I R 1936 Cal 556 (561) : 167 Ind Cas 713 : 63 Cal 1098 (DB), *Bhupati Nath* v. *Basanta Kumari.*
('16) 3 AIR 1916 All 302 (303):36 Ind Cas 989 (DB), *Mannu Lal* v. *Radha Kishen.*
('38) 25 AIR 1938 Cal 490 (494) : 179 Ind Cas 847, *Bhabatarini Debi* v. *Ashmantara Debi.*
('31) 18 A I R 1931 Oudh 14 (14) : 131 Ind Cas 442 (DB), *Shaukat Begam* v. *Sri Thakurji.*
('28) 15 AIR 1928 All 699 (702) : 117 Ind Cas 351 (DB), *Hiramani Singh* v. *Anmol Singh.* (A gift by way of sankalp at the time of nuptials.)

6. ('99) 23 Bom 725 (735) : 26 Ind App 71 (PC), *Runchordas* v. *Parbatibai.*
('12) 14 Ind Cas 247 (247) : 1912 Pun Re No. 78 (DB), *Gurudit Singh* v. *Sher Singh.*
('33) 20 AIR 1933 Lah 833 (835) : 14 Lah 827 : 146 Ind Cas 1013 (DB), *Narain Das* v. *Brij Lal.*
('90) 14 Bom 482 (488), *Cursandas* v. *Vundravandas.*
('94) 18 Bom 136 (140) (DB), *Devashankar* v. *Motiram.*
('02) 26 Bom 632 (636) : 3 Bom L R 902, *Bai Chandunbai* v. *Dady.*
('07) 30 Mad 340 (341): 17 Mad L Jour 379 (DB), *Parthasarathi* v. *Thiruvengada.* (Subramaniya Ayyar, J., contra.)
('10) 6 Ind Cas 141 (144) (DB) (Cal), *Kandarpa* v. *Jogendra.*

chatra[7] or for worship of God without naming the deity[8] are all void for vagueness and uncertainty of the object of the gift.

6. "Existing moveable or immoveable property."—This chapter, unlike Chapters III, IV and V, is not limited to immovable property. It deals with gifts of both moveable and immovable property.

A gift can be made only of *existing* property, and the same must be transferable under S. 6. Thus, there cannot be a gift of property that may come into existence in the future, or of the things referred to in section 6.

An actionable claim is an existing property and can be validly gifted.

It has been held in the undermentioned case[1] that, by usage, a Goswami of the Ballavacharya sect has an interest in the property held by him (including the temple and the idol) of which he can make a gift.

A gift of a non-transferable occupancy holding cannot be questioned by the heirs of the donor himself on the ground of its non-transferability, though such transfer may not be binding on the landlord.[2]

A gift of a mortgage is a gift of immovable property within the meaning of this section.[3]

7. "Accepted by or on behalf of the donee." — The acceptance of a gift is an essential element of a gift whether under the English law or under this Act. But, under the English law, the acceptance by the donee is *presumed* until his dissent is signified,[1] and this is so even if the donee is not aware of the gift or even if the gift is onerous.[2] The presumption is made on the principle that a man may be fairly presumed to assent to that to which he, in all probability, would assent if the opportunity of so doing were given to him. The presumption may be rebutted, and a donee on becoming aware of the gift is entitled to repudiate it.[3] The English rule was applied to a case

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7. ('04) 6 Bom L R 56 (57) (DB), *Advocate-General* v. *Strangmun.*

8. ('19) 6 AIR 1919 Cal 199 (199) : 46 Cal 951 : 51 Ind Cas 215 (DB), *Chandi Charan* v. *Haribola.*

('11) 11 Ind Cas 260 (261) : 33 All 793 (DB), *Phundan Lal* v. *Arya Priti Nidhi Sabha.*

Note 6

1. ('15) 2 AIR 1915 All 44 (49) : 28 Ind Cas 715 (DB), *Gopal Lalji* v. *Girdhar Lalji.*

2. ('18) 5 AIR 1918 Cal 615 (616, 617) : 41 Ind Cas 878 : 45 Cal 434 (DB), *Behari Lall* v. *Sindhubala.*

3. ('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.* (Gift of mortgage therefore must be made by registered instrument under S. 123.)

Note 7

1. Halsbury, *Laws of England*, Vol. 15, para. 830.

2. Halsbury, *Laws of England*, Vol. 15, para. 830.

3. Halsbury, *Laws of England*, Vol. 15, para. 830.

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Notes 7–8

arising in this country before the Act.[4]

Under this section, however, the law is different.[5] There must be *actual* acceptance in fact, though it need not be *express*.[6] From the conduct of the donee Courts may, of course, draw a presumption that he accepted the gift.[6a] But this is a presumption of *fact* and not of *law* as in England. Where, for instance, it is shown that the donee was not aware of the gift, it cannot be presumed that he accepted the gift, and there is no valid gift.[7]

The acceptance may be made *by* or *on behalf of the donee*. An agent may accept the gift on behalf of his principal. A guardian of a minor or other person incompetent to contract may accept a gift in favour of such person on his behalf.[8] It has even been held in the undermentioned cases[9] that the minor himself is competent to personally accept a gift without a guardian.

The acceptance of a gift which is onerous is sufficient to constitute a valid gift. It is not necessary that the onerous conditions also should be specifically accepted.[10] But this would not disable the donee from setting up the invalidity of the burden. Thus, where mortgaged property was gifted by A to his sons, the sons were held entitled to question the validity of the mortgage.[11]

8. Donor dying before acceptance.—A gift must be accepted during the lifetime of the donor and while he is still capable of giving. The principle is that it is essential that there should be a transfer of the ownership during the lifetime of the donor;[1] and this will happen

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4. Marsh 357 (360) : 2 Hay 370, *Kooldebnarain Shahee* v. *Wooma Coomaree.*

5. ('39) 26 AIR 1939 Mad 290 (290) : 183 Ind Cas 631, *Papathi Ammal* v. *Doraiswamy.*

6. ('32) 19 AIR 1932 All 444 (445) : 54 All 534 : 137 Ind Cas 756 (DB), *Anandi Devi* v. *Mohan Lal.* (AIR 1917 All 43: 39 All 700 not approved.)

6a. ('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan.* (Delivery of gift deed to donee—Receipt by donee of same after knowing its bearing — Such receipt is acceptance of gift.)

('32) 19 AIR 1932 All 444 (445) : 54 All 534 : 137 Ind Cas 756 (DB), *Anandi Devi* v. *Mohan Lal.* (Actual or constructive possession by donee is proof of acceptance.)

('32) 19 AIR 1932 Mad 272 (275) : 136 Ind Cas 343, *Venkataramayya* v. *Nagamma.* (Gift by mother to her son and his wife — All living together — Acceptance was inferred. But the observation in this case that the presumption of English law will apply is, it is submitted, not correct.)

7. ('27) 14 AIR 1927 P C 42 (43) : 50 Mad 193 : 54 Ind App 89 : 100 Ind Cas 105 (PC), *Kalyansundaram Pillai* v. *Karuppa Mooppanar.*

8. ('38) 25 AIR 1938 Oudh 26 (30) : 171 Ind Cas 481 : 13 Luck 697 (DB), *Ram Bharose* v. *Rameshwar Prasad.*

9. ('16) 3 AIR 1916 Nag 55 (55) : 13 Nag L R 18 : 39 Ind Cas 46, *Ganeshdas Bhivraj* v. *Sitaram.*

('38) 25 AIR 1938 Oudh 26 (30) : 171 Ind Cas 481 : 13 Luck 697 (DB), *Ram Bharose* v. *Rameshwar Prasad.*

See also Section 127.

10. ('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan.*

11. ('26) 95 Ind Cas 406 (406) (DB) (Lah), *Hassan Din* v. *Jagat Singh.*

Note 8

1. ('43) 30 A I R 1943 Bom 7 (S) : 204 Ind Cas 212 (DB), *Keshavlal* v. *Bai Dahi.*

in a gift, only when it is accepted by the donee. If he dies or ceases to be capable of giving, before acceptance, the gift becomes void. But where it is *accepted* during the lifetime of the donor, the deed of gift, where there is one, might be got registered after his death.[2]

Where the donor has handed over the document of gift to the donee who has received it, it is sufficient acceptance. The fact that it was not stamped properly and the stamp duty and penalty were paid after the death of the donor does not detract from the completeness of the gift during his lifetime.[3]

9. Accepted gift is complete though deed is registered later. — See Note 6 on Section 123.

10. Donee dying before acceptance. — Since a donee must, in order to constitute a valid gift, actually *accept* the gift, the gift will be void where he dies before such acceptance.

11. Advancement. — In English law where a husband or father pays money and purchases property in the name of the wife or child, the presumption is that the purchase was intended to be an *advancement* to the wife or the child.[1] This doctrine has no application to this country.[2] The husband or the father would nevertheless be the beneficial owner of the property purchased.[3] Where A deposited his money in the name of himself and his wife, it was held that there was no presumption of any intended advancement to the wife.[4] As between two persons born of British parents, the English law would, however, apply.[5]

12. Gift to a persona designata.—Where a gift is made to A describing him "as the adopted son of the donor" and it turns out that

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2. See Note 6 on Section 123.

3. ('42) 29 A I R 1942 Cal 386 (389) : 201 Ind Cas 557.(DB), *Purna Chandra* v. *Kalipada.*

Note 11

1. ('21) 8 A I R 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (P C), *Kerwick* v. *Kerwick.*
('25) 12 AIR 1925 P C 181 (182) : 52 Ind App 286 : 88 Ind Cas 327 : 48 Mad 605 (PC), *Lakshmiah Chetty* v. *Kothandarama.*

2. ('21) 8 A I R 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
(1854) 6 Moo Ind App 53 (75, 79), *Gopeekrist* v. *Gunapersaud.*
('69) 13 Moo Ind App 232 (247), *Moulvies Sayyad* v. *Mt. Bebee Ultaj Fatima.*
('05) 29 Bom 306 (312) : 6 Bom L R 975 (DB), *Bai Motivahu* v. *Purshotum.*
('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 Ind Cas 327 (PC), *Lakshmiah Chetty* v. *Kothandarama.*
('28) 15 AIR 1928 P C 172 (173) : 109 Ind Cas 723 : 55 Cal 944 : 55 Ind App 235 (PC), *Guran Ditta* v. *Ram Ditta.*

3. ('21) 8 AIR 1921 P C 56 (57): 48 Cal 260: 47 Ind App 275: 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 Ind Cas 327 (PC), *Lakshmiah Chetty* v. *Kothandarama.*

4. ('43) 30 AIR 1943 Bom 7 (8) : 204 Ind Cas 212 (DB), *Keshavlal Tribhovandas* v. *Bai Dahi.* (A I R 1928 P C 172 relied upon.)

5. ('21) 8 AIR 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*

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Note 12

the adoption is not valid, or that no adoption of A ever took place, the question, whether the gift to A stands, depends upon the further question whether the words "my adopted son" are merely words of description or whether the fact of adoption was the motive and reason for the gift. In the former case, the gift would be valid though the adoption is not valid or did not take place. In the latter case the gift will be invalid.[1] "The distinction," said their Lordships of the Privy Council in *Fanindra Deb* v. *Rajeswar Das*,[2] "between what is description only and what is the reason or motive of a gift may often be very fine but it is a distinction which must be drawn from a consideration of the language and surrounding circumstances."

See also the undermentioned cases.[3]

Note 12

1. ('85) 11 Cal 463 (483, 484) : 12 I. A. 72 (PC), *Fanindra Deb* v. *Rajeswar Das.*
('24) 11 AIR 1924 Bom 516 (517): 76 Ind Cas 405 (DB), *Kalliyantai* v. *Shivappa.* (Intention of the donor was to give the property to *R* as his adopted son—Adoption invalid—Gift fails.)
('22) 9 AIR 1922 Bom 352 (353): 47 Bom 65: 68 Ind Cas 504(DB), *Bai Dhondubai* v. *Laxman.* (Testator made the gift out of natural love and affection and in making his will he merely described the donee as his adopted son in the ordinary course without intending that the gift should be conditional on the validity of his adoption — *Held*, gift valid though adoption failed.)

2. ('85) 11 Cal 463 (484) : 12 Ind App 72 (PC),
('30) 17 AIR 1930 Lah 115 (116) : 120 Ind Cas 793 (DB), *Daya Ram* v. *Hansraj.*

3. ('09) 1 Ind Cas 555 (555) : 31 All 5 (DB), *Lalta Prasad* v. *Saligram.*
('02) 24 All 195 (207) : 1902 All W N 10 (DB), *Lali* v. *Murlidhar.*
('34) 21 AIR 1934 Oudh 137 (138) : 148 Ind Cas 692 : 9 Luck 530 (DB), *Ali Bahadur* v. *Hafiz Samiullah.* (Construction — Bequest to adopted son — Adoption invalid — Reference to status as adopted son held merely description of donee and not motive of gift.)
(1900) 11 Mad L Jour 27 (28) : 24 Mad 613 (DB), *Venkatasami Reddy* v. *Rangamma.*
('10) 8 Ind Cas 517 (519) (DB) (Mad), *Venkatachariar* v. *Sadagopa.*
('97) 20 Mad 167 (188) : 6 Mad L Jour 218 (DB), *Court of Wards* v. *Venkata Surya.* (Case held to be one of description only.)
('29) 16 AIR 1929 Lah 20 (22) : 10 Lah 558 : 114 Ind Cas 334, *Ibrahim* v. *Sada Bibi.* (Gift to a person described as possessing a particular character or relationship may either be an absolute gift to him as an individual or a gift on account of that relationship in which case if the relationship fails, it will not take effect at all.)
('01) 24 Mad 214 (218) : 27 Ind App 162 (PC), *Subbarayar* v. *Subbammal.*
('99) 22 Mad 383 (391) : 26 Ind App 83 (PC), *Venkata Surya* v. *Court of Wards.*
('77) 26 Suth W R 91 (93) : 3 Ind App 253 (PC), *Nidhoomoni Debya* v. *Saroda Pershad.*
('92) 19 Cal 452 (462) : 19 Ind App 101 (PC), *Bireshwar* v. *Ardha Chandra.*
('06) 28 All 488 (495) : 33 Ind App 97 (PC), *Lali* v. *Murlidhar.*
('92) 19 Cal 513 (530): 19 Ind App 108 (PC), *Surendro Keshub* v. *Doorgasoondery.*
('93) 16 Mad 355 (359) (DB), *Abbu* v. *Kuppammal.*
('92) 2 Mad L Jour 240 (243) (DB), *Chokkammal* v. *Murugathal.*
(1799) 4 Ves 802 (808) : 31 E R 416, *Kennell* v. *Abbott.*
('19) 6 AIR 1919 All 391 (392) : 41 All 666 : 52 Ind Cas 311 (DB), *Khub Singh* v. *Ramji Lal.*
(1883-84) 22 Ch D 597 (602) : 52 L J Ch 239, *Boddington* v. *Clariat.*
('77) 26 Suth W R 91 (93) : 3 Ind App 253 (PC), *Nidhoomoni Debya* v. *Saroda Pershad.*

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Notes 13–16

13. Gift for unlawful objects. — A gift for an unlawful object would be void under section 6, clause (h). Thus, a gift for future illicit cohabitation[1] or in fraud of creditors[2] will not be valid.

14. What passes under a gift. — See Notes on Section 8.

15. Gift or trust. — An incomplete gift or voluntary transfer of property cannot take effect as a declaration of trust, since the donor's intention to *transfer* the property negatives any suggestion that he might have contemplated *retaining* the property as a trustee upon failure of the gift or voluntary transfer.[1]

16. Gift or sale. — A document purporting to be a gift may be shown to be really a sale. So also a document purporting to be a sale may be shown to be in reality a gift.[1] The test is whether there is any *consideration* for the transaction. If there is consideration the transaction cannot be considered to be a gift, but will operate as a sale. The question must be decided upon a construction of the document in each case.[2]

A party to the document cannot, by virtue of S. 92 of the Evidence Act, be allowed to let in *extrinsic evidence* to show that a deed purporting to be a sale is merely a gift.[3] But a *third* party is not prevented from letting in such evidence to prove the same.[4]

('09) 1 Ind Cas 687 (687) : 31 All 339 (DB), *Murarilal* v. *Kundan Lal.*
6 H L 265, *Hill* v. *Crook.*

Note 13

1. ('33) 20 AIR 1933 Bom 209 (215) : 149 Ind Cas 464 (DB), *Sabava Yellappa* v. *Yamanappa.*
[But see ('05) 28 Mad 413 (416, 417) : 15 Mad L Jour 286(DB), *Muthukannu* v. *Shunmugavelu Pillai.* (Transactions intended to be gifts, if amounting to completed transfers of property, cannot be impeached.)]
2. ('20) 7 AIR 1920 Cal 93 (94, 95) : 54 Ind Cas 700 (DB), *Official Assignee* v. *Bidyasundari.*

Note 15

1. Halsbury, *Laws of England*, Vol. 15, Para. 853.
(1862) 4 De F & J 264 (273, 274) : 45 E R 1185 (1189) : 31 L J Ch 798 : 8 Jur (NS) 806 : 7 L T (NS) 178 : 135 R R 135, *Mil Roy* v. *Lord.*
('24) 11 AIR 1924 Bom 88 (89) : 87 Ind Cas 312, *Natha Gulab* v. *Shaller.*
('21) 8 AIR 1921 Cal 148 (149): 48 Cal 986: 66 Ind Cas 586, *Amarendra Krishna Dutt* v. *Moni Munjary.*
[*See also* ('85) 9 Bom 115 (122), *Ashabai* v. *Haji Tyeb.*
('08) 10 Bom L R 1209 (1216), *Manchershaw S. Narielwalla* v. *Ardeshir S. Narielwalla.* (5 Bom 268 referred to.)]

Note 16

1. See Note 1.
('70) 7 Bom H C R O C 27 (30), *Rujabai* v. *Ismail Ahmed.*
2. ('91) 13 All 409 (416, 417) : 1891 All W N 159 (FB), *Angan Lal* v. *Muhammad Hussain.* (*Held*, only a sale.)
('10) 5 Ind Cas 599 (600) : 34 Bom 287 (DB), *Madhavrao Moreshvar* v. *Kasibai Dattubhau.*
3. ('05) 27 All 612 (618) : 2 All L Jour 360 (DB), *Faiz-un-nissa* v. *Hanif-un-nissa.*
(1900) 28 Cal 70 (73) (DB), *Rahiman* v. *Elahi Bhaksh.*
('19) 6 AIR 1919 Oudh 420 (423) : 22 Oudh Cas 222 : 53 Ind Cas 961, *Azhtaq Husain* v. *Syed Nazir Husain.*
4. ('05) 2 Cal L Jour 338 (340) (DB), *Jagat Mohini* v. *Rakhal Das.*

Section 122
Notes 17-20

17. Gift or will. — A document purporting to be a will may really be a gift[1] or a document purporting to be a gift may really be a will.[2] The test is when is the document to take effect and whether the power to revoke is reserved by the author expressly or by necessary implication.[3]

See also the undermentioned cases.[4]

18. Gift is irrevocable. — See Section 126.

19. Muhammadan law. — This section does not, by virtue of S. 129, affect any rule of Muhammadan law. See Notes on S. 129.

20. Hindu law.—See Notes on Ss. 123 and 129.

By virtue of S. 129 as it stood before 1929, this section did not affect any rule of Hindu law. But there was no rule of Hindu law inconsistent with this section. Under the Hindu law, as under this section, acceptance by the donee is necessary to constitute a valid gift.[1]

('90) 1890 Pun Re No. 117, *Tara Chand* v. *Baldeo.*
('13) 21 Ind Cas 60 (61) (Oudh), *Alla Baksh* v. *Hajjin Imdadi.*
('31) 18 AIR 1931 Oudh 424 (425) : 34 Ind Cas 1092, *Narsing Narain* v. *Santram.*

Note 17

1. (1865) 3 Suth W R 200 (202, 203) (DB), *Chunder Mohinee Dossee* v. *Hurrosoondaree Dossee.*
2. ('24) 11 AIR 1924 Mad 605 (606) : 78 Ind Cas 156, *P. Venkatachalam Chetty* v. *Govindaswamy Naicker.* (Deed, though in form a deed of gift, held to be in fact a deed of will and not one of gift as there was no disposal of any immediate rights of possession or any immediate interest in property.)
3. ('40) 27 AIR 1940 Mad 236 (238), *Veerabhadrayya* v. *Seethamma.*
('25) 12 AIR 1925 Mad 471 (473) : 86 Ind Cas 8, *Sengamalam* v. *Logambal.*
('29) 16 AIR 1929 Lah 143 (144) : 111 Ind Cas 893, *Ganga Ram* v. *Birjo.*
[*See also* ('10) 7 I. C. 357(358): 33 Mad 304 (DB), *Rajammal* v. *Authiammal.*]
4. ('04) 1904 Pun Re No. 74, *Muran Bakhsh* v. *Husain Baksh.* (A document dividing immovable property in specified shares between the heirs of the executant which was intended to give immediate effect to the intention of the alienor contained therein and whereunder possession was actually transferred within a short time of its execution, held to be a deed of gift, although it was called throughout and registered by the executant as a will.)
('30) 17 AIR 1930 Mad 744 (745) : 127 Ind Cas 619, *Kotayya* v. *Varadhanamma.* ((i) The document in question was executed on plain paper (ii) it was styled as marana sasanam (iii) the property was transferred (iv) it was registered as a will. These circumstances are sufficient to indicate that it is a will and not a deed of gift.)
('28) 15 AIR 1928 Nag 308 (310) : 113 Ind Cas 373, *Mahadeo* v. *Ganeshram.* (Whether a certain document is a will and not a gift or a family arrangement, depends upon the right construction of a document and involves a question of law.)
('18) 5 AIR 1918 Oudh 191 (192) : 21 Oudh Cas 312 : 48 Ind Cas 396, *Lachman* v. *Baldeo.*
('17) 4 AIR 1917 Oudh 64 (65): 37 Ind Cas 69 (DB), *Dip Narain* v. *Hargobind.*
('24) 11 AIR 1924 Nag 236 (238) : 75 Ind Cas 687, *Zuglai* v. *Ratan.* (Document intended to operate after death—*Held* to be a will.)
[*See also* (1900) 1900 All W N (1), *Seth Chand Mal* v. *Lachmi Narain.* (There is no objection to one part of a document operating as a deed of gift and the other part as a will.)]

Note 20

1. ('27) 14 AIR 1927 Oudh 278 (283): 1 Luck 97 : 104 Ind Cas 299, *Krishnapal Singh* v. *Sri Raj Kuar.*
('42) 29 AIR 1942 Lah 243 (246, 247) : 203 Ind Cas 404 (DB), *Madho Singh* v *Skinner.*

The amendment of S. 129 in 1929 now makes this section directly applicable to gifts by Hindus also. Section 122 Note 20

Section 123

[a]**123. Transfer how effected.** For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

a. As to limitation to the territorial operation of S. 123, *see* S. 1. Section 123 extends to every cantonment in British India : *see* S. 287 of the Cantonments Act, 1924 (II of 1924).

Synopsis

1. Scope of the section.
2. Hindu law.
3. Buddhist law.
4. Muhammadan law.
5. Gifts of immovable property.
6. Registration and operation of gift.
7. "Signed by or on behalf of the donor."
8. "Attested by at least two witnesses."
9. Doctrine of part performance, whether applies to gifts.
10. Donee's possession under invalid gift of immovable property.
11. Section applies to gifts in Cantonment areas.
12. Delivery of property.
13. Incomplete gift does not constitute donor trustee for donee.
14. Gifts of actionable claims.
15. Law in places to which Transfer of Property Act is not extended.
16. Extent.

Other Topics (miscellaneous)

Delivery, how made. See Note 12.

Gift of moveable property. See Notes 1 and 12.

Gift, when takes effect. See Note 6.

Mode of transfer
- Immovable. See Note 5.
- Moveables. See Notes 1 and 12.

Whether donor may revoke gift after delivery of deed and before registration. See Note 6.

1. **Scope of the section.** — This section lays down the modes in which gifts of immovable and moveable property are to be effected. With regard to immovable property it provides that *irrespective of the value of the property* the transfer must be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.[1] With regard to moveable property it provides two modes

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Section 123 — Note 1

1. ('16) 3 AIR 1916 All 351 (351) : 35 Ind Cas 14 : 38 All 212, *Karam Ilahai* v. *Sharafuddin.*
('87) 14 Cal 446 (449) (DB), *Dharmodas* v. *Nistarini Dasi.*
('39) 26 AIR 1939 Rang 76 (78) : 179 Ind Cas 903 : 1938 Rang L R 678, *U Thita* v. *U Areseinna.*

Section 123 Note 1

of transfer, i. e., it may be effected either by a registered instrument as aforesaid or by delivery of the property.[2]

('34) 21 AIR 1934 Rang 129 (131) : 150 Ind Cas 966 (DB), *Ma Shin* v. *Ma Thin Kyi.*

('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath Marwari* v. *Mt. Chandni Bibi.*

('34) 21 AIR 1934 Cal 772 (773) : 151 Ind Cas 1063 : 61 Cal 525, *Neelima Basu* v. *Jaharilal Sarkar.*

('24) 11 AIR 1924 Pat 657 (660) : 80 Ind Cas 980 : 3 Pat 842 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.*

('38) 25 AIR 1938 All 452 (454) : 177 Ind Cas 260 : I L R (1938) All 638 (DB), *Sunder Singh* v. *Commissioner of Income-tax.*

('11) 13 Ind Cas 436 (440) (DB) (All), *Ram Prasad* v. *Bedo.*

('99) 1 Bom L R 495 (497) (DB), *Bhiwa* v. *Shivram.*

('17) 4 A I R 1917 Cal 681 (684, 685, 686) : 34 Ind Cas 450 (DB), *Sital Chandra* v. *Mrs. A. J. Delanney.* (No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and Ss. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary.)

('14) 1 AIR 1914 Low Bur 62 (62) : 25 Ind Cas 495, *Ma Sein Nyun* v. *Maung U.* (A partition of joint family property can be effected by private arrangement without an instrument in writing—The provisions of the Transfer of Property Act do not apply to such a partition.)

('24) 11 AIR 1924 Nag 214 (215) : 76 Ind Cas 218, *Lallu Prasad* v. *Babulal.* (The mutation of names by itself creates no proprietary title.)

('12) 15 Ind Cas 343 (344) (DB) (Mad), *Ariyaputhira Padayachi* v. *Muthu Kumarasamy Padayachi.*

('39) 26 A I R 1939 Mad 290 (290) : 183 Ind Cas 631, *Papathi Ammal* v. *Dorai swamy Naicker.*

('22) 9 AIR 1922 Pat 514 (524) : 2 Pat 52 : 68 Ind Cas 383 (DB), *Baijnath Singh* v. *Brijraj Kuer.*

('06) 29 Mad 412 (415) : 1 Mad L Tim 227 (DB), *Ranganath Mudaliar* v. *Baghirathi Ammal.*

[*See also* ('02) 12 Mad L Jour 387 (387) (D B), *Kone Goundan* v. *Bola Naicken*

('19) 6 A I R 1919 Nag 100 (101) : 51 Ind Cas 93 : 15 Nag L R 93, *Laxman* v. v. *Tatya.* (A transaction by which a partition of self-acquired property is effected by a father among his sons is not a gift within Transfer of Property Act and is not required to be effected by a registered deed.)

('14) 1 AIR 1914 Mad 204 (205): 22 Ind Cas 661 (DB), *Krishnaswamy* v. *Kamalambal.* (Per Napier, J.)

('11) 12 Ind Cas 109 (110) : 33 All 728 (DB), *Rustam Ali Khan* v. *Gaura.* (Transfer of property, where registration is compulsory can only be effected by a registered instrument or by a decree of a competent Court.)]

See also cases cited under Note 5, point 1.

2. ('87) 14 Cal 446 (449) (DB), *Dharmodas* v. *Nistarini Dasi.*

('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Janki Das* v. *E. I. Railway Co.*

('41) 28 AIR 1941 Mad 154 (157, 158) : 195 Ind Cas 507 : I L R (1941) Mad 232 (DB), *Mrs. Ida L. Chambers* v. *K. H. Chambers.*

('22) 9 AIR 1922 All 467 (469) : 68 Ind Cas 798 : 45 All 115 (FB), *Lallu Singh* v. *Gur Narain.* (Second clause of S. 123 does away with the provision of Hindu law requiring delivery of possession as regards moveable property.)

('23) 10 AIR 1923 Pat 165 (170): 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Reknath Koeri.*

('24) 11 AIR 1924 Pat 657 (660) : 80 Ind Cas 980 : 3 Pat 842 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.*

('31) 18 AIR 1931 All 596 (597) : 132 Ind Cas 573 : 53 All 633 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.*

The provisions laid down in the section are mandatory and must be strictly fulfilled.[3]

2. Hindu law.—Under Hindu law writing was not necessary for the validity of a gift.[1] There was, however, some doubt as to whether actual delivery of possession was required in every case for the completion of a gift under that law.[2] See the undermentioned cases.[3] But

('12) 14 Ind Cas 720 (722) (DB), (Cal) *Benode Kishore* v. *Asutosh Mukhopadhya.*

('24) 11 AIR 1924 Bom 88 (88) : 87 Ind Das 312, *Natha Gulab & Co.* v. *W. C. Shaller & G. I. P. Ry. Co.*

[*See also* (1890) 25 Q B D 57 (74, 75, 76): 38 W R (Eng) 588 : 59 L J Q B 377 : 63 L T 153, *Cochrane* v. *Moore.* (The delivery of possession of a chattel is necessary for the completion of a gift.)

(1869) 19 L T (N S) 809 (811), *James* v. *James.* (Mere evidence of a motive of a gift where the property is not in the possession of the donee is not sufficient to establish a claim to it.)]

3. ('30) 17 AIR 1930 All 669 (672) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmi Bai.*

('28) 15 AIR 1928 All 699 (702) : 117 Ind Cas 351 (DB), *Hira Mani Singh* v. *Anmol Singh.*

[*See also* ('31) 18 AIR 1931 All 596 (597) : 132 Ind Cas 573 : 53 All 633 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.* (Where there is joint deposit in the name of a person and his wife the question whether there is a gift of the money by the husband to the wife should be determined according to the provisions of S. 123 and English decisions cannot be considered for that purpose.)]

Note 2

1. (1856) 6 Moo Ind App 267 (278, 279, 288) : 10 Moo P C 140 : 1 Sar 540 (PC), *Doe dem Seebkristo* v. *The East India Company.*

('90) 3 C P L R 37 (38), *Govinda* v. *Malhari.*

('31) 18 AIR 1931 Sind 186 (190) : 134 Ind Cas 388, *Valji Dayabhai* v. *Virji Tulsidas.*

('71) 6 Mad H C R 270 (274) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

(1862) 1 M H C R 100 (100) (DB), *Mantana Royaparaj* v. *Chekuri Venkata Raj.*

('41) 28 AIR 1941 Pat 354 (357) : 192 Ind Cas 789 (DB), *Ramji Lackhmanji & Jankiji* v. *Mathura Prasad.* (In the case of a dedication made before the passing of the Transfer of Property Act, no registered deed of dedication is necessary even assuming that a gift to an idol is a gift within the meaning of S. 123, T. P. Act.)

2. ('03) 25 All 358 (365) : 1903 All W N 70 (DB), *Phulchand* v. *Lakkhu.*

3. ('93) 17 Bom 486 (496, 501) (DB), *Bhaskar Purshottam* v. *Sarasvathibai.* (By Hindu law a gift of property, whether moveable or immovable, may operate, where no question of resumption arises, to give the donee a right to obtain possession, and is not invalid by reason of its not being immediately followed by possession.)

('85) 11 Cal 121 (135) : 11 Ind App 218 (PC), *Kalidas Mullick* v. *Kanhaya Lal Pundit.* (Do.)

(1900) 2 Bom L R 69 (71) (DB), *Virapaxappa* v. *Muniappa.* (Do.)

('03) 27 Bom 31 (38) : 4 Bom L R 754 (DB), *Joitaram* v. *Ramkrishna.* (Do.)

(1900) 27 Cal 242 (249) : 4 Cal W N 405 (DB), *Ramchandra Mukerjee* v. *Ranjit Singh.* (Do.)

('01) 1901 Pun Re No. 45 : 1901 Pun L R No. 64, *Chaudhri Lila Kishen* v. *Chadhri Hoa Ram.* (Do.)

('06) 1906 Pun Re No. 45 : 1906 Pun L R No. 120, *Partab Singh* v. *Fatta.* (Do.)

('08) 1908 Pun Re No. 52 : 1908 Pun W R No. 103, *Ram Charan Das* v. *Bhagwati.* (Do.)

('25) 12 A I R 1925 Lah 648 (649) : 89 Ind Cas 326 (DB), *Bhagwan Singh* v. *Kripa Ram.* (Do.)

('34) 21 A I R 1934 Lah 197 (198) : 149 Ind Cas 1013, *Rullia* v. *Mangla.* (Do.)

('34) 21 A I R 1934 Lah 858 (859, 860), *Dhani Ram* v. *Legha.* (Do.)

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Note 2

('36) 23 A I R 1936 Lah 49 (50) : 161 Ind Cas 592, *Bhagwan Das* v. *Gian Chand.* (Do.)

('02) 26 Bom 449 (470) : 3 Bom L R 857, *Gordhandas* v. *Ramcooverbai.* (Do.)

('99) 23 Bom 131 (134) (DB), *Rajaram* v. *Ganesh.* (Do.)

('03) 1903 Pun Re No. 75 : 1903 Pun L R No. 125, *Sanatan Dharm Sabha Hoshiarpur* v. *Mt. Sobhi.* (Do.)

('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath Marwari* v. *Mt. Chandni Bibi.* (Do.—11 Cal 121 followed.)

('83) 9 Cal 854 (855) : 12 Cal L Rep 530 (DB), *Dagai Dabee* v. *Mothura Nath Chattopadhya.* (A gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is not in itself a valid transaction, even though the deed of gift be registered.)

('94) 16 All 185 (186) : 1894 All W N 21 (DB), *Balmakund* v. *Bhagwan Das.* (The delivery to the donee of immovable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee.)

('81) 4 All 40 (45) : 1881 All W N 78 (DB), *Man Bhari* v. *Naunidh.* (Do.)

(1872-73) 6 Mad H C R 194 (196) (DB), *Wannathan Kandile Chiruthai* v. *Keyakadath Pydel Kurup.* (A gift is perfectly valid if such delivery is made as the nature of the object permits.)

('21) 8 AIR 1921 All 37 (38) : 62 Ind Cas 862 : 43 All 503, (DB), *Ram Dhan* v. *Prayag.*

('83) 7 Bom 131 (132, 133) (DB), *Vasudeo Bhat* v. *Narain Daji.* (The texts of the Hindu law clearly require delivery and acceptance of the subject of the gift to be effected, in the case of land, by putting the donee into possession in order to give complete validity to the gift as between donor and donee. The mere registration of the deed of gift cannot, in any sense, be regarded as equivalent to the delivery of possession.)

('94) 18 Bom 688 (689, 690): 1893 Bom P J 497 (DB), *Abaji Gangadhar* v. *Mukta.* (Do.)

('93) 20 Cal 464 (468, 469) (DB), *Lakshimoni Dasi* v. *Nittyananda Day.* (Do.)

('31) 18 AIR 1931 Sind 186 (190) : 134 Ind Cas 388, *Valji Dayabhai* v. *Virji Tulsidar.* (Do.)

('86) 1 C P L R 41 (41, 42), *Dhuria Lodhi* v. *Kadhi Lodhi.* (Under the Hindu law in order that a gift may become complete and effectual the donee must be placed in possession of the property given.)

('90) 3 C P L R 37 (37, 40), *Govinda* v. *Malhari.* (Do.)

('81) 6 Bom 168 (175) (FB), *Laxmandas* v. *Dashrath.* (Do.)

('92) 5 C P L R 63 (64), *Mt. Sani* v. *Pancham Patil.* (Do.)

('72-73) 6 Mad H C R 270 (274) (DB), *Visalatchimi Ammal* v. *Subbu Pillai.* (Do.)

('77) 2 Bom 299 (331, 333) : 1880 Bom P J 57 (DB), *Lalubhai Surchand* v. *Bai Amrit.* (Do.)

('68-69) 4 Mad H C R 460 (462) (DB), *Venkatta Chella Maniyakarer* v. *Thathammal.* (Do.)

('84) 1884 All W N 184 (184) (DB), *Murari* v. *Radha Bibi.* (Do.)

('38) 25 AIR 1938 Nag 142 (143) : 173 Ind Cas 85 : I L R (1939) Nag 293, *Chandrabhaga Bajirao* v. *Anandrao.* (Do.)

('05) 29 Bom 267 (276) : 7 Bom L R 45 (49), *Moosabhoy* v. *Yaukbbhai.* (Possession actual, symbolical or constructive is absolutely necessary to complete a gift under Hindu law.)

('67) 4 Bom H C R A C 31 (34) (SB), *Harjivan Anandram* v. *Naran Haribhai.* (A gift of land is not complete, under Hindu law, without possession or receipt of rent by the donee.)

('68) 5 Bom H C R (O C) 83 (94) (DB), *Bank of Hindustan, China and Japan* v. *Premchand Raichand.* (Do.)

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Note 2

assuming that delivery of possession was essential to complete a gift under that law, it was abrogated by this section which applied even to gifts by Hindus. A gift of immovable property by a Hindu after the passing of the Transfer of Property Act must now be effected in the manner laid down in the first paragraph of this section. Delivery of possession of the property to the donee is neither necessary[4] nor sufficient.[5] The

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('83) 7 Bom 452 (453,454) (DB), *Bai Kushal* v. *Lakhma Mana.* (Where the donee is already in physical occupation of the property the declaration by the donor in a registered deed of gift that he has parted with the possession converts the occupation of the donee into possession and amounts to a valid gift.)

('30) 17 AIR 1930 Lah 145 (146) : 119 Ind Cas 271 (DB), *Sarwan Das* v. *Mansa Ram.* (It is not essential that possession of the gifted property should be actually transferred from the donor to the donee especially when the latter is a minor and is living with the former — But before such a gift can be upheld, it must be established that there was a real and *bona fide* intention to pass title and that from the date of the transfer the donor was holding the property is trust for the donee.)

('66) 6 Suth W R 245 (247) (DB), *Moheshur Buksh Singh* v. *Mt. Gunoon Koonwar.* (Do.)

('79) 3 Cal L Rep 247 (250, 252) (DB), *Taro Bebee* v. *Ghasiram.* (Do.)

('28) 15 AIR 1928 Lah 9 (11) : 111 Ind Cas 251 (DB), *Dhannamal* v. *Parmeshari Das.* (Where the donee is the wife of the donor, a gift is not invalid though the donor does not vacate the donated property and put the donee in its exclusive possession. All that is required in such a case to validate the gift is an unequivocal intention to make a gift and an effective transfer of control of and power to dispose of the gifted property to the donee, and this may be done by the execution and registration of the deed of gift, though the husband and wife who resided in the house may continue to do so after the gift.)

[*See also* ('86) 1886 All W N 86 (87) (DB), *Raghubansi Kuari* v. *Narbada Ram.* (A gift once completed by delivery or its equivalent is binding upon the donor himself, and upon his representatives and is valid even against creditors, provided it was made *bona fide*, i. e., with the honest intention of passing the property and not merely as a fraudulent contrivance to conceal the ownership.)

('23) 10 AIR 1923 Nag 195 (196) : 71 Ind Cas 409, *Mt. Krishnabai* v. *Debi Singh.* (The question as to delivery of possession being required under the Hindu law to validate a gift can arise only between the donor and the donee and cannot be raised by a third party.)]

4. ('40) 27 A I R 1940 Cal 254 (256) : 189 Ind Cas 249, *Hari Pada* v. *Elokeshi Devi.*

('87) 14 Cal 446 (448, 449) (DB), *Dharmodas Das* v. *Nistarini Dasi.*

('17) 4 A I R 1917 Pat 551 (553) : 41 Ind Cas 389, *Muhammad Abdul Nayeem* v. *Jhonti Mahton.*

('26) 95 Ind Cas 240 (241) (Nag), *Sahodra* v. *Laxmiprasad.* (A I R 1925 Nag 199, followed.)

('02) 5 Oudh Cas 89 (90), *Nandu* v. *Chandi Dat.*

('07) 34 Cal 853 (859) : 6 Cal L Jour 233 (DB), *Balbhadra Nilmadhub* v. *Mt. Bhowani.*

('99) 23 Bom 234 (236) (DB), *Bai Rambai* v. *Bai Mani.*

('22) 9 AIR 1922 All 467 (469) : 68 Ind Cas 798 : 45 All 115 (FB), *Lallu Singh* v. *Gur Narain.*

('03) 25 All 358 (366) : 1903 All W N 70 (DB), *Phulchand* v. *Lakhu.*

('25) 12 AIR 1925 Nag 199 (202) : 83 Ind Cas 41 : 22 Nag L R 124 (DB), *Bhagwan Prasad* v. *Hari Singh.* (3 C P L R 37 and 5 C P L R 63 overruled.)

('42) 29 AIR 1942 Lah 243 (246) : 203 Ind Cas 404 (DB), *Madho Singh* v. *Lieut. James R. R. Skinner.*

5. ('29) 16 AIR 1929 Pat 591 (593) : 125 Ind Cas 127 (DB), *Debi Saran* v. *Nandlal.*

('40) 27 AIR 1940 Cal 254 (256) : 189 Ind Cas 249, *Haripada* v. *Elokeshi Debi.*

Section 123 Notes 2–3

compliance with the provisions of the section completes the title of the donee and if the donor remains in possession of the property thereafter, his possession is that of the donee.[6] As regards gifts of moveable property the second paragraph of the section allows it to be effected either by a registered instrument or by delivery.[7]

As to the validity of gifts in favour of a Hindu idol, see Note 5a on section 122.

3. Buddhist law.—Under the Buddhist law delivery of possession to the donee was necessary for the completion of a gift.[1] But the law as regards delivery of possession has been abrogated by S. 123 of the Transfer of Property Act[2] which applied to Buddhists even before the

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('28) 15 AIR 1928 All 699 (702, 703) : 117 Ind Cas 351 (DB), *Hira Mani Singh* v. *Anmol Singh.*

6. ('05) 27 All 169 (171) : 1 All L Jour 625 (DB), *Pahlwan Singh* v. *Ram Bharose.*
('04) 1 All L Jour 625 (627) : 27 All 169 (DB), *Rajkunwar* v. *Ram Bharose.*
('22) 9 AIR 1922 All 44 (45) : 66 Ind Cas 480 (DB), *Debi Singh* v. *Bansidhar.*

7. ('87) 14 Cal 446 (448, 449) (DB), *Dharmodas Das* v. *Nistarini Dasi.*
('89) 3 C P L R 37 (38), *Govinda* v. *Malhari.*

Note 3

1. ('10) 8 Ind Cas 1200 (1201) (Rang),-*Maung Pan U* v. *Ma Kyi Nyo.*
('20) 7 AIR 1920 Upp Bur 8 (10) : 3 Upp Bur Rul 228 : 59 Ind Cas 999, *Ma Me I* v. *Maung Lauk Hnya.* (Gifts made by grand parents to grand children are an exception to the ordinary rule of Buddhist law under which an actual delivery of possession is necessary to validate a gift — Such gifts are valid without any transfer of possession.)
('18) 5 AIR 1918 Upp Bur 40 (42) : 3 Upp Bur Rul 23 : 42 Ind Cas 68, *Ma Tok* v. *Ma Chit.*
('24) 11 AIR 1924 Rang 13 (14) : 75 Ind Cas 166 : 1 Rang 351 (DB), *Ma Thin Myaing* v. *Maung Gyi.*
('11) 11 Ind Cas 862 (863) : 6 Low Bur Rul 32, *Ma Hla U* v. *Mg. Aung Dun.*
('13) 18 Ind Cas 466 (469) : 6 Low Bur Rul 77 (FB), *Ma Su* v. *Ma Jin.*
('24) 11 AIR 1924 Rang 309 (310) : 83 Ind Cas 557 : 2 Rang 131 (DB), *U Pandawun* v. *U. Sandima.*
('15) 2 AIR 1915 Low Bur 142 (143, 144) : 30 I C 665 : 8 Low Bur Rul 190 (DB), *Ma Pan Nyun* v. *Ma Hla Sein.* (The rule as to Shinbyu gifts is an exception to the ordinary principle of the Buddhist law by which a gift to be valid has to be completed by delivery of possession.)
('24) 11 AIR 1924 Rang 353 (353), *Mi Hla Zan* v. *Pa Pa Ye.*
('17) 4 AIR 1917 Low Bur 23 (24) : 40 Ind Cas 854, *Maung Ba Maung* v. *Maung Pyu.*

2. ('24) 11 AIR 1924 Rang 309 (310, 311) : 83 Ind Cas 557 : 2 Rang 131 (DB), *U Pandawun* v. *U Sandima.*
('24) 11 AIR 1924 Rang 353 (353), *Mi Hla Zan* v. *Pa Pa Ye.*
('24) 11 AIR 1924 Rang 13 (14) : 1 Rang 351: 75 I.C. 166 (DB), *Ma Thin Myaing* v. *Maung Gyi.*
('16) 3 AIR 1916 Low Bur 11 (11, 12) : 33 Ind Cas 129, *Maung Shwe Kho* v. *Ma Mya.* (Kanwin property is the property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair. Such a gift, if not in writing and registered as required by S. 123 of the Transfer of Property Act, is not valid.)
('17) 4 AIR 1917 Low Bur 23 (24): 40 Ind Cas 854, *Maung Ba Maung* v. *Maung Pyu.*
[*See also* ('24) 11 AIR 1924 Rang 260 (261) : 80 Ind Cas 255 (DB), *Mg. Po Thet* v. *Mg. Min Din.*]

Transfer of Property (Amendment) Act, XX of 1929, by virtue of the old S. 129 of the Act which apart from the provisions of S. 123 saved all rules of Buddhist law relating to gifts. Section 123 Notes 3–4

It has been held that the Burmese Buddhist *religious* gifts are not excepted from the operation of this section and must therefore be effected in accordance with its provisions.[3]

4. Muhammadan law. — This section does not affect any rule of Muhammadan law. (See section 129.)

A gift by a Muhammadan must comply with the provisions of Muhammadan law.[1] Under that law a *writing* is not necessary for

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3. ('18) 5 AIR 1918 Low Bur 11 (12) : 9 Low Bur Rul 258 : 45 Ind Cas 926 (DB), *U Zayanta* v. *U Naga*. (Gift of a Kyaung is invalid unless registered.)
('20) 7 AIR 1920 Upp Bur 47 (47) : 3 Upp Bur Rul 207 : 57 Ind Cas 809, *U Ne Mein* v. *Ma Hmin On*.
('38) 25 AIR 1938 Rang 303 (306) : 178 Ind Cas 232, *Daw Sein* v. *Ma Mai Ma*.

Note 4

1. ('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali*.
('15) 2 AIR 1915 Cal 601 (606) : 26 Ind Cas 466, (DB) *Rahim Baksh Mandal* v. *Sajjad Ahmad*.
('06) 28 All 439 (449) : 9 Oudh Cas 196 : 33 Ind App 68 (PC), *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*.
('29) 16 AIR 1929 Oudh 435 (436) : 124 Ind Cas 354 : 5 Luck 384, *Abdul Rahman* v. *Gaya Prasad*.
('32) 19 AIR 1932 Cal 497 (498) : 138 Ind Cas 733 : 59 Cal 557 (DB), *Sultan Miya* v. *Ajibakhatoon Bibi*.
('12) 15 Ind Cas 698 (699) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi*.
('23) 10 AIR 1923 Oudh 214 (215) : 74 Ind Cas 390 : 26 Oudh Cas 128, *Khalil Ullah Shah* v. *Ewaz Ali*.
('16) 3 AIR 1916 P C 27 (31) : 36 Ind Cas 104 : 38 All 627 : 43 Ind App 212 : 19 Oudh Cas 192 (PC), *Sadik Hussain Khan* v. *Hashim Ali Khan*.
('36) 23 AIR 1936 All 600 (605) : 164 Ind Cas 515 (DB), *Kulsum Bibi* v. *Shiam Sunder Lal*.
('27) 14 AIR 1927 P C 22 (22, 23) : 100 Ind Cas 32 : 54 Ind App 23 : 5 Rang 7 (PC), *Ma Mi* v. *Kallander Ammal*.
('91) 13 All 409 (414, 418) : 1891 All W N 159 (FB), *Angan Lal* v. *Muhammad Husain*.
('28) 15 AIR 1928 P C 108 (109) : 109 Ind Cas 31 : 52 Bom 316 : 55 I A 171 (PC), *Musa Miya* v. *Kadar Bax*.
('29) 16 AIR 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad*.
('36) 23 AIR 1936 Rang 522 (523, 525) : 166 Ind Cas 327 : 14 Rang 485, *Rahmat Bibi* v. *Maung Po Sein*.
('14) 1 AIR 1914 Low Bur 152 (154) : 23 Ind Cas 903 : 7 Low Bur Rul 123 (DB), *Annamalay Chetty* v. *Mahomed Ismail*.
('05) 29 Bom 275*n* (276*n*) *Abdul Cadar* v. *Tajoodin*.
('34) 21 AIR 1934 Oudh 163 (165) : 148 Ind Cas 801 (DB), *Abdul Hamid* v. *Abdul Ghani*.
('16) 3 AIR 1916 All 351 (351) : 35 Ind Cas 14 : 38 All 212 (DB), *Karam Ilahi* v. *Sharf-ud din*.
('28) 15 AIR 1928 Nag 275 (276) : 108 Ind Cas 435, *Mayadad Khan* v. *Hazari Lal*.
('33) 20 AIR 1933 Mad 86 (91) : 141 Ind Cas 843, *Abdul Razak Saheb* v. *Zainab Bi*.
('10) 8 Ind Cas 38 (39) (DB) (Cal), *Jahedunnessa Bibi* v. *Najibul Islam*.
('15) 2 AIR 1915 Oudh 75 (76) : 28 Ind Cas 180 : 18 Oudh Cas 122, *Ali Baksh* v. *Ghurai*.

Section 123
Note 4

a valid gift *inter vivos*, but there must be a delivery of possession according to the nature of the property given.[2] The mere fact of

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('37) 24 AIR 1937 All 25 (27) : 166 Ind Cas 439 : I L R (1937) All 285 (DB), *Mt. Kulsum Bibi* v. *Bashir Ahmad.*
('31) 18 AIR 1931 All 237 (237) : 124 Ind Cas 756, *Ali Hasan* v. *Mt. Rashidan.*
('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vahazullah Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)
[*See also* ('21) 8 AIR 1921 Nag 84 (85) : 64 Ind Cas 126 : 17 Nag L R 103, *Fahmidun Nisa* v. *Hiralal.*]
[But see ('01) 24 Mad 513 (521, 522) : 11 Mad L Jour 227 (DB), *Alabi Koya* v. *Mussa Koya.* (Per Benson, J.—Not followed in 30 Mad 519.)

2. ('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali.*
('32) 19 AIR 1932 Cal 497 (498) : 59 Cal 557 : 138 Ind Cas 733 (DB), *Sultan Miya* v. *Ajibakkatoon Bibi.*
(1841-46) 3 Moo Ind App 245 (258) : 6 Suth W R P C 46 (PC), *Jeswunt Singhjee* v. *Jet Singhee.*
('22) 9 AIR 1922 P C 281 (288) : 44 All 301 : 25 Oudh Cas 95 : 68 Ind Cas 254 : 49 Ind App 195 (PC), *Md. Abdul Ghani* v. *Mt. Fakhr Jahan Begem.*
('27) 14 AIR 1927 P C 22 (22, 23) : 100 Ind Cas 32 : 54 Ind App 23 : 5 Rang 7 (PC), *Ma Mi* v. *Kallander Ammal.*
('16) 3 AIR 1916 P C 27 (31, 32) : 38 All 627 : 43 Ind App 212 : 19 Oudh Cas 192 36 Ind Cas 104 (PC), *Sadik Husain* v. *Hashim Ali.*
('28) 15 AIR 1928 P C 108 (110) : 52 Bom 316 : 55 Ind App 171 : 109 Ind Cas 31 (PC), *Musa Miya* v. *Kadar Bax.*
('29) 16 AIR 1929 P C 149 (151) : 4 Luck 305 : 56 Ind App 213 : 116 Ind Cas 405 (PC), *Amjad Khan* v. *Ashraf Khan.*
('32) 19 AIR 1932 P C 13 (19) : 6 Luck 556 : 59 Ind App 1 : 136 Ind Cas 385 (PC), *Sadiq Ali* v. *Fakr Jahan Begam.*
('74) 6 N W P H C R 338 (341) (DB), *Nizam-ud-din* v. *Zabeda Bibi.*
('75) 7 N W P H C R 313 (317, 318) (DB), *Kasum* v. *Shaista Bibi.*
('66) 1 Agra H C R 238 (239) (DB), *Gyaz-ood-Deen Hyder* v. *Fatima Begum.*
('66) 1 Agra H C R 250 (251) (DB), *Munnoo Bebee* v. *Jehandar Khan.*
('81) 3 All 266 (275) (PC), *Kamar Unnissa Bibi* v. *Hussani Bibi.*
('89) 11 All 1 (8) : 1888 All W N 266 (DB), *Rahim Bakhsh* v. *Muhammad Hasan.*
('91) 13 All 409 (413) : 1891 All W N 159 (FB), *Angan Lal* v. *Mohammad Husain.* (Per Mahmood, J.)
('95) 18 All 1 (3) : 1895 All W N 123 (DB), *Sajjad Ahmed* v. *Kadri Begam.*
('99) 21 All 165 (170) : 1899 All W N 8 (DB), *Anwari Begam* v. *Nizamuddin Shah.*
('06) 28 All 439 (449) : 33 Ind App 68 : 9 Oudh Cas 196 (PC), *Mehdi Hasan* v. *Mahomed Hasan.*
('87) 1887 All W N 84 (88) (DB), *Kaniz Fatima* v. *Abbas Ali.*
('11) 11 Ind Cas 534 (535, 536) (All), *Neaz Begam* v. *Manzoor Ahmad.*
('12) 14 Ind Cas 587 (588) : 34 All 465 (DB), *Ahmad-ud-din* v. *Ilahi Bakhsh.*
('13) 20 Ind Cas 900 (900) (All), *Namdor Khan* v. *Mohammed Saddiq.*
('36) 164 Ind Cas 720 (720) (All), *Baldeo Prasad Balgovind* v. *Shubratan.*
('16) 3 AIR 1916 All 351 (351) : 38 All 212 : 35 Ind Cas 14 (DB), *Karam Ilahi* v. *Sharfuddin.*
('22) 9 AIR 1922 All 347 (347) : 44 All 580 : 67 Ind Cas 671 (DB), *Mohan Lal* v. *Mahmud Husain.*
('24) 11 AIR 1924 All 370 (371) : 78 Ind Cas 222 : 46 All 260 (DB), *Mt. Mulani* v. *Maula Baksh.*
('27) 14 AIR 1927 All 345 (345, 346) : 49 All 503 : 100 Ind Cas 644 (DB), *Ahmadi Begam* v. *Abdul Aziz.*
('27) 14 AIR 1927 All 414 (415) : 100 Ind Cas 1022 (DB), *Mahomad Yusuf* v. *Mahomed Ismail.*

Section 123
Note 4

('30) 17 AIR 1930 All 793 (794) : 124 Ind Cas 728, *Gause Sheikh* v. *Mahommad Sharif*. (A gift of an undivided share of joint property by a co-owner in constructive possession of the same through other co-owner is valid provided he does all that lies in his power to do to wipe himself off and to put his donee into the same kind of possession as he himself had over the property.)
('31) 18 AIR 1931 All 237 (237) : 124 Ind Cas 756, *Ali Hasan* v. *Mt. Rashidan*.
('32) 19 AIR 1932 All 370 (371, 372) : 138 Ind Cas 841, *Mahomed Said* v. *Mahomed Hanif*. (Gift by one cosharer to another—Donee already in possession on behalf of all cosharers—Gift valid.)
('34) 21 AIR 1934 All 179 (188) : 148 Ind Cas 528 (DB), *Iftikhar Wali Khan* v. *Sikandar Begam*.
('36) 23 AIR 1936 All 600 (605) : 164 Ind Cas 515 (DB), *Kulsum Bibi* v. *Shiam Sundar Lal*.
('37) 24 AIR 1937 All 25 (27) : I L R (1937) All 285 : 166 Ind Cas 439 (DB), *Kulsum Bibi* v. *Bashir Ahmad*.
('37) 24 AIR 1937 All 547 (548) : ILR (1937) All 609 : 170 Ind Cas 824 (DB), *Mt. Jamilunnissa* v. *Mohammad Zia*.
('82) 6 Bom 168 (175) (FB), *Lakshman Dass Sarup Chand* v. *Dasrat*.
('82) 6 Bom 645 (648) (DB), *Adam Khan* v. *Alarakhi*.
('82) 6 Bom 650 (661, 662) (DB), *Mohinudin* v. *Mancharsha*.
('85) 9 Bom 146 (150, 151) (DB), *Shaik Ibhram* v. *Shaik Suleman*. (With regard to the delivery of the subject-matter of a gift essential under the Mahomedan law, the principle is that when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts the former into possession.)
('87) 11 Bom 517 (518) (DB), *Mogulsha* v. *Mahamad Saheb*.
('89) 13 Bom 156 (159) (DB), *Meherali* v. *Tajudin*.
('89) 13 Bom 264 (274) (DB), *Nizamuddin Gulam* v. *Abdul Gafur*.
('89) 13 Bom 352 (355) (DB), *Emnabai* v. *Hajirabai*.
('99) 23 Bom 682 (684) : 1 Bom L R 177 (DB), *Ismal* v. *Ramji*.
('05) 29 Bom 267 (276) : 7 Bom L R 45, *Moosabhai* v. *Yacoobhai*.
('05) 29 Bom 275*n* (276*n*) : 6 Bom L R 263, *Abdul Cadar* v. *Tajoodin*.
('05) 29 Bom 428 (434): 7 Bom L R 477 (DB), *Mahamadunnissa Begum* v. *J. C. Bachelor*.
('05) 29 Bom 468 (477, 478, 479) : 7 Bom L R 443 (DB), *Bibi Khaver* v. *Bibi Rakhia*.
('04) 6 Bom L R 983 (992), *Khavar Sultan* v. *Rukha Sultan*.
('04) 6 Bom L R 1043 (1050), *Mahomed* v. *Bai Cooverbai*.
(1864) 1 Bom H C R 157 (160, 161), *Amina Bibi* v. *Khatija Bibi*.
('75) 1875 Bom P J 35 (DB), *Siraj Chanda-Saheb* v. *Bapusaheb*.
('76) 1876 Bom P J 272, *Ghasimia* v. *Bibanbu*.
('98) 1898 Bom P J 402 (DB), *Gahirmal Umaram* v. *Moktambi*.
('11) 12 Ind Cas 225 (240) : 36 Bom 214, *Casmally* v. *Currimbhoy Ebrahim*.
('20) 7 AIR 1920 Bom 135 (136) : 55 Ind Cas 952 (DB), *Abdul Majidkhan* v. *Husseinbu*.
('21) 8 AIR 1921 Bom 248 (249) : 45 Bom 1296 : 64 Ind Cas 21 (DB), *Chandsaheb* v. *Gangabai*.
('24) 11 AIR 1924 Bom 410 (411, 412) : 80 Ind Cas 208 : 48 Bom 396 (DB), *Hashimbi Yakubsaheb* v. *Ajamatbi*.
('25) 12 AIR 1925 Bom 305 (308) : 86 Ind Cas 886 (DB), *Hassanalli Degumiya* v. *Ruhulla Ahmad*.
('26) 13 AIR 1926 Bom 559 (562, 563) : 98 Ind Cas 285 (DB), *Kadarbhai* v. *Nanibibi*.
('34) 21 AIR 1934 Bom 21 (22, 24) : 149 Ind Cas 225 : 58 Bom 254, *Ebrahim Ali Bhai* v. *Bai Asi*.
('35) 22 AIR 1935 Bom 84 (89) : 155 Ind Cas 334, *Mahomed Hussain* v. *Aishabai*
('76) 2 Cal 184 (197) : 3 Ind App 291 (PC), *Khajooroennissa* v. *Rowshan Jehan*.
('83) 9 Cal 138 (142) (DB), *Uusuf Ali* v. *Collector of Tipperah*.
('84) 10 Cal 1112 (1123, 1124) (DB), *Abdoolgaffoor* v. *Muleka*.

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('88) 15 Cal 684 (702) : 15 Ind App 81 (P C), *Mahomed Buksh Khan* v. *Hosseni Bibi.*
('98) 25 Cal 9 (17) : 24 Ind App 196 (P C), *Aga Mahomed Jaffer Bindaneem* v. *Koolsom Bibi.*
('04) 31 Cal 319 (330) (DB), *Fatma Bibee* v. *Ahmed Baksh.*
('80) 5 Cal L R 91 (93, 94) (DB), *Valayet Hossein* v. *Maniram.*
(1864) 1864 Suth W R 121 (123) (DB), *Wajeed Ali* v. *Abdool Ali.*
(1864) 1864 Suth W R 185 (186) (DB), *Zohoroodeen Sirdar* v. *Baharoollah Sircar.*
('66) 5 Suth W R 4 (19) (DB), *Roshun Jahan* v. *Enaet Hossein.*
('68) 9 Suth W R 257 (258) (DB), *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon.*
('71) 16 Suth W R 88 (90) (DB), *Obedur Reza* v. *Mahomed Muneer.*
('74) 22 Suth W R 314 (314) (DB), *Shahjan Bibee* v. *Shib Chunder Shaha.*
('75) 23 Suth W R 208 (210) : 2 Ind App 87 (PC), *Ameeroonnissa Khatoon* v. *Abadoonnissa Khatoon.*
('09) 2 Ind Cas 846 (847, 848) (DB) (Cal), *Danoo Darjee* v. *Momatajaddi Bhuiya.*
('10) 8 Ind Cas 38 (39, 40) (DB) (Cal), *Jahedunnessa Bibi* v. *Najibul Islam.*
('12) 13 Ind Cas 434 (436) (DB) (Cal), *Mahomed Farid* v. *Mahomed Abdul Gafur.*
('12) 15 Ind Cas 698 (699, 700) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi.*
('31) 132 Ind Cas 95 (95) (DB) (Cal), *Abia Khatoon* v. *Omar Ali.*
('15) 2 AIR 1915 Cal 601 (606) : 26 Ind Cas 466 (DB), *Rahim Baksh* v. *Sajjad Ahmad.*
('19) 6 AIR 1919 Cal 741 (742, 743) : 52 Ind Cas 314, *Shed Ahmed* v. *Ibrahim.*
('21) 8 AIR 1921 Cal 225 (225, 226) : 59 Ind Cas 355 (DB), *Samsul Mehar Bibi* v. *Mahiuddin Ahmad.*
('22) 9 AIR 1922 Cal 422 (424, 425, 426) : 62 Ind Cas 481 : 49 Cal 68 (DB), *Tara Prasanna* v. *Shandi Bibi.*
('27) 14 AIR 1927 Cal 808 (811, 812) : 105 Ind Cas 67 : 54 Cal 754 (DB), *Sarafuddin Mohamed* v. *Mohiddin Muhammad.*
('32) 19 AIR 1932 Cal 497 (501, 502) : 138 Ind Cas 733 : 59 Cal 557 (DB), *Sultan Miya* v. *Ajibakhatoon Bibi.*
('33) 20 AIR 1933 Cal 785 (785, 786) : 146 Ind Cas 803, *Muhara Bibi* v. *Maharulla Mondal.*
('35) 22 AIR 1935 Cal 393 (394, 395, 396) : 156 Ind Cas 563, *Gani Mia* v. *Wajid Ali.*
('68) 1868 Pun Re No. 107, *Futteh Khan* v. *Allayar Khan.*
('75) 1875 Pun Re No. 76, *Nizam-uddin* v. *Mahomed Nur.*
('81) 1881 Pun Re No. 19, *Hyat Muhammad* v. *Dina.*
('82) 1882 Pun Re No. 86, *Gulam Muhammad* v. *Muhammad Amin.*
('83) 1883 Pun Re No. 51, *Sher Shah* v. *Jafer Shah.*
('86) 1886 Pun Re No. 3, *Budhu* v. *Chiragh.*
('95) 1895 Pun Re No. 15, *Fatta* v. *Bakhra.*
('26) 27 Pun L R 433 (437), *Mustaquim* v. *Diwan Chand.*
('37) 39 Pun L R 1014 (1015), *Sher Dad* v. *Jafar Jan.*
('12) 17 Ind Cas 857 (859, 860) : 1912 Pun Re No. 106 (DB), *Nur Muhammad* v. *Bhagwan Das.*
('26) 93 Ind Cas 334 (335) (DB) (Lah), *Abdul Khaliq* v. *Fateh Mohammad.*
('17) 4 AIR 1917 Lah 181 (185) : 1917 Pun Re No. 92 : 40 Ind Cas 374 (DB), *Mahomed Hamid* v. *Muhammad Majid.*
('22) 9 AIR 1922 Lah 40 (41) : 70 Ind Cas 493 (DB), *Sharif Hussain* v. *Rukan Din.*
('24) 11 AIR 1924 Lah 562 (563) : 79 Ind Cas 81 (DB), *Feroz-ud-din* v. *Sirdar Shah.*
('25) 12 AIR 1925 Lah 501 (502) : 90 Ind Cas 640, *Rahmat Ali* v. *Mt. Daulat Bibi.*
('26) 13 AIR 1926 Lah 286 (287) : 92 Ind Cas 479, *Fateh Mahomed* v. *Mitha.*
('29) 16 AIR 1929 Lah 45 (47) : 9 Lah 567 : 108 Ind Cas 741 (DB), *Allah Rakha* v. *Ali Mahomed.*
('31) 18 AIR 1931 Lah 620 (621) : 132 Ind Cas 859 (DB), *Abdullah Shah* v. *Haji Shah.*
('32) 19 AIR 1932 Lah 316 (318) : 143 Ind Cas 261 (DB), *Mt. Saidunnissa* v. *Inam Ilahi.*

('33) 20 AIR 1933 Lah 601 (605) : 144 Ind Cas 45 : 14 Lah 473 (DB), *Mahomed Hassan* v. *Safdar Mirza.*
('35) 22 AIR 1935 Lah 795 (796, 798):159 Ind Cas 968 : 16 Lah 629 (DB), *Qamar-ud-din* v. *Mt. Hassan Jan.*
('36) 23 AIR 1936 Lah 92 (94, 96) : 161 Ind Cas 365 (DB), *Nazir Din* v. *Mahomed Shah.*
('90) 13 Mad 46 (47) (DB), *Hussain* v. *Shaik Mira.*
('93) 16 Mad 43 (48) : 3 Mad L Jour 14 (DB), *Sharifa Bibi* v. *Gulam Mahomed Dastagir Khan.*
('96) 19 Mad 343 (344) (DB), *Bava Saib* v. *Mahomed.*
(1900) 23 Mad 70 (72, 73):9 Mad L Jour 185 (DB), *Esuph Ravuthan* v. *Pattamsa Ammal.*
('07) 30 Mad 305 (307): 2 Mad L Tim 180 (DB), *Veetil Bava* v. *Veetil Pakrukutti.*
('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vaha Zullah Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)
('69) 5 Mad H C R 114 (119) (DB), *Khader Hussain* v. *Hussain Begum.*
('70) 6 Mad H C R 455 (463), *Azimunnissa Begum* v. *Dale.*
('10) 8 Ind Cas 431 (432, 433) (Mad), *Bee Jan Bee* v. *Fatima Bee Bee.*
('12) 14 Ind Cas 993 (994, 997):35 Mad 120 (DB), *Nynar Mahamed* v. *Kandasami Kolathi.*
('12) 16 Ind Cas 616 (617, 618) (DB) (Mad), *Abdul Rahman* v. *Hasan Sahib.*
('14) 1 AIR 1914 Mad 264 (266) : 23 Ind Cas 547 (DB), *Abdul Rahiman Nachiyar* v. *Muhammad Nurdin Maracayer.*
('14) 1 AIR 1914 Mad 446 (448) : 23 Ind Cas 802 (DB), *Rasool Bee* v. *Ghulam Kasim Saheb.*
('15) 2 AIR 1915 Mad 1 (3) : 23 Ind Cas 651 (DB), *Rahiman Bi* v. *Mahomed Fatima Bibi.*
('15) 2 AIR 1915 Mad 921 (923): 31 I. C. 545 (DB), *Rahiman Bi* v. *Fatima Bibi.*
('15) 2 AIR 1915 Mad 972 (975) : 29 Ind Cas 439 (DB), *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah.*
('15) 2 AIR 1915 Mad 1056 (1058) : 31 Ind Cas 281 (DB), *Mahammad Sulfalla Sahib* v. *Vajihuddin Sahib.*
('17) 4 AIR 1917 Mad 20 (26): 38 Ind Cas 248 (DB), *Yacook Sahib* v. *Pacha Bibi.*
('18) 5 AIR 1918 Mad 1337 (1344, 1345) : 42 Ind Cas 684 (DB), *Sabjan Sahib* v. *Abdul Azeez Sahib.*
('19) 6 AIR 1919 Mad 669 (670): 49 Ind Cas 204 (DB), *Subramania Iyer* v. *Assan Koya.*
('23) 10 AIR 1923 Mad 52 (53) (DB), *Fatima Bibi* v. *Khairum Bibi.*
('27) 14 AIR 1927 Mad 572 (574) : 100 Ind Cas 62, *Ajagar Hazar Saheb* v. *Annammah.*
('28) 15 AIR 1928 Mad 613 (613, 614) : 108 Ind Cas 637, *Nabooma* v. *Khedar Hussain.*
('30) 17 AIR 1930 Mad 593 (593): 127 Ind Cas 127, *Muhammad Naina Maracair* v. *Ummanaikani Ammal.*
('33) 20 AIR 1933 Mad 86 (91) : 141 Ind Cas 843, *Abdul Razak* v. *Zainab Bi.*
('28) 15 AIR 1928 Nag 275 (276) : 108 Ind Cas 435, *Mayadad Khan* v. *Hazarilal.*
('10) 8 Ind Cas 717 (718) : 13 Oudh Cas 347, *Muhammad Idris Khan* v. *Iftikhar Ahmad.*
('13) 20 Ind Cas 286 (287) (Oudh), *Mt. Shahda Bibi* v. *Ashraf Hussain.*
('37) 167 Ind Cas 299 (300, 301) (Oudh), *Mt. Kadirunnisa* v. *Mt. Tahirunnisa.*
('14) 1 AIR 1914 Oudh 167 (168) : 17 Oudh Cas 60 : 23 Ind Cas 453, *Munifa Bibi* v. *Fateh Ali.*
('15) 2 AIR 1915 Oudh 75 (76) : 28 Ind Cas 180 : 18 Oudh Cas 122, *Ali Baksh* v. *Ghurai.*
('21) 8 AIR 1921 Oudh 209 (212) : 24 Oudh Cas 374 : 66 Ind Cas 24 (DB), *Mt. Hafizunnisa* v. *Jawahir Singh.*
('22) 9 AIR 1922 Oudh 93 (95) : 65 Ind Cas 132 : 24 Oudh Cas 321, *Siraj Hussain* v. *Mushaf Hussain.*

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registration of the deed of gift in accordance with the provisions of S. 123 cannot cure the want of such delivery of possession.[3] On the other

('23) 10 AIR 1923 Oudh 80 (84) : 25 Oudh Cas 291 : 70 Ind Cas 253 (DB), *Sharfuzzaman* v. *Sir Henry Stanyon.*
('23) 10 AIR 1923 Oudh 214 (215) : 74 Ind Cas 390 : 26 Oudh Cas 128, *Khalil Ullah Shah* v. *Ewaz Ali.*
('25) 12 AIR 1925 Oudh 568 576) : 28 Oudh Cas 265 : 87 Ind Cas 445 (DB), *Amjad Khan* v. *Ashraf Khan.*
('26) 13 AIR 1926 Oudh 474 (475) : 94 Ind Cas 392, *Amir Khan* v. *Hakumat Bibi.*
('28) 15 AIR 1928 Oudh 414 (415) : 110 Ind Cas 26 (DB), *Mohammad Hyder* v. *Moti Lal.*
('29) 16 AIR 1929 Oudh 435 (436) : 5 Luck 384 : 124 Ind Cas 354, *Abdul Rahman* v. *Gaya Prasad.*
('30) 17 AIR 1930 Oudh 71 (73) : 123 Ind Cas 857 : 5 Luck 597 (DB), *Zahuran* v. *Abdur Salam.*
('31) 18 AIR 1931 Oudh 7 (8, 9) : 129 Ind Cas 161 *Jhumman* v. *Husain.*
('31) 18 AIR 1931 Oudh 19 (20) : 129 Ind Cas 335 : 6 Luck 403 (DB), *Khaliq Bux* v. *Mahabir Prasad.*
('31) 18 AIR 1931 Oudh 177 (229, 230) : 136 Ind Cas 642, *Mahomed Azim Khan* v. *Sadat Ali Khan.*
('34) 21 AIR 1934 Oudh 27 (29) : 147 Ind Cas 867, *Ewaz Mohammad* v, *Ghafoor Khan.*
(34) 21 AIR 1934 Oudh 163 (165) : 148 Ind Cas 801 (DB), *Abdul Hamid* v. *M. Abdul Ghani.*
('17) 4 AIR 1917 Pat 447 (448) : 40 Ind Cas 856 (DB), *Official Trustee of Bengal* v. *Nimchand Marwari.*
('18) 5 AIR 1918 Pat 291 (293, 294) : 43 Ind Cas 857, *Basirul Haq* v. *Md. Ajimuddin.*
('23) 10 AIR 1923 Pat 481 (482, 483) : 71 Ind Cas 897, *Dalpheroo Mian* v. *Bangali Mali.*
('27) 14 AIR 1927 Pat 20 (21, 22) : 97 Ind Cas 154 (DB), *Abdul Haque* v. *Mt. Tamizan.*
('28) 15 AIR 1928 Pat 183 (187) : 7 Pat 118 : 114 Ind Cas 204 (DB), *Bibi Bilkis* v. *Wahid Ali.*
('29) 16 AIR 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad.*
('14) 1 AIR 1914 Low Bur 208 (209) : 24 Ind Cas 704 (DB), *Ahmed Ghulam Mahomed Sadiq* v. *Mahomed Cassim Makda.*
('33) 20 AIR 1933 Rang 155 (155) : 143 Ind Cas 828 : 11 Rang 109, *Suna Meah* v. *S. A. S. Pillai.*
('36) 23 AIR 1936 Rang 430 (431) : 14 Rang 439 : 164 Ind Cas 934 (FB), *Ma Asha* v. *B. K. Haldar.*
('36) 23 AIR 1936 Rang 522 (523) : 14 Rang 485 : 166 Ind Cas 327, *Rahmat Bibi* v. *Maung Po Sein.*
('31) 18 AIR 1931 Sind 17 (20) : 25 Sind L R 72 : 129 Ind Cas 900 (DB), *Mt. Hakim Bibi* v. *Mir Ahmed.*
('70) 7 Bom H C R O C 27 (33), *Ruja Bai* v. *Ismail Ahmad.*
[*See also* ('75) 23 Suth W R 131 (131) : 14 Beng L R 307 (DB), *Gungahurry Nundee* v. *Raghubram Nundee.*
('33) 20 AIR 1933 Oudh 99 (100) : 142 Ind Cas 42 (DB), *Mt. Khairunnisa* v. *Karamatulla.*
('10) 9 Ind Cas 635 (636) : 38 Cal 518 (DB), *Abdul Aziz* v. *Fateh Mahomed Haji.*
('05) 28 All 147 (152) : 1905 All W N 222 (DB), *Humera Bibi* v. *Najm-un-nissa Bibi.*
('21) 8 AIR 1921 Nag 84 (85) : 64 Ind Cas 126 : 17 Nag L R 103, *Fahmidun-Nisa* v. *Hiralal.*]

3. ('15) 2 AIR 1915 Cal 601(606):26 Ind Cas 466 (DB), *Rahim Bakhsh Mandal* v. *Sajjad Ahmad Chowdhary.*

hand, where a gift complies with the provisions of that law it will not become invalid by the mere presence of a deed of gift which, owing to some defect, is invalid under S. 123 of the Transfer of Property Act.[4] As held by Suhrawardy, J., in *Nasib Ali* v. *Wajed Ali*[5]:

> " A gift in order to be valid must be made in accordance with the forms stated above, and even if it is evidenced by writing, unless all the essential forms are observed it is not valid according to law. That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming; so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence."

It has been held that even where a Mahomedan makes a gift to a Hindu, the gift is governed by the rules of Mahomedan law and not by the provisions of this section.[6]

See also Notes on section 129.

5. Gifts of immovable property. — As seen in Note 1, the section requires that a gift of immovable property, *irrespective of its value*, must be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift which

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('32) 19 AIR 1932 Cal 497 (500) : 138 Ind Cas 733 : 59 Cal 557 (DB), *Sultan Miya* v. *Ajiba Khatoon Bibi.*

('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vahazulla Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)

('16) 3 AIR 1916 P C 27 (32) : 36 Ind Cas 104 : 38 All 627 : 43 Ind App 212 (PC), *Sadik Husain Khan* v. *Hashim Ali Khan.*

('14) 1 AIR 1914 Mad 264 (266) : 23 Ind Cas 547 (DB), *Abdul Rahiman Nachiyal* v. *Muhammad Nurdin Maracayer.*

('12) 15 Ind Cas 698 (700) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi.*

[*See also* ('29) 16 AIR 1929 Lah 45 (47) : 108 Ind Cas 741 : 9 Lah 567 (DB), *Allah Rakha* v. *Ali Mahomed.*

('14) 1 AIR 1914 Low Bur 208 (209) : 24 Ind Cas 704 (DB), *Ahmed Gulam Mahomed Sadiq* v. *Md. Cassim Makda.*

('87) 11 Bom 517 (518) : 1887 Bom P J 118 (DB), *Mogulsha* v. *Mahamad Saheb.*

('99) 23 Bom 682 (684) : 1 Bom L R 177 (DB), *Ismal* v. *Ramji.*]

4. ('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali.*

('16) 3 AIR 1916 All 351 (351) : 38 All 212 : 35 Ind Cas 14 (DB), *Karam Ilahi* v. *Sharf-ud-din.* (Not properly attested.)

('36) 23 AIR 1936 All 600 (605) : 164 Ind Cas 515 (DB), *Mt. Kulsum Bibi* v. *Shiam Sunder Lal.*

('29) 16 AIR 1929 Oudh 435 (436) : 5 Luck 384: 124 Ind Cas 354, *Abdul Rahman* v. *Gaya Prasad.*

[*See also* ('26) 13 AIR 1926 All 294 (294) : 92 Ind Cas 558, *Pancham Lal* v. *Md. Yaqub Khan.*]

5. ('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB).

6. ('29) 16 A I R 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (D B), *Mt. Tabera* v. *Ajodhya Prasad.*

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does not comply with this requirement is bad and cannot pass any title to the donee.[1]

Note 5

1. ('19) 6 AIR 1919 P C 44 (46) : 53 Ind Cas 901 : 43 Mad 244 : 46 Ind App 285 (PC), *Varda Pillai* v. *Jeevarathnammal.* (Donor presenting a petition to the Collector for transfer of the property in donee's name in pursuance of a gift — Donee also presenting similar petition — Property registered by the Collector in donee's name—*Held*, provisions of S. 123 not complied with.)

('38) 25 AIR 1938 Oudh 97 (98) : 173 Ind Cas 610 : 14 Luck 9, *Wajid Ali* v. *Gangadin.* (When a person is sole owner of property there cannot be any family settlement about it between him and his son and if he wants to give up his rights in the property in favour of his son it must be done by a deed of gift properly registered and attested under S. 123.)

('10) 6 Ind Cas 581 (581) (All) (DB), *Kalicharan* v. *Utmi.* (Application for mutation cannot be treated as a gift.)

('34) 21 A I R 1934 P C 67 (68) : 147 Ind Cas 328 : 12 Rang 238 (PC), *Lim Charlie* v. *Official Receiver.*

('27) 14 A I R 1927 Rang 143 (144) : 101 Ind Cas 634 : 5 Rang 125, *Maung Kyan Za* v. *U De Bi.*

('10) 5 Ind Cas 599 (600) : 34 Bom 287 (DB), *Madhavrao Moreshvar* v. *Kasibai Dattubhai.*

('27) 14 A I R 1927 Rang 335 (335) : 101 Ind Cas 590, *Ma E Yin* v. *U Shwe Ni.*

('27) 14 A I R 1927 Sind 206 (207) : 102 Ind Cas 277 (DB), *Bhagwati Bai* v. *Bhagwandas.*

('06) 9 Oudh Cas 113 (116, 117) (DB), *Chhabzaj Koli* v. *Gopal.*

('28) 15 A I R 1928 Bom 250 (252) : 109 Ind Cas 149 (DB), *Hiralal Chimanlal* v. *Gaurishankar.*

('25) 12 A I R 1925 Mad 1174 (1174) : 90 Ind Cas 331, *Made Gouda* v. *Chenne Gouda.* (The formal requirements of the Transfer of Property Act cannot be avoided by calling a transaction by a particular name under the Hindu law. A person cannot by the mere recognition of another as a cosharer of his convey title to him of immovable property, without observing any of the formalities required by law for it—17 Ind Cas 885 dissented from.)

('12) 17 Ind Cas 885 (886) (DB) (Cal), *Girhi Rani* v. *Chandra Lal.* (If persons actually entitled to a property agree to treat a near relation as a cosharer out of affection and abandon their claim to an exclusive right, they may do so without a registered deed. If the act is unequivocal, it will create title in favour of the person who is taken in as a cosharer—Dissented from in A I R 1925 Mad 1174.)

('40) 27 AIR 1940 Cal 254 (256) : 189 Ind Cas 249, *Haripada* v. *Elokeshi Devi.*

('11) 12 Ind Cas 858 (858) (Low Bur), *Mg. Po Than* v. *Ma On Buin.*

('16) 3 AIR 1916 Low Bur 11 (12) : 33 Ind Cas 129, *Mg. Shwe Kho* v. *Ma Mya.* (A Kanwin gift, i. e., a gift by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair, must be in writing and registered as required by S. 123 of the Act.)

('21) 8 AIR 1921 Mad 137 (138) : 61 Ind Cas 461 : 44 Mad 196 (DB), *Perumal Ammal* v. *Perumal Nayaker.* (Gifts of mortgages are regarded as gifts of immovable property.)

('26) 13 AIR 1926 Bom 261 (262) : 94 Ind Cas 609 (DB), *Girija Prosad* v. *Purshottam.* (A gift cannot be created by a document signed by the person intended to be benefited by an oral gift, in favour of the owner of the property acknowledging the gift.)

('21) 8 AIR 1921 Bom 198 (198, 199): 58 Ind Cas 403 : 45 Bom 164 (DB), *Kuverji Kavasji* v. *The Municipality of Lonavala.*

('39) 26 AIR 1939 Pat 258 (259) : 180 Ind Cas 105, *Rup Narain* v. *Sheo Sagar.*

('29) 16 AIR 1929 All 300 (301, 302): 119 Ind Cas 503 : 51 All 629 (DB), *Bachchi Lal* v. *Debi Din.*

('30) 17 AIR 1930 Pat 610 (612) : 128 Ind Cas 791 (DB), *Harihar Prasad* v. *Siri Gurugranth Saheb.*

A mere delivery of possession without a registered instrument, will not cure the defect.[2] On the other hand, if there is a registered document, no delivery of possession is necessary to effect the transfer.[3]

Under S. 49 of the Registration Act a deed of gift not registered as required by this section may be used in evidence for collateral purposes.[4]

6. Registration and operation of gift. — The mere fact that a deed of gift is registered does not render the gift complete, in the absence of *acceptance* by the donee. Consequently, the donor can revoke the gift before such acceptance.[1]

Before the decision of their Lordships of the Privy Council in *Kalyanasundaram* v. *Karuppa*[2] there was a difference of opinion as to whether a gift which had been *accepted* by the donee was suspended in its operation until the *registration* of the deed of gift. According to one view[3] a deed of gift was not complete until it was registered and could therefore be revoked before registration, even if it had been accepted by the donee. Another view was that a donor could not be compelled to register the deed of gift since that would be compelling

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('32) 19 AIR 1932 Nag 51 (52, 53) : 137 Ind Cas 153 : 28 Nag L R 20, *Fouzmal* v. *Rajaram.*

('26) 13 AIR 1926 Pat 125 (127) : 90 Ind Cas 769, *Ashloke Singh* v. *Bodha Ganderi.*

('38) 25 AIR 1938 Oudh 97 (98) : 173 Ind Cas 610 : 14 Luck 9, *Wajid Ali* v. *Ganga Din.*

('26) 13 AIR 1926 Oudh 98 (100) : 91 Ind Cas 927 : 1 Luck 33, *Secretary of State* v. *Harcharan Dass.*

('26) 13 AIR 1926 Oudh 371 (377) : 96 Ind Cas 672 : 1 Luck 273 : 29 Oudh Cas 378 (FB), *Maluka Kunwar* v. *Pateshar Singh.*

('22) 1 Bur L Jour 26 (27, 28), *Po Maung* v. *Aung Din.* (A division of property by a father in his life-time to his children except in the case of an orasa is not a partition but in reality a gift.)

2. See cases cited in Note 2 point 5.

3. See cases cited in Note 2 point 4 and Note 3 point 2.

4. ('43) 30 AIR 1943 Mad 15 (19) (DB), *Krishnaswami Naidu* v. *Secretary of State.*

[*See also* ('77) 2 Bom 273 (287), *Raju* v. *Krishnarao.* (But not for proving a covenant for title contained in the deed.)]

Note 6

1. ('39) 26 AIR 1939 Mad 290 (290, 291) : 183 Ind Cas 631, *Papathi Ammal* v. *Doraiswami Naicker.*

('24) 11 AIR 1924 Pat 657 (660, 661) : 80 Ind Cas 980 : 3 Pat 842 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.* (A registered deed of gift as any other such document may be merely a nominal transaction, without any intention on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document.)

2. ('27) 14 AIR 1927 P C 42 (44) : 100 Ind Cas 105 : 50 Mad 193 : 54 Ind App 89 (PC).

3. ('96) 19 Mad 433 (435) : 6 Mad L Jour 207 (DB), *Ramamirthayyan* v. *Gopala Aaiyan.*

('24) 11 AIR 1924 Bom 434 (436) : 80 Ind Cas 477 : 48 Bom 435 (DB) *Subba Rama* v. *Venkat Subba.* (Overruled by AIR 1925 Bom 210.)

('15) 2 AIR 1915 Mad 1145 (1146) : 28 Ind Cas 271 (DB), *Dasi Swarnam* v. *Deivanayagam Pillai.*

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Note 6

him to complete an incomplete gift and that therefore the registration of a deed of gift against the wishes of a donor was void.[4] In the undermentioned case[5] it was held that a voluntary registration of a deed of gift by the legal representatives of a donor had the same effect as its voluntary registration by the donor in his lifetime.

The undermentioned cases[6] held that the expression "registered instrument" in this section meant registered in accordance with the provisions of the Registration Act; that there was nothing in the section *which required the donor to register the deed of gift himself* and that the deed of gift was therefore not invalid merely because the registration of it took place against the wishes of the donor or after his death. A Full Bench decision of the Madras High Court in *Venkati Rama Reddi* v. *Pillati Rama Reddi*[7] accepted the last view and a later Full Bench decision[8] of the same High Court followed it. Subsequently, the Bombay High Court also in a Full Bench decision in *Atmaram Sakharam* v. *Vaman Janardan*[9] held that once a deed of gift of immovable property was executed by the donor, handed over to the donee and accepted by him, the gift became complete and the donor could not revoke it after such acceptance even if it had not been registered at that time.

The conflict of views has now been set at rest by the decisions of their Lordships of the Privy Council in *Kalyanasundaram* v. *Karuppa*[10] and *Venkatasubba Srinivas Hegde* v. *Subba Rama Hegde*[11]

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4. ('96) 19 Mad 433 (434, 435) : 6 Mad L Jour 207 (DB), *Ramamirthayyan* v. *Gopala Aiyan.* (Overruled in AIR 1917 Mad 27.)
('03) 13 Mad L Jour 303 (305) (DB), *Amirdan* v. *Muthukumara Chetty.*
[*See also* ('18) 5 AIR 1918 Mad 194 (199, 200) : 44 Ind Cas 483 (DB), *Amba* v. *Shrinivasa Kamathi.* (Deed of gift repudiated by the donor before registration is inoperative.)]

5. ('02) 25 Mad 672 (674) : 12 Mad L Jour 409 (DB), *Meiyyalu Nadan* v. *Anjalay.*

6. ('08) 32 Bom 441 (444) : 10 Bom L R 536 (DB), *Khushaba Mansing* v. *Chandrabhagabai.*
('98) 20 All 392 (393):1898 All W N 88 (DB), *Nand Kishore Lal* v. *Suraj Prasad.* (Following 11 All 319.)
('12) 16 Ind Cas 406 (406, 407) : 35 All 3 (DB), *Parbati* v. *Baij Nath.* (Letters Patent Appeal from 14 Ind Cas 61.)
('06) 33 Cal 584 (588, 589) : 4 Cal L Jour 340 (DB), *Bhabatosh Banerjee* v. *Soleman.*

7. ('17) 4 A I R 1917 Mad 27 (30) : 38 Ind Cas 707 : 40 Mad 204 (FB).

8. ('23) 10 AIR 1923 Mad 282 (283):73 I. C. 206 (FB), *Kalyanasundaram Pillai* v. *Karuppa Muppannar.* (Letters Patent Appeal from AIR 1921 Mad 90—The subsequent birth of a child, the adoption of a child, or the death of the donor has not the effect of defeating a title obtained under an instrument of gift executed before the happening of these events but registered thereafter.)

9. ('25) 12 A I R 1925 Bom 210 (222, 223) : 49 Bom 388 : 87 Ind Cas 490 (FB).

10. ('27) 14 AIR 1927 P C 42 (43, 44) : 100 Ind Cas 105 : 50 Mad 193:54 Ind App 89 (PC).

11. ('28) 15 A I R 1928 P C 86 (87) : 108 Ind Cas 367 : 52 Bom 313. (A I R 1927 P C 42 : 50 Mad 193 : 54 Ind App 89 (PC) applied.)

affirming the law as laid down by the said Full Bench decisions. Their Lordships in the first of these cases observed as follows : Section 123 Notes 6–7

> "It has been forcibly argued that, until registration there is no complete gift, and that if the donor dies or revokes or becomes incapable of making the gift before the registration, it cannot take effect. On the other hand attention must be directed to S. 47 of the Indian Registration Act of 1877, which is in these terms :
>
> A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.
>
> * * * *
>
> They are unable to see how the provision of S. 123 of the Transfer of Property Act can be reconciled with S. 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."[12]

Where a deed of gift has been accepted by the donee its registration after his death cannot invalidate it.[13]

7. "Signed by or on behalf of the donor." — A difficulty has arisen in the interpretation of this expression in view of the fact that the Act has used different expressions in different sections dealing with the mode of transfer. Thus, in S. 130 the words used are "signed by the transferor or his duly authorised agent." In S. 59 the expression used is "signed by the mortgagor." And in Ss. 54 and 107, there is no reference to the signature of the transferor. The words "on his behalf" taken literally would seem to include any one signing on behalf of the donor, whether with or without authority. It has, however, been observed by the Allahabad High Court[1] that the words have been loosely used in

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12. *See also* ('33) 20 AIR 1933 Cal 212 (213): 142 Ind Cas 452 : 59 Cal 1176 (DB), *Nabadwepchandra Das* v. *Lokenath Ray.*

('37) 24 AIR 1937 Nag 1 (3) : 167 Ind Cas 48 : ILR (1937) Nag 291 (DB), *Kasturchand* v. *Mt. Wazir Begam.*

13. ('37) 41 Cal W N 1201 (1203) (DB), *Sishir Kumar Chowdhary* v. *Tarnagini Debya.*

Note 7

1. ('02) 24 All 319 (325, 327) : 1902 All W N 127 (FB), *Deo Narain* v. *Kukur Bind.* (Per Stanley, C. J.)

Section 123
Notes 7–10

the section, and must be construed as meaning only a signature by a person *duly authorised* by the donor.

In the undermentioned case[2] A made a gift of a house to B, but did not execute any document of gift. But B passed a document to A reciting that a gift of the house was made to him by A. The document was signed by B. It was held that it could not have the effect of a valid gift under this section.

As to the meaning of the word "signed," see Note 12 on S. 3.

8. **"Attested by at least two witnesses."** — The section requires that the deed of gift must be "attested by at least two witnesses." If there is no attestation as required by the section the deed of gift is null and void,[1] and cannot affect the property which is the subject of the gift.[2] The word "attested" has been defined in S. 3. (See Notes 11 to 19 on that section.) The definition was inserted for the first time in that section by the Transfer of Property (Amendment) Act, XXVII of 1926. According to that definition, the word "attested" itself means "attested by two or more witnesses." So the words "by at least two witnesses" occurring after the word "attested" in this section have now become superfluous.

9. **Doctrine of part-performance, whether applies to gifts.** — As to the question whether the plea of part-performance is available as a defence to a person who is in possession of immovable property under an unregistered deed of gift, see Note 7 on S. 53A and the undermentioned cases.[1]

10. **Donee's possession under invalid gift of immovable property.** — A gift of immovable property is invalid if it is not effected in the manner laid down in the first clause of this section. The possession of the donee under such an invalid gift is adverse to the

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2. ('26) 13 AIR 1926 Bom 261 (262) : 94 Ind Cas 609 (DB), *Girjaprasad* v. *Purshottam.*

Note 8

1. ('25) 12 AIR 1925 Pat 151 (152) : 86 Ind Cas 676, *Ram Pragash Lal* v. *Mt. Bhikana Kuer.*
('42) 29 AIR 1942 Pat 120 (125) : 196 Ind Cas 837 (DB), *Bhudeb Chandra* v. *Bhikshakar Pattanaik.* (Attestation by one witness not sufficient.)
2. ('34) 21 AIR 1934 Cal 772 (775) : 151 Ind Cas 1063 : 61 Cal 525, *Neelima Basu* v. *Jaharlal Sarkar.*
('22) 9 AIR 1922 Pat 514 (524, 525) : 68 Ind Cas 383 : 2 Pat 52 (DB), *Baijnath Singh* v. *Brijraj Kuar.*

Note 9

1. ('24) 11 AIR 1924 Rang 102 (103) : 79 Ind Cas 579 : 1 Rang 651, *Ma Shin* v. *Maung Hman.*
('24) 11 AIR 1924 Rang 200 (201) : 79 Ind Cas 485 : 1 Rang 665, *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin.*
('27) 14 AIR 1927 Rang 128 (128) : 101 Ind Cas 703, *U Sayainda* v. *U Thà Mngala.*
('25) 12 AIR 1925 Rang 184 (185, 186) : 88 Ind Cas 66 : 2 Rang 649 (DB), *Ma Htay* v. *U Tha Hline.*
('29) 16 AIR 1929 Rang 316 (317, 318) : 123 Ind Cas 142, *Maung Hla Maung* v. *Maung Po Htai.*

donor and if he remains in possession for a period of twelve years his title becomes perfect by prescription.[1] Section 123 Notes 10–11

11. Section applies to gifts in Cantonment areas. — The section has been extended to every Cantonment in British India by S. 287 of the Cantonments Act, II of 1924 (old S. 32 of the Cantonments Act, XIII of 1889), sub-s. (1) of which enacts as follows :

> Paragraphs 2 and 3 of S. 54 and Ss. 59, 107 and 123 of the Transfer of Property Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every Cantonment."

In the undermentioned Lahore case[1] an oral gift was made by a Mahomedan to another in the Cantonment area. It was contended that S. 123 should be read along with S. 129 and that the gift was valid under the Mahomedan law. It was held that, inasmuch as only S. 123 had been extended to the Cantonment area and not S. 129, the Mahomedan law could not be applied to the case and the oral gift was therefore not valid. Abdul Raoof, J., observed :

> "The only question then to determine is whether an oral gift, by a Mahomedan of property situate in the cantonment can be made under S. 32, Cantonments Act. The provisions of S. 123, Transfer of Property Act, IV of 1882, have been made applicable to all gifts whether made by a Hindu, Mahomedan or a Buddhist. It is, however, contended that S. 123 cannot be read without S. 129, Transfer of Property Act. The omission of the inclusion of S. 129, Transfer of Property Act, in S. 32, Cantonment Act, may be intentional or accidental.
>
> "It is not, however, necessary for me to determine what the exact reasons for this omission may be, for I must take the law as it stands and, interpreting it according to the well-recognised rules of statutes relating to construction, I cannot but hold that the

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Note 10

1. ('19) 6 AIR 1919 P C 44 (46, 47) : 53 Ind Cas 901 : 43 Mad 244 : 46 Ind App 285 (PC), *Varada Pillai* v. *Jeevarathnammal.*
('03) 13 Mad L Jour 302 (303) (DB), *Venkatarayudu* v. *Subamma.*
('24) 11 AIR 1924 Mad 800 (800):82 Ind Cas 67, *Narayanaswamy* v. *Thangavelu.*
('26) 13 AIR 1926 Oudh 371 (377) : 29 Oudh Cas 378 : 96 Ind Cas 672 : 1 Luck 273 (FB), *Mt. Maluka Kunwar* v. *Pateshwar Singh.*
('26) 13 AIR 1926 Oudh 98 (100, 101) : 91 Ind Cas 927 : 1 Luck 33, *Secretary of State* v. *Harcharan Das.*
('24) 11 AIR 1924 Pat 641 (644) : 79 Ind Cas 26 : 3 Pat 349 (DB), *Janki Kuer* v. *Birj Bhikhan Ojha.*
('41) 28 AIR 1941 Pat 219 (221) : 195 Ind Cas 203 (DB), *Sri Padma Kumari Patto Mahadevi* v. *Nanda Padhan.*
('24) 11 AIR 1924 Nag 222 (223) : 79 Ind Cas 117, *Mt. Kasturi* v. *Baliram.*
[*See also* ('02) 5 Oudh Cas 345 (350, 351, 354) (DB), *Itraj Kuar* v. *Bacha Mahadeo Kuar.*]
See Author's Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 60.

Note 11

1. ('20) 7 AIR 1920 Lah 249 (251) : 54 I.C. 829, *Muhammad Beg* v. *Amar Nath.*

Section 123
Notes 11–12

effect of S. 32, Cantonments Act, is that a gift must be made in the manner provided by S. 123, Transfer of Property Act."

It is submitted that this view does not appear to be good law in view of the decision of their Lordships of the Privy Council in *Ma Mi* v. *Kallandar Ammal*[2] which was a case in which the *Local Government* had extended S. 123 to a particular area, but not S. 129. Their Lordships held that the Local Government had no power to extend a particular section of the Act so as to give it an effect not contemplated by the Act.

12. Delivery of property. — As seen in Note 1 the section provides two alternative modes of transfer in the case of the gifts of moveable property : (a) a registered instrument signed by or on behalf of the donor and attested by at least two witnesses; and (b) delivery of the property. With regard to delivery of the property the section says that it may be made in the same way as goods sold may be delivered. Thus, delivery of moveable property under this section is the delivery described in S. 33 of the Sale of Goods Act, 1930 (old section 90 of the Contract Act, 1872),[1] which provides for delivery of goods sold. It runs as follows :

"Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf."

Where a certain sum was bestowed as gratuity on one X, a servant in the employment of a Railway Company, and the same was sanctioned to be paid to X and the order for payment was received by the pay-master, but before payment was made to X the amount was attached in execution of a decree obtained against him by K, it was held that the receipt of the order to pay was not equivalent to a delivery of the money to X as he was not put in possession of the money, that the money was not therefore at the disposal of X, and could not be attached by K before it was received by X.[2]

Where the property gifted is in the possession of a third person and the third person consents to hold the property on behalf of the donee when asked by the donor to deliver the property to the donee, there is no sufficient delivery of the property to the donee if the third

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2. ('27) 14 AIR 1927 P C 22 (22, 23) : 100 Ind Cas 32 : 54 Ind App 23 : 5 Rang 7 (P C).

Note 12

1. ('23) 10 AIR 1923 Pat 165 (170, 171) : 67 Ind Cas 451 (DB), *Rameshwar Narain* v. *Reknath Koeri.* (Section 90, Contract Act, 1872.)

('14) 1 AIR 1914 Cal 566(567): 22 I. C. 500 (DB), *Akhoy Kumar* v. *Haridas.*(Do.)

('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Jankidas* v. *East Indian Railway Co.* (Do.)

2. ('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Janki Das* v. *East Indian Railway Co.*

('24) 11 AIR 1924 Bom 88 (88) : 87 Ind Cas 312, *Natha Gulab* v. *W. C. Shaller.* (The delivery of the cheque by the Railway Company to the Mercantile Bank, though coupled with the request to send the amount to their London Office to be paid to defendants is not equivalent to delivery to the defendants.)

person is not authorised by the donee to hold the property on his behalf. In such a case the transaction does not operate to transfer the property to the donee.[3] Section 123 Note 12

Where the property gifted is already in the possession of the donee, a fresh delivery at the time of the gift is not necessary. It is sufficient if the conduct of the parties shows that the ownership in the property has changed.[4] Thus, where a person is in possession of a barge as servant of his master at the time of the gift of the barge, but after the gift, works the barge as an owner, there is sufficient delivery of possession and the property becomes vested in him.[5]

Where the goods are stored and locked up in a warehouse the delivery of the key to the donee giving exclusive control over the goods is sufficient delivery of the goods.[6]

In the undermentioned case[7] a deposit was made in a bank by the husband in the joint names of himself and his wife in the following terms : "Mr. and Mrs. Hope, payable to either or survivor." It was held that there was no gift of the money by the husband to the wife as there was no delivery of the money by the husband to the wife within the meaning of S. 123 and that the English law which presumed a gift by the husband to the wife, in such a case, defeasible on the death of the wife in the life-time of the husband, was not applicable in India. See also the undermentioned cases.[8]

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3. ('23) 10 AIR 1923 Pat 165 (170, 171) : 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Rani Reknath Koeri.*
('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Jankidas* v. *East Indian Railway Co.*
('24) 11 AIR 1924 Bom 88 (88): 87 I.C. 312, *Natha Gulab & Co.* v. *W. C. Sheller.*
See also illustration (f) to the old S. 90 of the Indian Contract Act, 1872.

4. (1861) 4 L T (N S) 639 (640) : 9 W R (Eng) 747 : 127 R R 925, *Winter* v. *Winter.*
(1891) 64 L T 645 (646, 647) : 7 Ir L R 418, *Alderson* v. *Peel.*
(1896) 2 Q B 283 (288) : 74 L T 728 : 65 L J Q B 587, *Cain* v. *Moon.*
(1892) 1 Q B 582 (585) : 40 W R (Eng) 479 : 66 L T 797, *Kilpin* v. *Ratley.*

5. (1861) 4 L T (N S) 639 (640) : 9 W R (Eng) 747, : 127 R R 925, *Winter* v. *Winter.*

6. (1888) 39 Ch D 669 (676) : 36 W R (Eng) 762 : 57 L J Ch 973 : 59 L T 172, *Hilton* v. *Tuker.*

7. ('31) 18 AIR 1931 All 596 (597): 132 Ind Cas 573: 53 All 633 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.*

8. ('15) 2 AIR 1915 P C 96 (97) : 37 All 557 : 42 Ind App 202 : 30 Ind Cas 299 (PC), *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh.* (Where a husband purchases property in the name of his wife the presumption is that it is benami — There is no presumption of advancement in India.)
('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 Ind Cas 327 (PC), *Lukshmiah Chetty* v. *Kothandarama Pillai.* (Do.)
('29) 16 AIR 1929 Oudh 97 (108) : 3 Luck 521 : 117 Ind Cas 385 (DB), *Mirza Md. Sadiq Ali Khan* v. *Fakhr Jahan Begam.* (Do.)
('29) 16 AIR 1929 Oudh 134 (145, 146) : 117 Ind Cas 456 (DB), *Ameer Hasan* v. *Muhammad Ejaz Husain.* (Do.)
('05) 29 Bom 306 (314) : 6 Bom L R 975 (DB), *Bai Motivahoo* v. *Purshottam Dayal.* (According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit.)

Section 123
Notes 13-16

13. Incomplete gift does not constitute donor trustee for donee. — See Note 15 on Section 122.

14. Gifts of actionable claims.—A gift of an actionable claim is governed by section 130 and not by this section. See Notes on that section.

A deed of gift of immovable property and actionable claims, which fails as a gift of immovable property for non-compliance with the requirements of this section does not fail also as a gift of actionable claims unless the gift of the latter is made conditional on the gift of the former taking place.[1]

15. Law in places to which Transfer of Property Act is not extended.—This section will not affect gifts effected in places to which the Transfer of Property Act is not extended.[1] But if there is a deed of gift of immovable property it is compulsorily registrable under section 17 of the Registration Act, and if not so registered will not under section 49 of that Act, affect the property comprised therein or be received in evidence of any transaction affecting such property. It will, however, be admissible in evidence for the purposes mentioned in the proviso to that section. See also the undermentioned cases.[2]

16. Extent.— As to limitations to the territorial operation of the section, see the last Paragraph of section 1.

(1854) 6 Moo Ind App 53 (75, 76) : 1 Sar 493 (PC), *Gopeekrist Gosain* v. *Gungapersaud Gosain.* (Under Hindu law when a Hindu purchases real property in the name of his son the presumption is that the purchase is benami.)

('69) 13 Moo Ind App 232 (246, 247) : 13 Suth W R P C 1 (P C), *Moulvie Sayyud Azhar Ali* v. *Mt. Bebee Ultaf Fatima.* (The practice of holding lands and buying lands in the name of another exists in India as much among Mahomedans as among Hindus and the rule laid down in 6 Moo Ind App 53 would apply.)

Note 14

1. ('21) 8 AIR 1921 Mad 137 (139, 140) : 61 Ind Cas 461 : 44 Mad. 196 (DB), *Perumal Ammal* v. *Perumal Naiker.*

Note 15

1. ('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath* v. *Chandni Bibi.*

('37) 39 Pun L R 1014 (1015), *Sher Dad* v. *Zafar Jan.*

('26) 13 AIR 1926 Lah 286 (287) : 92 Ind Cas 479, *Fateh Mahomed* v. *Mitha.*

2. ('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath* v. *Chadni Bibi.*

('25) 12 AIR 1925 Lah 183 (183) : 78 Ind Cas 113, *Hira Singh* v. *Punjab Singh.* (A document by which rights in immovable property are surrendered without any consideration is in effect a deed of gift.)

('26) 13 AIR 1926 Lah 372 (372) : 94 Ind Cas 7 (DB), *Maula Buksh* v. *Hafiz-ud-din.*

('33) 20 AIR 1933 Pesh 67 (69) : 146 Ind Cas 363, *Totaram* v. *Mt. Isri Bai.*

('13) 18 Ind Cas 918 (919) : 1913 Pun Re No. 83 (DB), *Jaman* v. *Chandiya Ram.*

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter. Section 124

Synopsis

1. Scope of the section.
2. Gift of future property, if operates as contract to give future property.
3. Muhammadan law.

1. Scope of the section. — By its very definition a gift is a transfer of *existing* property. And indeed, as has been seen in Note 7 on S. 5 there can be no *transfer of any kind* of what is not in existence. It follows that a gift of property that may come into existence in the future is void. Where a gift purports to be of existing property as well as future property, this section provides that the whole gift is not void but only so much of the gift as relates to the future property.

2. Gift of future property, if operates as contract to give future property. — It has been seen in Note 7 on S. 5 that if a person purports to make a transfer of what may come into existence in future, it will be regarded only as a *contract* to assign the property when it comes into existence in future. This rule, however, applies only to attempted transfer for *consideration*, of future property, for a contract must be supported by consideration; otherwise it will be void. A gift is a transfer *without consideration*, and there can be no *contract*, therefore, to make a gift. A transfer by way of gift, of future property is thus void not only as a transfer, but also as a *contract* to transfer the property.

3. Muhammadan law. — This section does not affect any rule of Muhammadan law (see S. 129). But there is no inconsistency between this section and any rule of Muhammadan law. Even under that law, there cannot be a gift of future property.[1]

Gift to several, of whom one does not accept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted. Section 125

1. Scope of the section. — The general principle that where a transfer of property is made in favour of A and B and the transfer fails with regard to B, the whole transfer does not fail, but only fails in regard to B, has been recognised by the Indian Legislature in various provisions. Thus, S. 115 of the Succession Act provides that where a bequest is made to a *class* of persons with regard to some of whom the interest fails by reason of the rule against perpetuities, such interest

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Section 124 — Note 3

1. ('05) 7 Bom L R 306 (307), *Abdoola* v. *Mahomed.*
('98) 22 Bom 489 (492) (DB), *Amtul Nissa* v. *Mir Nurudin.*

Section 125 Note 1

fails in regard to *those persons only* and not in regard to the whole class. A similar provision is found in Ss. 15 and 22 of this Act.

This section also is in accordance with the said general principle and provides that the failure of a gift as regards one of two or more donees by reason of non-acceptance operates as a failure only to the extent of the interest which he would have taken had he accepted.

The section does not appear to be limited in its operation to cases where a gift is made to two or more persons as *joint tenants*. It would seem to apply to all transfers whether made jointly or severally to two or more persons. But the effect of the failure of the gift as regards one of them by reason of non-acceptance, on the interests of the other donees, would differ according as the gift was made to them as *joint tenants or tenants in common*. In the former case, the donees who accept the gift would *take the whole*[1] while in the latter case, their shares will not be increased, by the share of the other who does not accept the gift.

As to whether and when two or more donees take as joint tenants or as tenants-in-common, see Note 6 on S. 45.

Section 126

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) *A* gives a field to *B*, reserving to himself, with *B's* assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A's* lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B's* assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

Section 125 — Note 1

1. ('89) 16 Cal 677 (682) : 16 Ind App 44 (P C), *Nandi Singh* v. *Sita Ram.* (*Humphrey* v. *Taylour*, 27 E R 89, followed.)

Synopsis

1. Scope of the section.
2. Agreement for revocation.
3. Gift revocable at the will of the donor.
4. Resumability of service tenures. See Note 69 on S. 105.
5. Paragraph 2 — General.
6. Coercion.
7. Fraud.
8. Misrepresentation.
9. Undue influence.
10. Pardanashin women.
11. Mistake.
12. Limitation for suit to revoke gifts. See Notes on Art. 91 of the Author's Commentaries on the Limitation Act, 2nd (1942) Edn.
13. Right to revoke gift—When may be lost.
14. Who may suspend or revoke gifts.
15. Revocation—If need be express.
16. "Save as aforesaid, a gift cannot be revoked"—Paragraph 3.
17. Transferees for consideration without notice—Paragraph 4.

1. Scope of the section. — This section deals with the circumstances under which a gift may be suspended or revoked. The first paragraph provides that a gift may be suspended or revoked by *agreement* of parties. The second paragraph provides that a gift may be revoked on grounds on which *contracts might be rescinded*. The words "save as aforesaid, a gift cannot be revoked" show that the section is exhaustive of the way in which a gift can be revoked. The contrary observation in the undermentioned case[1] is, it is submitted, not correct.

Before the amendment of S. 129 in 1929, this section did not affect any rule of Hindu law. Under that law, if a person made a gift to another in expectation that the donee will do some work in consideration of the gift, and the donee failed to do it, the gift was revocable.[2] This will not be good law after the amendment of S. 129, rendering this section applicable to Hindu gifts also.

This section does not affect any rule of Muhammadan law. As to the revocability of gifts under that law, see Mulla's *Principles of Muhammadan Law*.

2. Agreement for revocation. — The first paragraph of the section refers to *agreements* for the suspension or revocation of gifts. As has been seen in Note 14 on S. 10, this section does not deal with *conditions* imposed by the donor in the gift and it is incorrect to speak of agreements for revocation under this section as "conditions" as has been done in some cases.[1] But apart from this section, however, a person

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Section 126 — Note 1

1. ('30) 17 AIR 1930 All 669 (674) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmibai*.
2. ('73) 5 N W P H C R 5 (6) (DB), *Mahadeo Pundit* v. *Mt. Badamo*.
('30) 17 AIR 1930 All 669 (674) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmibai*.

Note 2

1. ('90) 17 Cal 826 (828) (DB), *Nilmadhab* v. *Narattam*.
('23) 10 AIR 1923 Mad 67 (69) : 69 Ind Cas 673 (DB), *Venkatarama Ayyar* v. *Aiyasami Aiyer*.
('07) 4 All L Jour 708 (709) (DB), *Thakur Prasad* v. *Rajrup Singh*.
('39) 26 AIR 1939 All 221 (223) : ILR (1939) All 298 : 181 Ind Cas 407 (DB), *Brij Devi* v. *Shiva Nanda Prasad*.

Section 126 Notes 2–5

can make *conditional* gifts. The conditions in such cases must be valid conditions under the various provisions of Chapter II.[2]

An agreement for revocation under this section must, of course, be a *valid* agreement. Further the event on which the parties agree to revoke the gift must not depend upon the will of the donor. In other words, an agreement for revocation of a gift must satisfy two conditions:

(1) it must be valid as an agreement under the law of contracts, and

(2) the event, on the happening of which the gift is to be suspended or revoked, must not depend upon the will of the donor.

Where A made a gift of funds for the specific purpose of founding a college for a particular community, and the founding of such college became impossible by the passing of the University Act, it was held that the promoters of the scheme and the donors must be deemed to have agreed within the meaning of this section that on the failure of the scheme, the gift shall be revoked.[3]

3. **Gift revocable at the will of the donor.** — Where the gift is revocable wholly or in part *at the mere will of the donor* the gift is void wholly or in part as the case may be.[1] The reason is that where a party declares his intention to make a gift and then annexes to such a declaration a stipulation that he will revoke it when he wills it, the declaration of the gift is contradictory in itself and there is no gift at all.[2]

4. Resumability of service tenures. — See Note 69 on Section 105.

5. **Paragraph 2 — General.** — As has been seen in Note 3 on S. 4, *sales*, *mortgages*, *leases* and *exchanges* are all transfers of property based initially on *contracts* and the chapters of the Act dealing with those transfers must be taken as part of the Contract Act.

The chapter on *gifts* cannot, however, be said to relate to contracts inasmuch as a gift is a transfer *without consideration*. Consequently, this chapter cannot, by virtue of S. 4, be read as part of the Contract Act. The special provision in the second paragraph has, therefore, been inserted in this section making a gift revocable in cases in which, if it were a contract it might be rescinded. A contract may be rescinded where it is *voidable* under the provisions of the Contract Act, these

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('29) 16 AIR 1929 Rang 226 (228) : 7 Rang 306 : 119 Ind Cas 737, *Ma Yin Hu* v. *Ma Chit May*.

2. ('34) 21 AIR 1934 Rang 129 (131) : 150 Ind Cas 966, *Ma Shin* v. *Ma Thin Kyi*. (A condition that donee should allow the donor to enjoy the usufruct during his lifetime is not contrary to law.)

('35) 22 AIR 1935 All 437 (438) : 154 Ind Cas 516, *B. B. & C. I. Ry.* v. *Raghib Ali*. (Gift on immoral condition—Void.)

('82) 4 Mad 200 (202) (DB), *Anantha* v. *Nagamuthu*. (Condition against alienation in a gift of land to Brahmins is inoperative.)

(1844) 49 E R 1134 (1137) : 7 Beav 437 : 64 R R 111, *Ridgway* v. *Woodhouse*. (Condition itself held not illegal.)

3. ('34) 21 AIR 1934 Oudh 329 (333) : 150 Ind Cas 713 (DB), *Audesh Singh* v. *Commissioner, Lucknow*.

Note 3

1. ('10) 6 Ind Cas 513 (518) : 34 Bom 604, *Jaina Bai* v. *Sethna*.

2. ('82) 5 Mad 173 (179) (DB), *Secretary of State* v. *Arathoon*.

provisions being Ss. 19, 19A, 39, 53 and 55. By virtue of this paragraph, a gift also can be revoked on the grounds referred to in the said sections. Thus, a gift can be revoked on the ground of coercion, fraud, misrepresentation or undue influence.[1]

6. Coercion. — A contract brought about by coercion is voidable under S. 19 of the Contract Act. Consequently, a gift brought about by coercion would under this section be revoked.

"Coercion" is defined under S. 15 of the Contract Act as follows:

> "'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> *Explanation.* — It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

In *Chikkam Ammiraju* v. *Seshamma*,[1] where a husband attempted to commit suicide in consequence of which he obtained a deed of release from his wife and the son, it was held that his act amounted to 'threatening to commit an act forbidden by the Penal Code' and therefore to 'coercion' and that the deed was, therefore, liable to be set aside.

7. Fraud.—Since a contract procured by fraud is voidable under S. 19 of the Contract Act, a gift obtained by fraud would, under this section, be revocable at the option of the donor.[1]

'Fraud' has been defined in section 17 of the Contract Act, 1872, as follows:

> "*17.* 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it;
>
> (4) any other act fitted to deceive;
>
> (5) any such act or omission as the law specially declares to be fraudulent.
>
> *Explanation.* — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

Note 5

1. ('18) 5 AIR 1918 Cal 615 (617) : 45 Cal 434 : 41 Ind Cas 878 (DB), *Behari Lal* v. *Sidhu Bala*.

Note 6

1. ('18) 5 AIR 1918 Mad 414 (416) : 41 Mad 33 : 40 Ind Cas 352 (SB).

Note 7

1. (1866) L R 2 Eq 319 (322) : 35 L J Ch 684 : 14 L T 394, *Wilkinson* v. *Joughin*.

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8. Misrepresentation. — A gift may be revoked if it had been caused by a misrepresentation of fact.[1]

'Misrepresentation' has been thus defined in S. 18, Contract Act, 1872, as follows :

"*18.* 'Misrepresentation' means and includes —

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

9. Undue influence. — A contract is, under S. 19A of the Contract Act, voidable on the ground of undue influence. A gift brought about by undue influence will, accordingly, under this section, be revocable by the donor.

'Undue influence' is the most common ground on which a gift is generally sought to be revoked. It has been defined in S. 16, Contract Act, 1872, as follows :

"*Section 16.* (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of S. 111 of the Indian Evidence Act, 1872.

Illustrations.

(a) *A*, having advanced money to his son, *B*, during his minority, upon *B's* coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B's* influence over him as his medical attendant, to agree to pay *B*, an unreasonable sum for his professional services. *B* employs undue influence.

Note 8

1. (1900) 1 Ch 354 (362) : 69 L J Ch 278 : 82 L T 412, *In re Glubb.*

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(c) *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence."

In *Sital Prasad* v. *Prabhu Lal*,[1] Straight, J., observed as follows :

"It is of the most serious public importance that the free and voluntary contracts of persons in favour of others should, in no way, be interfered with or disturbed by the Courts of law, and it is not because a man chooses to make an ill-considered or foolish contract, that therefore the Courts of law are to step in and relieve him of the consequences of his act. . . . . But what the Courts in this country will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit."

In *Allcard* v. *Skinner*,[2] Lindley, L. J., explains the principle as follows :

"What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded on the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction. . . . . On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws."

The relation of dependence arises (a) from a special authority or confidence reposed in the donee, or (b) from the feebleness in mind or body of the donor. There are many classes of influence in which the donee from his position is presumed to be likely to have exercised special influence over the mind of the donor, though the Courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will *prima facie* be made.[2a] Some examples of such

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Note 9

1. ('88) 10 All 535 (544, 545) : 1888 All W N 221 (DB).
2. (1887) 36 Ch D 145 (182, 183) : 56 L J Ch 1052 : 57 L T 61 : 36 W R (Eng) 251.
2a. ('27) 14 AIR 1927 P C 148 (150) : 103 Ind Cas 239 (PC), *Daing Soharah Binte* v. *Chabak Binte*.

[*See also* ('14) 1 AIR 1914 Low Bur 278 (280) : 26 Ind Cas 39 : 8 Low Bur Rul 235, *Maung Pu* v. *Lucy Moss*. (Under the English law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law even if made during the donor's illness and a few days before his death. The Indian law in this respect would be the same. Otherwise no gift by an old father to his son would be valid, unless the son could show that the confidential relationship, i. e., the intimate relationship of the father and son, had ceased.)]

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influence are, the influence of a solicitor over his client,[3] of a medical attendant over his patient,[4] of a spiritual adviser over his disciple,[5] of a trustee over his *cestui que trust*,[6] of an executor over the beneficiary under the will,[7] of a guardian over his ward,[8] of a parent over his child,[9] of an agent over his principal,[10] and of a paramour over his mistress.[10a] In all such cases, and other cases of dependence the relationship itself does not necessarily preclude the making of the gift; but the burden is on the donee to show that there was no such influence. He can discharge the burden by showing that the gift was the spontaneous act of the donor, acting under circumstances which enabled the donor to exercise an independent will and which justifies the Court in holding that the gift was the result of the free exercise of the donor's will.[11]

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3. (1903) 1 Ch 27 (50) : 51 W R (Eng) 106 : 72 L J Ch 138 : 87 L T 624 : 19 T L R 29, *M. Wright* v. *Carter.*
('68) 10 Suth W R 469 (472) (DB), *Fuzeelun Beebee* v. *Omdah Beebee.*
('30) 17 AIR 1930 Mad 317 (320, 321) : 120 Ind Cas 882 (DB), *Vasi Reddi Balachandra* v. *Subbaya.*
(1902) 1902 App Cas 271 (276, 277) : 71 L J Ch 609 : 86 L T 805 : 18 T L R 602, *Willis* v. *Barron.*
('95) 5 Mad L Jour 233 (237) (DB), *Sri Raja Papamma Row* v. *Sitaramayya.*
(1895) 2 Q B 679 (683) : 44 W R (Eng) 116 : 65 L J Q B 34 : 73 L T 428, *Liles* v. *Terry.*
[*See* (1889) 61 L T 8 (9) : 37 W R (Eng) 339 : 53 J P 212, *Tyars* v. *Alsop.*]

4. ('37) 172 Ind Cas 527 (528) (PC), *James Augustus Williams* v. *Patience Pratt Jahnson.*
(1881) 8 Q B D 587 (589) : 29 W R (Eng) 558 : 50 L J Q B 460 : 45 L T 694, *Mitchell* v. *Homfray.*

5. ('90) 12 All 523 (529) : 1890 All W N 56 (DB), *Mannu Singh* v. *Umadat Pande.*
(1868) 6 Eq 655 (674) : 16 W R (Eng) 824 : 18 L T 451 : 37 L J Ch 674, *Lyon* v. *Home.*
(1764) 28 E R 908 (910) : 2 Eden 286, *Norton* v. *Relly.*
(1860) 66 E R 103 (113) : 2 Giff 246 : 29 L J Ch 857 : 6 Jur (N S) 1066 : 8 W R (Eng) 742, *Nottidge* v. *Prince.*
[*See also* (1807) 14 Ves 273 (300) : 33 E R 526 (536), *Huguenin* v. *Baseley.*]

6. ('06) 30 Bom 578 (589) : 8 Bom L R 525 (DB), *Raghunath* v. *Varjivandas Madanji.*

7. (1893) 1893 W N 128, *Wheeler* v. *Sargeant.*

8. (1804) 9 Ves 292 (297, 298) : 32 E R 615 (617) : 1 Smith K B 226, *Hatch* v. *Hatch.*
(1754) 28 E R 349 (350) : 2 Ves Sen 547, *Hylton* v. *Hylton.*

9. (1855) 114 R R 60 (64, 70) : 8 De G M & G 133 : 25 L J Ch 753 : 4 W R (Eng) 410 : 2 Jur (NS) 599, *Wright* v. *Vanderplank.*
(1856) 5 H L C 627 (655, 663) : 10 E R 1046 (1058, 1061) : 25 L J Ch 482 : 2 Jur (NS) 503 : 4 W R (Eng) 471, *Savery* v. *King.*
('05) 30 Mad 169 (174) : 17 Mad L Jour 19 (FB), *Lakshmi Doss* v. *Roop Laul.*
(1900) 1 Ch 243 (245, 246) : 69 L J Ch 164 : 82 L T 84, *Powell* v. *Powell.*

10. ('27) 14 AIR 1927 P C 148 (150) : 103 I.C. 239 (PC), *Daing Soharab Binte* v. *Chabak Binte.*
('03) 25 All 358 (364) : 1903 All W N 70 (DB), *Phulchand* v. *Lakkhu.*

10a. ('38) 25 A I R 1938 Bom 304 (306) : 176 Ind Cas 187 (DB), *Shivgangawa* v. *Basangouda.*

11. ('29) 16 AIR 1929 PC 3 (6) : 115 Ind Cas 733 (PC), *Inche Noriah* v. *Shaik Allie.*

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There is no rule of law that the gift is invalid in the absence of competent independent advice.[12] The possession of competent independent advice or the absence of it, is, no doubt, a fact relevant to the issue, whether the donor thoroughly comprehended and deliberately, and of his own free will, carried out the transaction. But if upon review of the facts, the conclusion is reached that the obtaining of independent advice would not have made any difference in the result, then the deed ought to stand, even when no independent advice was obtained.[13]

('27) 14 A I R 1927 P C 148 (150) : 103 Ind Cas 239 (PC), *Daing Soharah Binte* v. *Chabak Binte.*
('91) 18 Cal 545 (548) : 18 Ind App 144 (PC), *Wajid Khan* v. *Ewaz Ali Khan.*
(1887) 36 Ch D 145 (171) : 56 L J Ch 1052 : 57 L T 61 : 36 W R (Eng) 251, *Allcard* v. *Skinner.*
('12) 15 Ind Cas 529 (532) (DB) (Bom), *Rajaram* v. *Khandu Balu.*
('34) 21 A I R 1934 All 507 (509) : 152 Ind Cas 146 (DB), *Mt. Azizunnissa* v. *Suraj Husain.*
('30) 17 A I R 1930 Sind 25 (29) : 118 Ind Cas 737 (DB), *Safdar Ali* v. *Nur Mahomed.*
('37) 172 Ind Cas 527 (528) (PC), *Williams* v. *Johnson.*
('92) 5 C P L R 44 (45), *Mt. Chimnabai* v, *Paiku.*
('22) 9 A I R 1922 Oudh 59 (71, 73) : 65 Ind Cas 380, *Mt. Chauras Kuar* v. *Mt. Abhairaj Kuar.*
('88) 10 All 535 (545) : 1888 All W N 221 (DB), *Sital Prasad* v. *Parbhu Lal.*
('03) 25 All 358 (363) : 1903 All W N 70 (DB), *Phul Chand* v. *Lakhu.*
('31) 18 AIR 1931 Oudh 34 (38) : 130 Ind Cas 119 (DB), *Tribhuwan Datt* v. *Someshwar Datt.*
('91) 15 Bom 549 (563), *Bai Manigavri* v. *Narondas Calliandas.*
('70) 7 Bom H C R O C 27 (33), *Rujabai* v. *Ismail Ahmed.*
(1903) 1 Ch 27 (50) : 51 W R (Eng) 106 : 72 L J Ch 138 : 87 L T 624, *Wright* v. *Carter.*
(1881) 8 Q B D 587 (589) : 29 W R (Eng) 558 : 50 L J Q B 460 : 45 L T 694, *Mitchell* v. *Hamfray.*
(1902) 1 Ch 765 (769) : 71 L J Ch 374 : 50 W R (Eng) 444 : 86 L T 663, *Re Haslam and Hier Evans.*
(1893) 1 Ch 736 (752) : 62 L J Ch 515 : 68 L T 619, *Moreley* v. *Loughman.*
(1844) 7 Beav 551 (560) : 8 Jur 761, *Archer* v. *Hudson.*
[*See also* ('21) 8 AIR 1921 Mad 394 (397): 68 Ind Cas 352 (DB), *Rajarajeswara Sethupathi Avergal* v. *Kupusami Iyer.*]

12. ('38) 25 AIR 1938 PC 38 (40) : 172 Ind Cas 720 : 32 Sind L R 285 (PC), *Sinkandar Begam* v. *Zulfikar Wali Khan.*
('13) 21 Ind Cas 985 (988) : 36 All 81 : 41 Ind App 23 : 16 Oudh Cas 378 (PC), *Kali Baksh Singh* v. *Ram Gopal Singh.*
('29) 16 AIR 1929 PC 3 (7) : 115 Ind Cas 733 (PC), *Inche Noriah* v. *Shaik Allie.*
('34) 21 AIR 1934 All 179 (181, 182) : 148 Ind Cas 528 (DB), *Iftikhar Wali Khan* v. *Sikandar Begam.*
('13) 20 Ind Cas 717 (720) (DB) (Cal), *Keshab Lal* v. *Radha Raman.*
('18) 5 AIR 1918 Cal 363 (371) : 48 Ind Cas 561 (SB), *Mariam Bibi* v. *Mahomed Ibrahim.*
('29) 16 AIR 1929 Lah 309 (311) : 116 Ind Cas 899 : 10 Lah 761 (DB), *Fayyaz-uddin* v. *Kulabuddin.*
('25) 12 AIR 1925 PC 204 (209) : 89 Ind Cas 649 : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (PC), *Mt. Faridunissa* v. *Mukhtar Ahmad.*

13. ('13) 21 Ind Cas 985 (987, 988) : 36 All 81 : 16 Oudh Cas 378 (PC), *Kali Bakhsh Singh* v. *Ram Gopal Singh.*

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Similarly, the absence of the power of revocation in the gift deed is merely a circumstance to be weighed with the other circumstances of the case.[14] Nor will the Courts consider the propriety or impropriety of the clauses except as evidence that the settlor did not understand what he was doing.[14a]

In *Muhammad Baksh* v. *Hoseini Bibi*,[15] Lord Macnaghten pointed out the following questions as being those which a Court should consider in deciding the issue of undue influence :

(a) whether the gift in question is one which a right minded person might be expected to make;
(b) whether the gift is or is not an improvident act on the donor's part;
(c) whether the gift is such as to have required advice if not obtained by the donor; and
(d) whether the intention to make the gift originated with the donor.

10. Pardanashin women.—*Pardanashin* women have always been treated as a class of persons specially exposed to undue influence. In the case of deeds taken from them, the burden of proof rests, as in the case of all improvident transactions by persons who are dependent upon or subject to the influence of others, on those who found their claim on them[1] and the Courts have been careful to see that the

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('34) 21 AIR 1934 All 179 (181) : 148 Ind Cas 528 (DB), *Iftikhar Wali Khan* v. *Sikandar Begam.*
('18) 5 AIR 1918 Cal 363 (371) : 48 Ind Cas 561 (SB), *Mariam Bibi* v. *Mahomed Ibrahim.*
('36) 1936 Oudh W N 273 (277) (DB), *Rajjan Khatun* v. *Ibrar Bano.*
(1866) L R 1 Ch App 252 (257) : 14 W R (Eng) 292 : 13 L T 778 : 12 Jur (NS) 178 : 35 L J Ch 267, *Rhodes* v. *Bate.*

14. (1873) 8 Ch App 430 (438) : 42 L J Ch 444 : 28 L T 383 :21 W R (Eng) 373, *Hall* v. *Hall.*
(1871) L R 7 Ch App 244 (247) : 20 W R (Eng) 129 : 41 L J Ch 211, *Phillips* v. *Mullings.*
(1881) 18 Ch D 668 (670) : 44 L T 918 : 30 W R (Eng) 472, *Henry* v. *Armstrong.*
('12) 15 Ind Cas 529 (533) (DB) (Bom), *Rajaram Rajaram* v, *Khandu Balu.*
(1863) 8 L T (NS) 777 (778) : 31 Beav 629 : 9 Jur (NS) 370, *Toker* v. *Toker.*

14a. (1883) 23 Ch D 278 (281) : 31 W R (Eng) 596 : 52 L J Ch 661 :49 L T 109, *Dutton* v. *Thompson.*

15. ('88) 15 Cal 684 (698-700) : 15 Ind App 81 (PC).

Note 10

1. ('22) 9 AIR 1922 P C 14 (16) : 43 All 525 : 48 Ind App 381 : 64 Ind Cas 559 (P C), *Kamawati* v. *Digbijai Singh.*
('91) 18 Cal 545 (548) : 18 Ind App 144 (148) (PC), *Wajid Khan* v. *Ewaz Ali.*
('86) 8 All 267 (269, 270): 1886 All W N 91 (DB), *Behari Lal* v. *Habiba Bibi.*
('95) 17 All 1 (12): 21 Ind App 148 (P C), *Deo Kuar* v. *Man Kuar.*
('31) 18 AIR 1931 Nag 69 (71) : 134 Ind Cas 259, *Vithal* v. *Narayan.*
('18) 5 AIR 1918 Pat 356 (358) : 45 Ind Cas 691 (DB), *Zakir Raza* v. *Madhusudhan Dass.*
('16) 3 AIR 1916 Oudh 10 (13): 35 Ind Cas 395 (DB), *Nisar Hussain* v. *Mt. Ashraf Un-Nissa.*
[*See also* ('68) 1 Beng L R (O C) 28 (32, 33, 34) (DB), *Manohar Das* v. *Bhagabati Dasi.*]

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strongest and most satisfactory proof is given by the person who claims under a sale or gift from them, that the transaction was a real or *bona fide* one and fully understood by the woman whose property is dealt with.[2]

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2. ('12) 16 Ind Cas 197 (200): 34 All 455: 15 Oudh Cas 271: 39 Ind App 156 (PC), *Sajjad Husain* v. *Abid Husain.*

('22) 9 AIR 1922 P C 14 (15) : 43 All 525 : 48 Ind App 381 : 64 Ind Cas 559 (PC), *Kamawati* v. *Digbijai Singh.*

('74) 21 Suth W R 340 (342) : 1 Ind App 192 (PC), *Tacoordeen Tewary* v. *Ali Hossein.*

('95) 17 All 125 (134) : 1895 All W N 24 (DB), *Achhan Kuar* v. *Thakur Das,* (Affirmed in 21 All 71 (PC).)

('29) 16 AIR 1929 Cal 77 (78) : 111 Ind Cas 746 (DB), *Kalamjan Bibi* v. *Sahajana Bibi.* (In the case of an absolute gift or an absolute sale by a pardanashin woman it is not always necessary that there should be proof of explanation of the terms of the document — It would be sufficient in many cases to show that the pardanashin woman knew that it was an absolute conveyance of title by which she was divesting herself of all interest in the property.)

('70) 13 Suth W R P C 3 (3) (PC), *Sookyaboye* v. *Latchmi.*

('72) 17 Suth W R 523 (524) (PC), *Fuzzul Hossein* v. *Amjud Ali.*

('18) 5 AIR 1918 Oudh 62 (70) : 44 Ind Cas 645 (DB), *Ganga Baksh Singh* v. *Gokul Prasad.*

('95) 18 Mad 257 (262) (DB), *Badi Bibi* v. *Sami Pillai.*

('75) 23 Suth W R 453 (456) (DB), *Delroos Banoo* v. *Syud Ashgur.*

('10) 5 Ind Cas 539 (545) : 37 Cal 526 (DB), *Sururjigar* v. *Baroda Kanta.*

('13) 20 Ind Cas 717 (720) (DB) (Cal), *Keshablal* v. *Radha Raman.*

('14) 1 AIR 1914 Cal 223 (227) : 23 Ind Cas 401 (DB), *Badiatannessa* v. *Ambikacharan.*

('78) 3 Cal 324 (327) (PC), *Ashgar Ali* v. *Delroos Banoo.*

('69-70) 13 Moo Ind App 419 (431) : 14 Suth W R P C 7 (PC), *Geresh Chunder* v. *Bhugobutty Debia.* (Deed of gift passed by Hindu widow in favour of her brother's wives to the exclusion of her husband's adopted son—Circumstances raising suspicion of fraud and absence of satisfactory proof that she knew nature of deed—Gift set aside.)

('10) 6 Ind Cas 689 (691) (DB) (All), *Kubra* v. *Ajodhia Prasad.*

('31) 18 AIR 1931 P C 303 (305) : 11 Pat 227 : 58 Ind App 450 : 134 Ind Cas 1076 (PC), *Tara Kumaree* v. *Chandra Mauleshwar.*

('38) 25 AIR 1938 P C 38 (40) : 32 Sind L R 285 : 172 Ind Cas 720 (PC), *Sikandar Begam* v. *Zulfikar Wali Khan.*

('66-67) 11 Moo Ind App 139 (168) : 10 Suth W R P C 3 (PC), *Mt. Thakoor Deyhee* v. *Baluk Ram.*

('92) 14 All 8 (12) : 1891 All W N 213 (DB), *Mariam Bibi* v. *Sakina.*

('14) 1 AIR 1914 All 320 (320) : 36 All 333 : 24 Ind Cas 34 (DB), *Maqbul Hussain* v. *Ghafurunissa.*

('24) 11 AIR 1924 All 362 (363) : 78 Ind Cas 180 : 46 All 310 (DB), *Aisha Bibi* v. *Mahfuz-un-Nissa.*

('34) 21 AIR 1934 All 179 (181, 182): 148 Ind Cas 528 (DB), *Iftikar Wali Khan* v. *Sikandar Begum.*

('81) 7 Cal 245 (250) : 8 Ind App 39 (PC), *Sudisht Lal* v. *Sheobarat Koer.*

('91) 18 Cal 545 (548) : 18 Ind App 144 (PC), *Wajid Khan* v. *Ewaz Ali.*

('19) 6 AIR 1919 PC 24 (26) : 47 Cal 175 : 46 Ind App 272 : 53 Ind Cas 131 (PC), *Soonitibala Debi* v. *Dhara Soondari.*

('71) 16 Suth W R 32 (33) (PC), *Kumeeroonnissa* v. *Syuffoollah.*

('74) 22 Suth W R 443 (444) (DB), *Rukhun* v. *Ahmed Hossein.*

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In *Kali Baksh Singh* v. *Ram Gopal Singh*,[2a] the Privy Council observed:

> "The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor."

If, however, *pardanashin* lady understands the transaction and acts as a free agent, the absence of competent independent advice will not invalidate the gift.[3] While it is important to maintain the principles of law laid down for the protection of *pardanashin* ladies, it is also important not to transmute such a legal protection into a legal disability.[4]

('68) 1 Beng L R (O C) 31*n* (32*n*), *Kanailal* v. *Kamini Debi.*

(1900) 5 Cal W N 505 (507) (FB), *Khas Mehal* v. *Administrator General of Bengal.*

('67) 7 Suth W R 98 (99) (DB), *Ram Pershad* v. *Phool Puttee.*

('02) 29 Cal 749 (757) : 29 Ind App 127 (PC), *Shambati Koeri* v. *Jago Bibi.*

('68) 9 Suth W R 297 (298) (DB), *Roop Narain* v. *Gugadkar Pershad.*

('25) 12 AIR 1925 Lah 196 (198) : 5 Lah 465 : 85 Ind Cas 169 (DB), *Sri Ram* v. *Nand Kishore.*

('36) 23 AIR 1936 Cal 721 (722) : 168 Ind Cas 137 (DB), *Khatejan Bibi* v. *Haji Mahomed Yusuf.*

('35) 22 AIR 1935 Cal 671 (673) : 159 Ind Cas 133 (DB), *Benoy Krishna* v. *Panchanan Sadhukhan.*

('25) 12 AIR 1925 Cal 239 (240) : 84 I. C. 490 (DB), *Bhola Nath* v. *Bhuth Nath.*

('89) 12 Mad 380 (384, 385) (DB), *Khatija* v. *Ismail.* (Conveyance held operative as it was voluntarily executed and was real and *bona fide* one.)

('81) 3 Mad 215 (220) (DB), *Sivithri Andarjanom* v. *Vasudevan Nambudripad.*

('27) 14 AIR 1927 P C 84 (86) : 101 Ind Cas 29 (PC), *Mt. Barkat-unissa* v. *Debi Baksh.*

('25) 12 AIR 1925 P C 204 (209) : 89 Ind Cas 649 : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C), *Mt. Faridunnissa* v. *Munshi Mukhtar Ahmad.*

('09) 3 Ind Cas 330 (333) (DB) (Cal), *Bindubashini Dasi* v. *Girdhari Lal Roy.*

('12) 16 Ind Cas 110 (113) : 39 Cal 933, *Kamini Dassee* v. *Krishna Chandra.*

('28) 15 AIR 1928 P C 303 (303, 304) : 110 Ind Cas 260 (PC), *Ruhulla* v. *Hassanalli Degumia.*

('14) 1 AIR 1914 Oudh 348(348):25 I.C.861(DB), *Mt. Miro* v. *Lachhman Prasad.*

('15) 2 AIR 1915 All 466 (467) : 26 Ind Cas 500 (DB), *Badri Pershad* v. *Gambhir Kunwar.*

('21) 8 AIR 1921 P C 118 (122) : 61 Ind Cas 486 : 47 Ind App 265 (PC), *Mati Lal Das* v. *Eastern Mortgage and Agency Co., Ltd.*

[*See also* ('66) 5 Suth W R 246 (247) (DB), *Soondur Kommaree Debia* v. *Kishoree Lal Sein.*]

2a. ('13) 21 Ind Cas 985 (987) : 36 All 81 : 41 Ind App 23 : 16 Oudh Cas 378 (PC).

3. See the cases cited under Pts. 13 and 14 of Note 9.

4. ('28) 15 AIR 1928 P C 303 (305): 110 Ind Cas 260 (PC), *Ruhulla* v. *Hasan Alli.*

('13) 21 Ind Cas 985 (989) : 36 All 81 : 41 Ind App 23 : 16 Oudh Cas 378 (PC), *Kali Bakhsh Singh* v. *Ram Gopal Singh.*

11. Mistake. — Under S. 20 of the Contract Act an agreement, both the parties to which are under a mistake of fact, is *void* and not merely voidable.[1] Again under S. 22 of that Act it is provided that the fact that *one* of the parties to a contract is under a mistake of fact does not render the contract voidable.

Thus, on the wording of the sections of the Contract Act no question of the rescission of the contract arises in such cases. It would seem to follow that a gift cannot be revoked merely on the ground that the donor was under a mistake of fact.[2] Section 36 of the Specific Relief Act, 1877, would, however, seem to suggest that a contract may be rescinded for mere mistake. That section runs as follows :

> *Section 36.* — Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

As pointed out by Pollock and Mulla in their work on "The Indian Contract and Specific Relief Acts", it is difficult to reconcile the language of that section (S. 36, Specific Relief Act, 1877) with Ss. 20 and 22 of the Contract Act, 1872.[3]

As to gifts to *persona designata*, see Note 12 on section 122.

12. Limitation for suit to revoke gifts. — See Notes on Art. 91 of the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.

13. Right to revoke gift—When may be lost. — A right to revoke a gift under the second paragraph of the section, may be lost by the donor's conduct amounting to an election by him not to revoke the gift,[1] though mere laches or delay in suing for relief will not destroy the right so long as it is not barred by limitation.[2]

14. Who may suspend or revoke gifts.—A right to revoke a gift under the provisions of this section may, of course, be exercised by the donor himself. It also survives after his death to his legal

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('16) 3 AIR 1916 Oudh 10 (13) : 35 Ind Cas 395 (DB), *Nisar Husain* v. *Mt. Ashrafunnissa.*

Note 11

1. ('30) 17 A I R 1930 All 252 (254) : 132 Ind Cas 39 (DB), *Mt. Rani Kuwar* v. *Mahabub Baksh.*
('20) 7 A I R 1920 Sind 59 (60) : 14 Sind L R 22 : 58 Ind Cas 591, *Hemumal Harpalmal* v. *Committee of Management, Hyderabad.*
[But see ('11) 10 Ind Cas 343 (344) (All), *Khuda Bux* v. *Fateh Chand.* (Submitted not correct.)]
2. (1863) 1 Mad H C R 393 (395) (DB), *Abhachari* v. *Rama Chandrayya.*
[*See also* ('75) 24 Suth W R 397*n* (398*n*) (DB), *Pubitra Dossee* v. *Damoodur Jana.*]
3. Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 6th Edn., page 830.

Note 13

1. (1881) 8 Q B D 587 (592) : 50 L J Ch 460 : 45 L T 694 : 29 W R (Eng) 558, *Mitchell* v. *Humfray.*
2. See Authors' Commentaries on the *Limitation Act*, 2nd (1942) Edn., Vol. 1, Preamble Note 5.

Section 126
Notes 14–16

representatives who may therefore revoke the gift.[1] But being a mere right to sue, it cannot be transferred by the donor and, consequently, a transferee from the donor cannot claim to exercise such right.[2]

15. Revocation if need be express. — The revocation of gift must, as in the case of rescission of contracts,[1] be by an express and unequivocal act. In the undermentioned case[2] where it was argued that the power of revocation was an incident of a gift by a Burmese Buddhist parent to his children, it was observed by the Lower Burma Chief Court that, assuming that such a power existed, it must be done by an *express* act, and could not be inferred merely from the fact that the donor conveyed the gifted property subsequently to another person.

16. "Save as aforesaid a gift cannot be revoked" — Paragraph 3. — It has been seen in Note 6 on S. 123 that an *incomplete gift* which has not been accepted by the donee, may be revoked by the donor before its acceptance.[1] But where a gift is *complete* and the donor has done all in his power to give effect to it, it is irrevocable except in the circumstances mentioned in this section.[1a] The provision in this section to that effect is merely a legislative

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Note 14

1. ('25) 12 A I R 1925 All 437 (438) : 47 All 619 : 88 Ind Cas 411 (DB), *Ghumna* v. *Ram Chanda Rao.*
('27) 14 AIR 1927 Bom 384 (387) : 51 Bom 133 : 100 Ind Cas 932 (DB), *Shravan* v. *Kashiram.*
(1893) 1 Ch 736 (752) : 62 L J Ch 515:3 R 592:68 L T 619, *Morley* v. *Loughman.*
[But see ('34) 21 AIR 1934 All 507 (511):152 Ind Cas 146 (DB), *Mt. Azizunnissa* v. *Siraj Husain.* (Right of revocation is personal to the donor — Submitted not correct.)]
Halsbury, *Laws of England*, Vol. XV, para 209 (cited in AIR 1927 Bom 384 (387).)

2. ('22) 9 A I R 1922 Pat 514 (523) : 2 Pat 52 : 68 Ind Cas 383 (DB), *Baijnath Singh* v. *Mt. Brijraj Kuer.*

Note 15

1. Pollock and Mulla, *The Indian Contract Act*, 4th Edition, page 362.

2. ('15) 2 A I R 1915 Low Bur 86 (87) : 30 Ind Cas 20 : 8 Low Bur Rul 185, *Lal Mahommed* v. *Mra Tha Aung.*

Note 16

1. Halsbury, *Laws of England*, Vol. 15, para. 852.
[*See also* ('24) 11 AIR 1924 Oudh 164 (165) : 74 Ind Cas 818, *Nanhun* v. *Ram Dayal.*]

1a. ('71) 8 Bom H C R (A C) 1 (5) (DB), *Collector of Ratnagiri* v. *Vyankatrao.*
('99) 23 Bom 131 (134) (DB), *Rajaram* v. *Ganesh.*
('18) 5 AIR 1918 Cal 615 (617) : 45 Cal 434 : 41 Ind Cas 878 (DB), *Behari Lall Ghose* v. *Sindhubala Dassi.*
('81) 5 Bom 630 (636) (DB), *Rambhat* v. *Lakshman Chintaman.*
('33) 20 AIR 1933 Rang 418 (422) : 149 Ind Cas 1113 (DB), *Lucy Moss* v. *Mah Nyein May.*
('86) 1886 All W N 86 (89) (DB), *Raghubansi Kuari* v. *Narbada Ram.*
[*See* (1854) 69 E R 279 (281) : 23 L J Ch 736 : 2 W R (Eng) 630 : 101 R R 796, *Tate* v. *Leithead.*]
[*See also* ('99) 23 Bom 518 (521) : 1 Bom L R 19 (DB), *Secretary of State* v. *Sitaram Shivram.*
('28) 15 AIR 1928 Oudh 35 (36) : 105 Ind Cas 132, *Sibta Din* v. *Biraj Rani.*]

Section 126 Notes 16–17

recognition of the doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers* v. *Beaumont*[2] :

> "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for, if you would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd."

17. Transferees for consideration without notice — Paragraph 4. — A right of revocation under this section cannot be exercised against a transferee for consideration without notice of the existence of such right.[1] A *volunteer* or a person who takes with notice of the existence of the right, cannot get the benefit of the saving clause.[1a] As was observed by Mukerji, J., in *Forman Ali* v. *Uzir Ali Shek*[2] :

> "It is a well-established proposition of law that in case of a gift tainted by undue influence and imposition of the person procuring the gift, even an innocent third party cannot retain the gift, if he is a mere volunteer. But if he is a purchaser for value without notice, there is no obligation of restitution on his part."

As to what amounts to notice, see Notes on section 3.

Section 127

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being

Onerous gift to disqualified person.

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2. (1682) 23 E R 342 (342) : 1 Vern 100.
Halsbury, *Laws of England*, Vol. 15, para. 831.

Note 17

1. ('38) 25 AIR 1938 Cal 157 (160) : 175 Ind Cas 712 (DB), *Ali Miji* v. *Uzir Ali Shek.* (Fact that purchaser was co-villager of donor held did not raise presumption of his having notice of undue influence.)
1a. ('38) 25 AIR 1938 Bom 97 (106) : 173 Ind Cas 817 (DB), *Lingo* v. *Dattaraya.*
('07) 30 Mad 169 (178) : 17 Mad L Jour 19 (SB), *Lakshmi Doss* v. *Roop Laul.*
('23) 10 AIR 1923 Mad 67 (68) : 69 Ind Cas 673 (DB), *Venkatarama Aiyar* v. *Aiyasami Aiyar.*
2. ('38) 25 AIR 1938 Cal 157 (160) : 175 I.C. 712 (DB).

Section 127
Note 1

aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) *A* has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in Y. He cannot take the shares in X.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Gifts subject to conditions.
4. Onerous gift to disqualified person.
5. Effect of acceptance of onerous gift.

Other Topics (miscellaneous)

Disqualified donee. See Note 4.

Section based on doctrine of election. See Note 2.

1. Analogous law. — The first *two* paragraphs of this section correspond to Ss. 122 and 123 of the Succession Act, 1925, which run as follows :

"*122.* Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (*X*), a prosperous joint stock company and also shares in (*Y*), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to *B* all his shares in joint stock companies; *B* refuses to accept the shares in (*Y*). He forfeits the shares in (*X*).

"*123.* Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to *B* the lease and a sum of money. *B* refuses to accept the lease. He will not by this refusal forfeit the money."

There is no provision in the Succession Act corresponding to the third paragraph of this section. The reason lies in the fact that *acceptance* is an essential element of a valid gift (see S. 122) whereas a bequest is valid independent of the acceptance thereof by the legatee. A person who has *accepted* a gift in his favour and thus completed the gift cannot repudiate his own act. In the case of a person incompetent to contract, however, the Legislature has in the third paragraph of this section provided an exception to the rule by giving such person an option to repudiate his own act under particular circumstances.

No such question of repudiation of the legatee's own act arises in the case of bequests, inasmuch as a valid bequest does not depend upon its being accepted by the legatee.

Section 127 Notes 2–4

2. Scope of the section. — As has been seen in Note 2 on S. 35 the doctrine of election is based on three broad principles : *firstly*, that every person who affects by a legal instrument to dispose of property must be taken to intend all that he has expressed and that such intention must be given effect to; *secondly*, that a man shall not be permitted to blow "hot and cold" with reference to the same transaction; and, *thirdly*, that he who receives advantage must bear the burden also : *qui sentit commodum sentire debet et onus*. This section is also based on the same principles.[1] Where a gift is in the form of a *single* transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, *prima facie* the intention of the donor is that the gift shall go as a whole[2] and this intention must be given effect to by the donee.[3] The first paragraph accordingly provides that in such cases, the donee can take nothing unless he accepts the gift fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, it cannot be said *prima facie* that the donor intended that the gift should go as a whole.[4] The principles stated above do not therefore apply to such case and the donee can accept one of the gifts and refuse the other.[5] This is provided for in the second paragraph of the section.

3. Gifts subject to conditions. — The burden contemplated by the section is one that *attaches to thing gifted*, e. g., shares in a company, subject to heavy calls. This section does not apply where the thing gifted is itself not burdened by any obligation, but the instrument of gift imposes a *condition* that the donee should discharge certain liabilities. In such cases, the donee accepting the gift will take it subject to the condition and is bound to perform the condition.[1] This, however, is not by virtue of this section, but under general principles of law.

4. Onerous gift to disqualified person. — It has been seen in Note 8 on S. 7, that a person incompetent to contract cannot *transfer*

Section 127 — Note 2

1. ('40) 27 AIR 1940 Lah 285 (288) : 190 Ind Cas 463 (DB), *Ram Sarup* v. *Shiv Dayal.*
2. (1883) 31 WR (Eng) 285 (285) : 22 Ch D 573 (577), *Guthrie* v. *Walford.*
3. (1834) 40 ER 96 (97) : 3 Myl & K 252, *Talbot* v. *Earl of Radnor.* (A legatee of a leasehold property held by the testator at a higher rent than it could be let after his death, cannot reject the gift of the property and retain an annuity under the will but must carry out the intention of the testator.)
4. (1860) 1 John & H 1 (12, 13) : 128 R R 242, *Warren* v. *Rundall.*
5. (1857) 3 Sm & G 468 (474) : 107 R R 149, *Mofett* v. *Bates.*
(1804) 32 E R 706 (709) : 9 Ves 525 (534), *Andrew* v. *Trinity Hall Cambridge.*

Note 3

1. ('33) 20 A I R 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan.*
('25) 12 AIR 1925 Nag 29 (30) : 80 Ind Cas 405, *Mt. Janki* v. *Mohanlal.*
(1828) 38 ER 885 (887) : 4 Russ 478. (Bequest with a condition to pay debts of the testator — The legatee accepting the bequest must pay the debts.)
(1830) 1830 Taml 393 (396) : 32 R R 302.
(1856) 23 Beav 33 (39) : 113 R R 20.

Section 127 Notes 4–5

property but can be a *transferee* of property. The third paragraph of this section shows that even a gift *subject to a burden* can be accepted by a person incompetent to contract without the intervention of a guardian.[1] But inasmuch as the incompetency of a person to contract prevents him from creating obligation as against himself, the law has reserved to him an option, on his becoming competent to contract, to repudiate his acceptance. If then he does repudiate his acceptance, he will of course have to return to the donor the thing gifted. If not, he will be bound to fulfil the obligation by which the gift is burdened.

The gift is complete from the moment of its acceptance. It is not in abeyance until the donee becomes competent to contract. Thus, the fact that the donee, after accepting the gift, dies before becoming competent to contract, will not affect the completeness of the gift.[2]

Until the donee actually repudiates his acceptance of the gift, he will be liable to fulfil the obligation imposed by the gift.[3]

5. Effect of acceptance of onerous gift. — Once onerous gift is accepted the donee becomes bound to fulfil the obligation by which the property gifted is burdened.[1]

Section 128

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by [a][and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

a. These words were inserted by Section 60 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Where a gift consists."
4. "Of the donor's whole property."
5. Liability of a universal donee.
6. Muhammadan law.
7. Onus of proof.

Other Topics (miscellaneous)

Distinction between this section and Section 53. See Note 2.
Surrender by Hindu widow whether universal gift. See Note 3.
Universal donee. See Note 2.

1. Legislative changes. — The words "and liabilities of" have been newly added by S. 60 of the Transfer of Property (Amendment)

Note 4

1. ('16) 3 A I R 1916 Nag 55 (55) : 13 Nag L R 18 : 39 Ind Cas 46, *Ganeshdas Bhiwaraj* v. *Suryabhan.*

2. ('97) 20 Mad 147 (148) (DB), *Subramania Ayyar* v. *Sitha Lakshmi.*

3. ('37) 24 AIR 1937 Oudh 517 (520) : 171 Ind Cas 296 (D B), *Bikham Lal* v. *Mt. Janak Dulari.*

Note 5

1. ('37) 24 AIR 1937 Oudh 517 (520) : 171 Ind Cas 296 (D B), *Bhikham Lal* v. *Mt. Janak Dulari.*

('36) 23 AIR 1936 Oudh 47(48):159 I.C. 54(DB), *Nisar Ahmad* v.*Manzur Ahmad*

Act, 1929 (XX of 1929). The reason for the addition has been given by the Special Committee as follows : Section 128 Notes 1–2

> "The scope of this section is made clear by the addition of the word "liabilities" after the word 'debts.' A donee should be liable to the extent of the property in his hands not only for the debts of the donor, but also for his other liabilities."[1]

2. Scope of the section. — Where the whole extent of a right which A has, is transferred to B, the 'translative' fact is called a "succession" and B is said to *succeed* to the right of A.[1] A *universal* succession takes place when the sum total of a man's rights and liabilities, called in Roman law, *universitates juris* is transferred to another. The Roman law recognised many forms of universal succession under which the whole of a man's property, whether consisting of rights in *rem* or rights in *personam* or of both combined, passed to another; and with the property or assets, *bona activa*, passed also the liabilities, *bona passiva*.[2] Under the English law, a universal succession is recognised only in the case of the *death* or *bankruptcy* of a person or the confiscation of his estate by the State. It cannot be brought about by the act of parties. This section is a departure from the English law in that it recognises a universal succession by gift.

The object of this section, like that of S. 53, is to prevent the rights of creditors from being defeated by their debtors disposing of their properties. But there are important differences between the two provisions :

(1) Section 53 deals with a transfer of *immovable property* by a debtor, whereas this section deals with gifts of both *moveable* and immovable property.

(2) Section 53 deals with transfers made *with intent to defeat or delay creditors*, whereas this section does not require any such intention.

(3) Under S. 53 the transfer itself is voidable at the option of the creditor or creditors defeated or delayed whereas under this section the gift cannot be avoided but the creditors can recover their debts from the donee.

As the Law Commissioners observed in their Report of 1879 :

> "Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud S. 53 of the revised bill would provide when the property is land. But an universal gift may *conceivably be honest* and comprise moveable property. It should therefore, we think, be specially provided for."

This section is also in accordance with the principle enunciated by the maxim of equity, *qui sentit commodum, sentire debt et onus* (he

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Section 128 — Note 1

1. See the Report of the Special Committee, printed on page 22 (68).

Note 2

1. Holland, *Jurisprudence*, 6th Edition, page 141.
2. Holland, *Jurisprudence*, 6th Edition, page 142.

Section 128 Notes 2–4

who derives the advantage ought to sustain the burden). There is no compulsion on the donee to accept a gift made to him. If he finds that the property is burdened with too much debts he is free to reject the gift. But if he accepts the entire assets of the donor, it is only just and equitable that he should share the liabilities of the donor.[3]

3. "Where a gift consists." — A gift is clearly different from a *trust*. In a trust, the trustees get no benefit for themselves and even if the deed of trust comprises all the property of the author of the trust, the trustees would not be liable personally for the debts of the author of the trust.[1]

A *surrender* by a Hindu widow in favour of the next reversioner is not a transfer of property.[1a] It is therefore not a gift by the surrenderer and this section cannot apply to such a transaction.[2] But the mere fact that the word "surrender" is used in an instrument is not conclusive on the question. It may really be a gift under the guise of a surrender. Thus, where a Hindu widow purported to surrender her interest in favour of a person who was *not the next reversioner* jointly with the next reversioner, it was held that the transaction was really a universal gift within the meaning of this section, and not merely a surrender as contemplated by the Hindu law.[3] In the undermentioned case,[4] the High Court of Calcutta has, however, assumed that a surrender by a Hindu female in favour of her next reversioners is a universal gift within the meaning of this section. It is submitted that this view is not correct. But the actual decision in the case holding the reversioners liable for the debts of the surrenderer, may be supported independently of this section, on the ground that they had expressly *undertaken* to pay such debts.

4. "Of the donor's whole property." — The section applies only where the gift is of the donor's *whole property*. If *any* portion of the donor's property is excluded from the gift the section will not apply, no matter what the *value* of the property excluded is or whether it is moveable or immovable property.[1] It was held in the undermentioned

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3. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan Gopal*.

See also the Report of the Second Law Commission, 1879, printed at p. 5 (16).

Note 3

1. ('39) 26 AIR 1939 Oudh 161 (174): 181 Ind Cas 155 : 14 Luck 548 (DB), *Matinuzzaman Khan* v. *H. Hunter*.

1a. See Note 4 on Section 5.

2. ('36) 161 Ind Cas 412 (414) (Nag), *Dayaram* v. *Saku Bai*.

3. ('36) 161 Ind Cas 412 (414) (Nag), *Dayaram* v. *Saku Bai*.

4. ('37) 24 AIR 1937 Cal 226 (228, 229) : 172 Ind Cas 121, *Sudhamoyee Bose* v. *Bhujendra Nath*.

Note 4

1. ('30) 17 AIR 1930 All 180 (182): 123 Ind Cas 324 (DB), *Shyam Behari Mal* v. *Maha Prasad*.

('32) 19 AIR 1932 Oudh 40 (43): 7 Luck 411: 135 Ind Cas 369 (DB), *Mt. Brij Raj Kuar* v. *Ram Dayal*.

case,[2] where *after* a gift of the whole of the properties of the donor, there was a compromise between the donor and the donee, whereby the former was given back a land for which he was to pay rent to the donee, and which was to return to the donee in the event of the donor dying without issue, that this fact did not prevent him from being a universal donee. Mukerji, J., rested his decision on the fact that "for all *practical purposes* the applicant holds the entire property of Kumar Singh (donor)." The decision may also be supported on the ground that transactions *subsequent* to the gift will not affect the nature of the gift when made.

5. Liability of universal donee. — The liability of a universal donee under this section is similar to that of the legal representative of a deceased person in respect of the liabilities of the latter, under Ss. 50 and 52 of the Code of Civil Procedure. It is limited *to the extent of the property received by him.*[1] The words "*personally* liable . . . . . *to the extent of the property* comprised therein" show that the liability is to be enforced in the first instance against the property received under the gift, but that if the donee has disposed it of to any extent, for purposes other than the discharge of such liability, it is to be enforced against the donee *personally*.

The liability under this section is independent of any *condition expressed* in the gift that the donee should pay the debts of the donor. Where such a condition is expressed in the instrument of gift (which need not be of the donor's whole property), the donee will be bound, if he accepts the gift to pay the debts, and this liability is not limited to the extent of the property received by him.[2]

A universal donee cannot escape liability by reason merely of the fact that the donor has, after the date of the gift, made part payments towards the debt or acknowledged it, and thus kept the debt alive.[3]

('28) 15 AIR 1928 All 500 (502) : 50 All 818 : 115 Ind Cas 114 (DB), *Anrudh Kumar* v. *Lachhmi Chand.*

('41) 28 AIR 1941 Oudh 205 (210) : 192 Ind Cas 619 (DB), *Ram Raj Singh* v. *Lal Chandra Pratap.* (Donor retaining equity of redemption in property other than gifted and owning house and moveables—Donee is not universal donee.)

2. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan Gopal.*

Note 5

1. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan Gopal.*

('35) 22 AIR 1935 Oudh 432 (432, 433) : 11 Luck 199 : 155 Ind Cas 303 (DB), *Krishna Behari* v. *Mt. Ahmadi.*

('40) 27 AIR 1940 Lah 285 (288) : 190 Ind Cas 463 (DB), *Ram Sarup* v. *Shiv Dayal.*

('28) 15 AIR 1928 All 234 (235): 116 Ind Cas 86 (DB), *Sachitanand* v. *Radhapat.*

2. (1828) 38 E R 885 (887): 4 Russ 478.

See also Note 3 on Section 127.

3. ('12) 17 Ind Cas 619 (620, 621) (DB) (Mad), *Velayudam Pillai* v. *Vaithyalingam Pillai.*

('37) 1937 Mad W N 395 (396), *Satyarayana* v. *Venkatanarsimham.* (Renewal of pronote after gift.)

Section 128 Notes 5-7

In the undermentioned case[4] where the donor owed two debts to the same person, one a mortgage-debt and the other an unsecured debt and the donee of the whole of the donor's property sought to redeem the mortgage-debt only, it was held that the mortgagee was entitled to tack on the unsecured debt also to the mortgage-debt and claim that both should be paid.

Where after a valid gift of his whole property, the donor was adjudicated an insolvent, it was held that the fact that the donee was liable for the debts of the insolvent would not authorise the Court acting under S. 4 of the Provincial Insolvency Act, to sell the properties in the hands of the donee for payment of the debts.[5]

6. Muhammadan law. — By virtue of S. 129 this section does not affect any rule of Muhammadan law. But there is no rule of Muhammadan law in conflict with this section. The section will, therefore, apply to gifts by Muhammadans or in favour of Muhammadans.[1]

A *hiba-bil-ewaz* i. e., a gift for consideration is really not a gift at all and consequently this section has no application to such gifts.[2]

7. Onus of proof. — The *onus* of showing that a transaction in favour of a particular person is a universal gift so as to render him liable under this section, is on the person setting it up.[1]

Section 129

Saving of donations mortis causa and Muhammadan law.

[a]**129.** Nothing in this Chapter relates to gifts of immoveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, [b](* * *).

a. Home Department No. 61/40—Judicial, Dated 16th November 1940.— In exercise of the powers conferred by the fourth paragraph of Section 1 of the Transfer of Property Act, 1882 (IV of 1882), the Central Government is pleased to extend Section 129 of the said Act to the following areas in the Province of Delhi, namely :

(a) Area within the jurisdiction of the Delhi Municipal Committee ;

(b) Area within the jurisdiction of the New Delhi Municipal Committee ;

(c) Area within the jurisdiction of the Notified Area Committee, Civil Lines; and

(d) Area within the jurisdiction of the Notified Area Committee, Fort.

——Gazette of India, Part I, dated 23-11-1940.

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4. ('83) 7 Bom 101 (106) (DB), *Ragho Govind* v. *Balwant Amrit.*

5. ('30) 17 AIR 1930 Pat 305 (306) : 124 Ind Cas 639 (DB), *Radhika Kuar* v. *Sushil Chandra.*

Note 6

1. ('30) 17 AIR 1930 Oudh 268 (270) : 127 Ind Cas 865 (DB), *Abid Husain* v. *Ram Nidh.*

('35) 22 AIR 1935 Oudh 432 (433) : 11 Luck 199 : 155 Ind Cas 303 (DB), *Krishna Behari* v. *Mt. Ahmadi.*

2. ('27) 14 AIR 1927 Oudh 176 (176) : 101 Ind Cas 690 (DB), *Ramcharan* v. *Mt. Abida Begum.*

Note 7

1. ('28) 15 AIR 1928 All 500 (502, 503) : 50 All 818 : 115 Ind Cas 114 (D B), *Anrudh Kumar* v. *Lachchmi Chand.*

b. The words "or, save as provided by Section 123, any rule of Hindu or Buddhist law" were omitted by Section 61 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Gift in contemplation of death.
4. Hindu and Buddhist law — Gifts in contemplation of death.
5. "Any rule of Muhammadan law."

1. Legislative changes.—The words "or save as provided by S. 123 any rule of Hindu or Buddhist law" were omitted from the original section, by S. 61 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The reasons for the omission were stated by the Special Committee :

> " Apart from the provisions of S. 123, S. 129 saves all rules of Hindu and Buddhist law relating to gifts. The provisions of Chapter VII relating to gifts are based on general principles and do not conflict with the rules of Hindu or Buddhist law. The Government of Burma does not object to the omission of the word 'Buddhist' from the Section. We propose to omit the reference to Hindu and Buddhist law."

See also the undermentioned case.[1]

2. Scope of the section.—This section saves from the operation of the provisions of this chapter gifts in contemplation of death and declares that such provisions shall not affect any rule of Muhammadan law. Where there is *no* rule of Muhammadan law inconsistent with any of the provisions of the chapter, those provisions will directly apply even where the transaction is between Muhammadans.[1] But where a rule of the Muhammadan law is in conflict with any provision in this chapter, the former will prevail over the latter.[2]

A Provincial Government has, under S. 1 of the Act, power to extend any part of this Act, to any territory under its administration, to which the Act did not originally apply. But the Provincial Government cannot under that provision extend *particular sections* of the Act so as to give them an operation different from that which they have in the Act itself read as a whole. Where it was argued, that the Burma Goverinment had extended only S. 123 of the Act to Burma and not S. 129, and that, therefore, even a gift by a Muhammadan was governed by S. 123 of the Act, their Lordships of the Privy Council observed[3] :

Section 129 — Note 1

1. ('27) 14 AIR 1927 Oudh 278 (283) : 104 Ind Cas 299, *Krishnapal Singh* v. *Sri Raj Kuar.* (Unless there is conflict between the T. P. Act and Hindu law, former applies to Hindus—Case before the amendment of 1929.)

Note 2

1. ('30) 17 AIR 1930 Oudh 268 (270) : 127 Ind Cas 865 (DB), *Abid Husain* v. *Ram Nidh.* (No rule of Muhammadan law conflicts with the provisions of S. 128, T. P. Act.)

2. ('34) 147 Ind Cas 504 (505) (DB) (Pat), *Bishun Prasad Sheoratan Prasad* v. *Muhammad Nayim.*

3. ('27) 14 AIR 1927 P C 22 (23) : 54 Ind App 23 : 5 Rang 7 : 100 Ind Cas 32 (PC), *Ma Mi* v. *Kallander Ammal.*

Section 129
Notes 2-3

"The power to extend any part of the Act to Burma did not authorise the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole and to abrogate in the area to which the extension applied a rule of Muhammadan law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act."

It may be noted that this section has been, by a Notification dated 16th November 1940, extended to the areas within the jurisdiction of the Delhi Municipal Committee, the New Delhi Municipal Committee, the Notified Area Committee, Civil Lines and the Notified Area Committee, Fort.[4]

3. **Gift in contemplation of death.**—A gift in contemplation of death is known in the Roman Civil law as *donatio mortis causa*. Such gifts are now governed entirely by the Succession Act, 1925. Section 191 of that Act provides as follows :

"(1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, *delivers*[1] to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver ; and shall not take effect if he recovers from the illness during which it was made ; nor if he survives the person to whom it was made."[1a]

A gift of the above nature is the middle point between a gift *inter vivos* and a legacy.[2] "It is like gift *inter vivos* in presupposing an immediate increase in the potentiality of the donee by the donor, and hence sharply distinguishes itself from the legacy. But added to

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4. See 'Gazette of India' Part I, dated 23rd November 1940 Notification No. 61 of 1940.

Note 3

1. (1874) 18 Eq 474 (485) : 43 L J Ch 617 : 30 L T 752 : 22 W R (Eng) 729, *Moore* v. *Moore.*
(1868) 6 Eq 198 (200) : 37 L J Ch 633 : 16 W R (Eng) 835, *Hewitt* v. *Kaye.* (Delivery of the donor's cheque — Cheque not presented to be cashed in donor's life-time—Not a good *donatio mortis causa.*)
(1827) 1 Bligh (N S) 497 : 4 E R 959, *Duffield* v. *Eleves.* (Mortgage security delivered—Good *donatio mortis causa.*)
(1789) 2 Bro C C 612 : 1 Ves Jun 407 : 29 E R 337, *Hill* v. *Chapman.*
(1793) 2 Ves Jun 111 : 30 E R 548 : 4 Bro C C 286, *Tate* v. *Hilbert.*
(1880) 43 L T 117 (119) : 15 Ch D 651 : 50 L J Ch 30 : 28 W R (Eng) 891, *In re Mead ; Austin* v. *Mead.*

1a. (1896) 2 Q B 283 (286, 288) : 65 L J Q B 587 : 74 L T 728, *Cain* v. *Moon.*
(1921) 1 Ch 343 (348) : 90 L J Ch 192 : 124 L T 500, *In re Korvine's Trust ; Levashoff* v. *Block.*
('71) 6 Mad H C R 270 (273, 274) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*
('69) 3 Beng L R (O C) 113 (121, 122) (DB), *Upendra Krishna* v. *Nabin Krishna.* (Per Sir Barnes Peacock C. J.)

2. ('71) 6 Mad H C R 270 (278) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

this distinctive mark is another which not less sharply distinguishes it from the ordinary donation and approximates it to the legacy—that of being actually perfected by the death of the giver."[3]

A gift in expectation of *suicide* cannot be said to be one made in contemplation of death for the purposes of this section.[4]

Whatever strictness is required in the proof of a testamentary disposition is at least equally required in cases of gifts in contemplation of death.[5]

4. Hindu and Buddhist law—Gifts in contemplation of death. — Under the strict Hindu law, a gift or a gratuitous contract made by a person afflicted with an incurable distemper is void. The incapacity is attached to the mind agitated with fever, anger or lust or the pain of an incurable disease.[1] The idea is that under the above circumstances a person cannot form a rational estimate as regards the consequences of his action.[2] But this strict rule of Hindu law was never followed in practice. In the undermentioned case[3] Mr. Justice Holloway held that a gift even during a mortal illness was valid provided it fulfilled all the requisites of a valid gift under the Hindu law. He observed : "To allow a gift in form of a will to be valid and deny that validity to one much nearer, the nature of a gift *inter vivos*, would be logically impossible. To reject the nearer and accept the more remote cannot certainly be vindicated."

In the undermentioned case[4] gifts made during illness in contemplation of death were treated as conditional gifts, the condition being expressed.

Under the Buddhist law also a death-bed gift was invalid,[5] the

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3. ('71) 6 Mad H C R 270 (276) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

4. (1925) 1925 Ch 553 (555) : 95 L J Ch 204 : 133 L T 465, *In re Dudman ; Dudman* v. *Dudman.*
(1896) 2 Ir R 204, *Agnew* v. *Belfast Banking Co.*

5. ('66) 11 Moo Ind App 139 (168) : 10 Suth W R (PC) 3 (PC), *Mt. Thakoor Deyhee* v. *Rai Baluk Ram.*

Note 4

1. ('71) 6 Mad H C R 270 (277) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*
('02) 4 Bom L R 883 (890), *Bachoo* v. *Khushal Das.* (A Hindu father cannot, on the point of death, make gifts to his children out of joint family, as the power to make gifts or presents must be confined to such occasions as are usual and to such presents as are customary.)
[*See* ('25) 12 AIR 1925 Oudh 383 (384) : 87 Ind Cas 900, *Sat Narain* v. *Krishna Datt.*]

2. ('38) 25 AIR 1938 Cal 157 (159) : 175 Ind Cas 712 (DB), *Forman Ali Miji* v. *Uzir Ali Shek.*

3. ('71) 6 Mad H C R 270 (278) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

4. ('69) 3 Beng L R (O C) 113 (121) (DB), *Upendra Krishna* v. *Nabin Krishna.* (Per Barnes Peacock, C. J.)
[*See* ('12) 14 Ind Cas 720 (722) (DB) (Cal), *Binode Kishore* v. *Ashutosh.* (The gift was proved to be an out and out gift and not *donatio mortis causa.*)]

5. ('15) 2 AIR 1915 Low Bur 122 (123) : 29 Ind Cas 888, *Maung Po Yin* v. *Mg. Ni.*
('29) 16 AIR 1929 Rang 243 (244) : 122 Ind Cas 897 (DB), *Ma Pwa Sein* v. *Maung Ba Saw.*

Section 129 Notes 4-5

underlying idea of the rule being that if such gift is recognised it would enable a Buddhist to defy his own personal law and practically to dispose of his property by methods which in effect would be equivalent to and operate as a will.[6]

These cases are now of no importance in view of the amendment of the section by the omission of the words "or save as provided by S. 123 any rule of Hindu or Buddhist law" and also by the enactment of S. 191 of the Succession Act, 1925.

5. "Any rule of Muhammadan law." — As to the rules of Muhammadan law governing gifts, see Mulla's *Principles of Mahomedan Law*.

The provisions of the Succession Act, 1925, relating to gifts in contemplation of death do not apply to Muhammadans. As to the rules of Muhammadan law relating to such gifts (known as *marz-ul-maut*), see Mulla's *Principles of Mahomedan Law*.

In some Provinces the Muhammadan law of gifts has been specifically declared by Provincial Acts to be applicable as between Muhammadans.[1] In cases where there is no such legislative declaration, the Muhammadan law of gifts is applied as being in accordance with justice, equity and good conscience. There is a difference of opinion as to whether the "rule of Muhammadan law" referred to in this section, refers to the rules of Muhammadans specifically declared by the Legislature to be applicable to Muhammadans or whether it includes also the rules which are applied as being in accordance with justice, equity and good conscience. In *Ma Asha* v. *B. K. Haldar*,[2] it was held by a Full Bench of the High Court of Rangoon that S. 129 did not except from the operation of the chapter those rules of Muhammadan law which were applied by Courts only as being in accordance with justice, equity and good conscience. In a subsequent decision of the same Court in *Maung Gyi* v. *Maung Saung*,[3] Mr. Justice Leach, while feeling himself bound by *Ma Asha's case*, observed as follows :

> "The operation of S. 129, Transfer of Property Act, is not limited. It says that nothing in the chapter shall be deemed to affect any rule of Muhammadan law. It does not differentiate between rules of Muhammadan law made specifically applicable under a local statute and rules of Muhammadan law which can be applied on the

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('19) 6 AIR 1919 Low Bur 47 (47) : 50 Ind Cas 522 (DB), *Ma Yu* v. *Po Thaung*.
('32) 19 AIR 1932 Rang 104 (106) : 10 Rang 224 : 139 Ind Cas 278 (DB), *U Tezawunta* v. *Mg. Saw Pe*.

6. ('32) 19 AIR 1932 Rang 104 (106) : 10 Rang 224 : 139 Ind Cas 278 (DB), *U Tezawunta* v. *Mg. Saw Pe*. (Under Buddhist law a person could not dispose of his property by will—A death-bed gift on the analogy of will was treated invalid.)

Note 5

1. See Bengal, Agra and Assam Civil Courts Act (XII of 1887), Section 37.
Central Provinces Laws Act (XX of 1875), Section 5.
Oudh Laws Act (XVIII of 1876), Section 3.
2. ('36) 23 AIR 1936 Rang 430 (433) : 14 Rang 439 : 164 Ind Cas 984 (FB).
3. ('37) 24 AIR 1937 Rang 240 (244) : 171 Ind Cas 752 (DB).

Section 129 Note 5

ground that they are in accordance with justice, equity and good conscience. The intention of the Legislature in inserting S. 129 was to preserve the Muhammadan law of gifts so far as gifts by Muhammadans were concerned, and the section has, in my opinion, this effect. I consider that the Legislature could never have intended the section to apply only in cases where Muhammadan law was made expressly applicable by local statute. But the matter does not rest there. There are the decisions of the Privy Council in the cases to which I have referred and unanimity of opinion in the High Courts of India on the question. For these reasons I should have been prepared to hold that Muhammadan law applied without any restriction to gifts by Muhammadans in this Province, but I consider that I am bound by the decision in *Ma Asha's case*."

See also the undermentioned cases.[3a]

Where the Muhammadan law was, under the Bengal, Agra and Assam Civil Courts Act, 1887, declared applicable, it was held by the High Court of Patna, that this section did not affect any rule of Muhammadan law, so declared applicable.[4]

The Muslim Personal Law (Shariat) Application Act, XXVI of 1937, now declares *inter alia* that in all matters of gift, the personal law of the Muhammadans shall be the rule of decision in cases where the parties are Muslims. This Act is applicable to the whole of British India except the N.-W. Frontier Province[5] and renders the conflict of view above referred to, of little importance.

CHAPTER VIII.

Of Transfers of Actionable Claims.

Section 130

130. Transfer of actionable claim. *(1)* The transfer of an actionable claim [b][whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, [c][***] shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall

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3a. ('01) 24 Mad 513 (520) : 11 Mad L Jour 227 (DB), *Alabi Koya* v. *Mussa Koya*. (Muhammadan law applies without any restriction.)

('38) 25 AIR 1938 Rang 435 (437) : 180 Ind Cas 675 (DB), *Abbadada & Co.* v. *Commr. of Income-tax, Burma*. (AIR 1936 Rang 430 : 14 Rang 439, followed.)

('36) 23 AIR 1936 Rang 522 (525) : 14 Rang 485 : 166 Ind Cas 327, *Rahmat Bibi* v. *Maung Po Sein*. (When the question is before the High Court in its exercise of ordinary original civil jurisdiction, Muhammadan law applies.)

4. ('29) 16 AIR 1929 Pat 417 (419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad*.

5. For a similar law applicable to the North-West Frontier Province, see the N. W. F. P. Muslim Personal Law (Shariat) Application Act, VI of 1935.

Section 130

vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance, [d][or affects the provisions of section 38 of the Insurance Act, 1938].

Illustrations.

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A's* executor, subject to the proviso in sub-section *(1)* of section 130 and to the provisions of section 132.

a. This Chapter was substituted for the original Chapter VIII by the Transfer of Property Act, 1900 (II of 1900).
b. These words were inserted by S. 62 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).
c. The words "and notwithstanding anything contained in Section 123" were omitted, *ibid.*
d. These words and figures were added by the Insurance Act, 1938 (IV of 1938) [26-2-1938].

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Transfer."
4. There must be present transfer of an existing actionable claim.
5. Distinction between transfer of a debt and a novation.
6. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.
7. Assignment of beneficial interest in moveable property.
8. Assignment of part of debt.
9. Debts due to a joint Hindu family.

10. Transfer by operation of law.
11. "Whether with or without consideration."
12. Form of assignment.
13. No particular words are necessary to constitute assignment.
14. Registration not necessary.
15. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.
16. "Duly authorised agent."
17. Completeness of the transfer and notice to the debtor.
18. Transfer of mortgage debt — Equities between mortgagor and mortgagee, if available against transferee.
19. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."
20. Assignor's liability after the assignment.
21. The right of a tenant in Malabar to compensation.
22. Sub-section (2).
23. Exception.
24. The principle of 'caveat emptor' applies to the purchase of an actionable claim.
25. Law in the Punjab.

1. Legislative changes.

(1) By the Transfer of Property Act, II of 1900, the whole of this chapter was substituted for the original chapter on actionable claims.

(2) Section 130 of the original chapter defined "actionable claims" and S. 131 provided as follows :

"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property, shall be valid as against such transfer.

Illustration.

A owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A* who, having no notice of the transfer, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt."

By the Transfer of Property Act, II of 1900, the definition of "actionable claims" was taken over to S. 3, and a new S. 130 was introduced which ran as follows :

"The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not."

By the Transfer of Property (Amendment) Act, XXXVIII of 1925, the words "notwithstanding anything contained in S. 123" were added after the words "authorized agent and" in sub-s. (1). But by the Transfer of Property (Amendment) Act, XX of 1929, those words were omitted and the words "whether with or without consideration" were inserted after the words "actionable claim" occurring in the beginning of the sub-section. (See Note 11.)

Section 130 Notes 1–2

By S. 121 of the Insurance Act, IV of 1938, the following words and figures were added to the exception of the section: "or affects the provisions of S. 38 of the Insurance Act, 1938." (See Note 23.)

2. Scope of the section. — This chapter enacts the general principles of law regarding transfers of actionable claims[1] and its principal provisions are presumably intended to discourage traffic in litigation.[2]

English law —

Choses in action, in English law are classified as legal or equitable according to the mode of procedure necessary for reducing them into possession.[3] Legal choses in action are those that can be recovered or enforced by action at law, such as a debt or a claim on a policy of insurance. Equitable choses in action, on the other hand, are those which were formerly enforced by a suit in equity and arise out of the property and rights in respect of which the Court of Chancery formerly had, and the Chancery division of the High Court now has, the exclusive or peculiar jurisdiction.[4]

At Common Law originally a chose in action, except in cases of annuity, was not assignable.[5] This rule was broken in from time to time and several cases of assignment were recognised as valid.[6] Courts of equity on the other hand recognised assignment of choses in action from the earliest times.[7] If the chose in action was equitable the

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Section 130 —Note 2

1. ('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Baksh.*
('38) 25 AIR 1938 All 544 (545):177 Ind Cas 700, *Agrenath Misir* v. *Ram Ratan.*
('30) 17 AIR 1930 Sind 77 (79) : 24 Sind L R 160 : 123 Ind Cas 297, *Official Assignee* v. *Fakirji Cowasji.*
('24) 11 AIR 1924 Pat 551 (552) : 3 Pat 575 : 78 Ind Cas 705 (DB), *Jai Narayan* v. *Kishun Dutta.*
('94) 1894 Pun Re No. 12, *Jhoki Ram* v. *Malick Kadar Baksh.*

2. ('96) 18 All 265 (267) : 1896 All W N 80 (FB), *Shib Lal* v. *Ajmat Ullah.*

3. Halsbury, *Laws of England*, Vol. 4, page 361.

4. Halsbury, *Laws of England*, Vol. 4, page 362.

5. Halsbury, *Laws of England* (Hailsham Edition), Vol. 4 Para. 790 Footnote.

6. Snell's *Principles of Equity*, 11th Edn., page 82.

7. ('25) 12 AIR 1925 Mad 753 (754) : 87 Ind Cas 382, *Doraisami* v. *Doraiswami.*
('12) 14 Ind Cas 769 (772, 773) (Bom), *Haridas Lalji* v. *Narotam.*
('26) 13 AIR 1926 Cal 447 (448) : 89 Ind Cas 735 (DB), *Kishen Gopal* v. *L. J. Bavin.*
('24) 11 AIR 1924 Pat 551 (552) : 3 Pat 575 : 78 Ind Cas 705 (DB), *Jai Narayan* v. *Kishun Dutta.*
('68) 9 Suth W R 243 (243) (DB), *Jug Mohan* v. *Buddun Koer.*
('10) 5 Ind Cas 834 (834) (DB) (Mad), *Ramasamy Pillai* v. *Muthu Chetty.*
('38) 25 AIR 1938 Sind 24 (28) : 32 Sind L R 640 : 123 Ind Cas 591, *Jhangaldas Chimandas Firm* v. *Firm Chetumal Bulchand.*
(1749) 27 E R 1074 (1083) : 1 White & Tud L C 96 : 1 Ves Sen 348 : 1 Atk 165, *Ryall* v. *Rowles.*
(1749) 27 E R 1064 (1064) : 1 White and Tud, L. C. 93 : 1 Ves Sen 331, *Row* v. *Dawson.*
(1789) 100 E R 517 (522) : 3 T R 174, *Tatlock* v. *Harris.*
(1867) 36 L J C P 173 (176) : L R 2 C P 205 : 15 L T 663 : 15 W R (Eng) 531, *Gerard* v. *Levis.*

Section 130
Note 2

assignee could sue in equity without joining the assignor as a party to his suit,[8] but if the chose in action was legal, the assignee was required to join the assignor either as a plaintiff or defendant to his suit in equity even when the assignment was absolute on the face of it. This was necessary in order, primarily, to bind him and prevent his suing at law and also to allow him to dispute the assignment if he thought fit. This was *a fortiori* the case when the assignment was by way of security or charge because the assignor, in that case had a right to redeem.[9] Further, the assignee could not give a valid discharge for the claim unless expressly empowered by the assignor in that behalf.[10]

In order to remove this state of affairs and to simplify the remedy in favour of the assignee and to protect the original debtor or other person from whom the assignor would have been entitled to claim the chose in action, sub-section (6) of S. 25 of the Supreme Court of Judicature Act, 1873[11] provided as follows:

> " Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose-in-action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees. "

(1838) 9 Sim 327 (332) : 59 E R 383 (385) : 7 L J Ch 310 : 2 Jur 655, *Hammond* v. *Messenger.*

(1898) 67 L J Q B 484 (486): (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

8. Halsbury, *Laws of England*, Vol. 4, page 391.

(1841) 160 E R 1064 (1067) : 4 Y & C Ex 405, *Cator* v. *The Croydon Canal Co.*

(1827) 38 E R 694 (698) : 3 Russ 583 : 27 R R 127, *Goodson* v. *Ellisson.*

9. Halsbury, *Laws of England*, Vol. 4, page 391.

(1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765: 48 L T 438, *Durham Brothers* v. *Robertson.*

(1910) 79 L J K B 664 (668) : 102 L T 29, *Forster* v. *Baker.*

(1884) 53 L J Q B 222 (223, 224) : 12 Q B D 347 : 50 L T 723 : 32 WR (Eng) 492, *Burlinson* v. *Hall.*

('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*

10. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

11. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

Section 130 Note 2

(The sub-section has now been repealed and re-enacted with verbal changes in S. 136 of the Law of Property Act, 1925.)

Section 25 (6) of the Supreme Court of Judicature Act, however, did not create any new rights. It only afforded a new mode of enforcing old rights. It enabled the assignee to sue in his own name in a Court of law without the concurrence of the assignor. It did not make assignable choses-in-action which were not assignable in equity before. Nor did it impair the efficacy of equitable assignments which would previously have been valid.[12] So even after the passing of the sub-section equitable assignments are given effect to.[13]

The words "debt or other legal chose in action" used in the sub-section mean "debt or right which the common law looked on as not assignable by reason of its being a chose-in-action but which a Court of equity dealt with as being assignable."[14]

It will be noted that a *statutory assignment* under the Act must be *absolute* and not by way of a charge[15] and must be in writing.[16] It

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12. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

(1884) 53 L J Q B 280 (282) : 12 Q B D 511 : 32 WR (Eng) 645, *Walker* v. *Bradford Old Bank.*

(1905) 74 L J K B 898 (902) : (1905) A C 454 : 93 L T 495, *William Bradt's Sons & Co.* v. *Dunlop Rubber Co.*

(1902) 71 L J K B 949 (960), *Associated Portland Cement Manufactures, Ltd.* v. *Tolhurst.*

(1902) 71 L J K B 712 (716) : (1902) 2 K B 427, *Torkington* v. *Magee.*

(1919) 88 L J Ch 392 (397) : (1919) 2 Ch 104 : 122 L T 264, *In re, Westerton.*

('25) 12 AIR 1925 Mad 753 (754) : 87 Ind Cas 382, *Doraisami Muãaliar* v. *Dorasami Iyangar.*

13. (1905) 74 L J K B 898 (902): 1905 App Cas 454, *William Brand's Sons & Co.* v. *Dunlop Rubber Co.*

14. (1902) 2 K B 427 (430) : 71 L J K B 712 (714) : 87 L T 304, *Torkington* v. *Mogee.*

15. ('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihalchand* v. *Ali Baksh.*

As to what amounts to absolute assignment see the undermentioned cases :

(1898) 67 L J Q B 484 (488) : (1898) 1 Q B 765: 48 L T 438, *Durham Brothers* v. *Robertson.* (Sum assigned by way of security for certain advances until the repayment of such advances—Assignment not absolute.)

(1884) 53 L J Q B 222 (223) : 12 Q B D 347 : 50 L T 723 : 32 W R (Eng) 492, *Barlingson* v. *Hall.* (Assignment by *A* to *B* upon trust that *B* should receive the debt and after deducting the amount due by *A* to *B* should pay the balance to *A*—*Held*, assignment was absolute.)

(1884) 33 W R (Eng) 163 (164), *Knill* v. *Prowse.* (*A* borrowed money from *B* and gave him a letter addressed to his tenant to pay *B* rent until the order should be countermanded by *B*—*Held*, assignment was absolute.)

(1889) 58 L J Q B 459 (460): 61 L T 229: 38 W R (Eng) 15 : 23 Q B D 239, *Tancred* v. *Delagoa Bay Co.* (Assignment of debt as security for advances made with a proviso for redemption and reconveyance or repayment of the advances creates absolute assignment.)

(1881) 50 L J Q B 437 (440): 6 Q B D 626: 44 L T 585: 29 WR (Eng) 564, *National Provincial Bank* v. *Harle.* (An assignment of a mortgage debt, to secure the repayment of a sum due from the assignor to the assignee was held not absolute but to be by way of charge only—Disapproved in (1889) 58 L J Q B 459.)

16. Halsbury, *Laws of England*, Vol. 4, page 371.

Section 130
Note 2

takes effect only from the date of notice of the assignment to the debtor.[17] Further the assignee can sue in his own name for recovery of the claim. An equitable assignment, on the other hand, need not be absolute[18] or in writing.[19] It takes effect from the *date of the assignment*, notice being necessary only for the purpose of binding the debtor.[20]

The section contains a special scheme which has some of the features both of the English Common Law and of the principles of equity.[21] In *Sadasook* v. *Hoare Miller*,[22] Rankin, J., observed as follows :

> "In construing Ss. 130 and 131 of the Transfer of Property Act, it has to be remembered that they contain a very special scheme which must be regarded as a whole in itself. At common law a chose-in-action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian Legislature in 1900 has composed a new scheme which has some of the features of both, and, as I read S. 130 it says this that the law while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with his original creditor unless and until he has received in writing a particular kind of notice."

This section is not inapplicable to Mahomedans so as to take a *gift* by a Mahomedan of an actionable claim, out of the operation of the section.[23]

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17. (1921) 90 L J Ch 116 (119) : (1921) 1 Ch 349 : 124 L T 664, *In re Steal Wing Co.*

('35) 22 AIR 1935 Mad 1003 (1005) : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

18. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham* v. *Robertson.*

19. ('30) 17 AIR 1930 Sind 77 (79) : 123 Ind Cas 297 : 24 Sind L R 160, *Official Assignee* v. *Fakirji Cowasji.*

20. (1823) 38 E R 475 (484) : 27 R R 1 : 3 Russ 1 : 2 L J (O S) Ch 62, *Dearle* v. *Hall.*

(1886) 56 L J Ch 85 (87) : 34 Ch D 128 : 55 L T 572: 35 W R (Eng) 86, *Gorringe* v. *Irwell India Rubber and Gutta Pircha Works.*

[*See also* (1804) 32 E R 659 (660, 661) : 9 Ves 407, *Jones* v. *Gibbons.*]

21. ('23) 10 AIR 1923 Cal 719 (722) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*

('35) 22 AIR 1935 Cal 218 (219) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *D. A. David.*

22. ('23) 10 AIR 1923 Cal 719 (722) : 80 Ind Cas 632 (DB).

23. ('17) 4 AIR 1917 Mad 20 (26) : 38 Ind Cas 248 (DB), *Yacoob Sahib* v. *Pacha Bibi.*

('36) 23 AIR 1936 Pat 527 (530): 165 Ind Cas 298, *Mt. Bibi Alimunnisa* v. *Shaikh Abdul Aziz.*

('42) 29 AIR 1942 Pat 210 (211): 20 Pat 798 : 197 Ind Cas 241 (DB), *Mohammad Zobair* v. *Bibi Sahidan.* (Wife wishing to release husband from dower debt — Release must be in writing.)

See the Report of the Special Committee, 1927, Clause 61, printed on page 22 (68).

Section 130
Note 3

3. "Transfer."— The word 'transfer' is used in this section in the same wide sense as that which is attributed to the word 'convey' by the definition to be found in S. 205 (ii) of the English Law of Property Act, 1925.[1] Thus, the section covers absolute transfers of actionable claims as well as transfers by way of security.[2] This is also made clear by the second illustration to the section in which the assignment of a life policy for *securing* the payment of an existing or future debt is assumed to be valid.[3] In the undermentioned case[4] an endowment policy was assigned by the assured in favour of his wife by an endorsement on it and the assignment was duly communicated to the insurance

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Note 3

1. ('38) 25 AIR 1938 Rang 1 (3): 175 Ind Cas 786, *In the matter of Aviet Stephen*, Under S. 205 of the Law of Property Act, 1925 "conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument except a will; "convey" has a corresponding meaning.

2. ('12) 17 Ind Cas 627 (628): 40 Ind App 24: 37 Bom 198 (PC), *Mulraj Khatau* v. *Visvanath Parabhuram Vaidya.*
('11) 11 Ind Cas 964 (967) (DB) (Bom), *Vishvanath Vaidya* v. *Mulraj Khatau.* (Reversed in 17 Ind Cas 627 on other grounds.)
('10) 7 Ind Cas 952 (954) (Bom), *Vishvanath* v. *London & Lancashire Life Assurance Co.*
('29) 16 AIR 1929 Rang 318 (319) : 7 Rang 365 : 120 Ind Cas 238 (DB), *Sidambaram Nadar* v. *Moganlal Brothers.*
('10) 5 Ind Cas 834 (834) (DB) (Mad), *Ramaswamy Pillai* v. *Muthoo Chetty.*
('15) 2 AIR 1915 Mad 1031 (1031) : 21 Ind Cas 316 : 38 Mad 297 (FB), *Muthukrishna Iyer* v. *Veeraraghava Iyer.*
('18) 5 AIR 1918 Mad 172 (178) : 43 Ind Cas 385 (SB), *Rama Aiyar* v. *Parathasarathy.*
('09) 4 Ind Cas 804 (807) : 33 Bom 610 (DB), *Ardeshir Bejanji Surti* v. *Syed Sirdar Ali Khan.* (The mere fact that parties have described a transaction as a "lien or charge" cannot deprive it of its real nature, if in substance the transaction is an assignment—Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the word 'lien' or 'charge' has no meaning except as giving the latter a right to recover the debt from the debtor—The transaction is in reality one whereby the owner of what in English law is called a chose in action transfers it to another.)
('20) 7 AIR 1920 Mad 426 (426) : 56 Ind Cas 146 (DB), *Arunachallam Chettiar* v. *Madaswami.*
('15) 2 AIR 1915 Mad 1031 (1031) : 21 Ind Cas 316 (317) : 38 Mad 297 (FB), *Muthukrishnier* v. *Veeraraghava Aiyar.*
('35) 22 AIR 1935 Cal 756 (758) : 160 Ind Cas 219 : 63 Cal 578 (DB), *Bhupati Mohan* v. *Fanindra Chandra.*
('07) 1907 Pun Re No. 9: 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.* (Assignment may be absolute though by way of mortgage.)
('40) 44 Cal W N 593 (595), *Kali Mohan Shaha* v. *Empire of India Life Assurance Co.*
('41) 28 AIR 1941 Mad 147 (148) : I L R (1941) Mad 378 : 195 Ind Cas 422 (DB), *Official Assignee, Madras* v. *Hukumchand.*
('40) 27 AIR 1940 Pat 683 (691, 692) : 19 Pat 715 : 192 Ind Cas 187 (DB) *Karnidan Sarda* v. *Sailaja Kanta.*
[But see ('12) 14 Ind Cas 769 (773) (Bom), *Haridas Lalji* v. *Narotam.*]

3. ('13) 17 Ind Cas 627 (628) : 37 Bom 198 : 40 Ind App 24 (PC), *Mulraj Khatau* v. *Vishwanath.*

4. ('39) 26 AIR 1939 Mad 411 (413) : I L R (1939) Mad 415 : 185 Ind Cas 173 (DB), *Lakshmikutty Kettilamma* v. *Vishnu Nambisan.*

Company. The endorsement recited that in the event of the wife predeceasing the assured or in the event of his surviving the date on which the policy was to become mature, the benefits of the policy together with the rights to recover the money thereunder would revert to the assured. It was held that this section applied to such a transfer, because, so long as the assignee's interest existed she had the whole interest and there was nothing in the terms of the section or in the principles underlying it to exclude the transfer of such a kind from its scope.

4. There must be present transfer of an existing actionable claim. — The word "transfer" means a *present* transfer.[1] A promise by the debtor to pay money to his creditor, when he, the debtor, might receive a debt due to him by a third person, does not constitute an assignment of the debt so as to charge the debt in the hands of the third person.[2] An undertaking by the debtor in the following terms: 'I will deposit at your shop all cheques that I may get from the P. W. Department' or 'I will be giving you cheques in satisfaction of the money due to you' has been held not to constitute a present assignment of the debt but to be merely an agreement to assign in future; the person in whose favour the agreement is made has no lien on the cheques.[3]

It is necessary not only that there should be a *present* transfer, but also that the actionable claim transferred is in *existence*, at the time of the transfer.[4] As was observed by Braund, J., in *In the matter of Aviet Stephens*[5]:

> "Section 130 (1) in its terms appears to point to an immediate interest of some sort passing. And that while it is in every way appropriate to an accruing, conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. In the three first cases an interest already exists which may or may not become a present debt . . . . . But a non-existent debt in the sense of a liability to become due in future from an unascertained person and to arise out of a relationship not yet established obviously imports no present interest at all and is not easy to fit into the intention of S. 130 (1) of the Act."

A share of a partner in a partnership and the right to recover it is an actionable claim which is assignable under this section. But a right

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Note 4

1. ('26) 13 AIR 1926 Nag 206 (207) : 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.*

2. ('73) 1873 Pun Re No. 63, *Mool Chand* v. *Jumyut Singh.*
('84) 1884 Pun Re No. 60, *Guruditta Mal* v. *Sultan Muhammad.*

3. ('26) 13 AIR 1926 Nag 206 (207) : 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.*

4. ('38) 25 AIR 1938 Rang 1 (4) : 175 Ind Cas 786, *In the matter of Aviet Stephens.*

5. ('38) 25 AIR 1938 Rang 1 (4) : 175 Ind Cas 786.

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of a partner to a rendition of accounts is not an actionable claim and cannot be assigned.[6]

A vendor's right to recover purchase money from the purchaser is an actionable claim transferable under this section.[7]

5. Distinction between transfer of a debt and a novation. —A transfer of a debt must be distinguished from a novation of contract. Section 62 of the Contract Act deals with novation of contracts and runs as follows :

Effect of novation, rescission and alteration of contract.

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A's*) estate for 5000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1000 rupees under a contract. *B* owes *C* 1000 rupees. *B* orders *A* to credit *C* with 1000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1000 rupees, and no new contract has been entered into."

The effect of a novation is thus not *to make* any assignment[1] but to *extinguish* the old contract, and bring about a new one either between the same parties or between one of them and a third party. It is a matter of consent of all the parties concerned.[2]

In a transfer of an actionable claim under this section, the liability of the debtor is neither substituted by any new liability nor is it transferred to any one else. The claim against the debtor is merely transferred to a third person, and is not a matter of any consent on the part of the debtor at all.[3]

6. Assignment of rents and profits and assignment of lessor's right of reversion under a lease. — A transfer of the rents and profits due to a person will be an assignment of an actionable claim requiring a document in writing under this section. But where

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6. ('41) 28 AIR 1941 Sind 73 (78) : 194 Ind Cas 380 (DB), *Mulchand Tagiomal* v. *Shamdas Jethanand.*

7. ('42) 29 AIR 1942 Mad 209 (210) : 201 Ind Cas 258, *Chinnapareddi* v. *Venkataramanappa.*

Note 5

1. ('25) 12 AIR 1925 Mad 753 (754) : 87 Ind Cas 382, *Doraiswami Mudaliar* v. *Doraiswami Iyengar.*

('32) 19 AIR 1932 Bom 446 (447, 448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivraj Joharmal* v. *Lalchand Shreekison & Co.*

[*See also* ('03) 5 Bom L R 373 (376), *Jiwan Vurjung* v. *Haji Oosman.*]

2. ('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Iyer* v. *Narayanswamy Pillay.*

3. *See* (1900) 27 Cal 827 (834) : 4 Cal W N 357 (FB), *Sirish Chandra* v. *Nasim Quazi.* (The character of the debt is not changed by the assignment.)

the *reversion* in a lease is transferred by the lessor to another person, the latter's right to collect the rents and profits due by the lessee is part of the reversionary right transferred and can be claimed by him without a separate transfer in writing of such rents and profits. As observed by Venkataramana Rao, J., in the undermentioned case[1]:

> "There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realize the rents and profits by virtue of the assignment in his favour, but in the case of a reversion it is not merely the right to recover the rents and profits that are transferred to him but also the rights which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry."

7. Assignment of beneficial interest in moveable property. — See Note 24 on S. 3 and the undermentioned cases.[1]

8. Assignment of part of debt. — In England there is a difference of opinion as to whether *at law* a part of a debt can be validly assigned, though the general trend of opinion is that it cannot be so assigned. In equity, however, such an assignment is valid and constitutes the assignee a creditor of the original debtor,[1] and he can enforce his rights against the debtor provided he makes the persons entitled to the other portion of the debt, parties to the suit.[2]

There is nothing in this section which prohibits the transfer of a part of a debt. But there is a conflict of opinion on the point. In the undermentioned cases[3] it was held that a part of the debt cannot be

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Note 6

1. ('38) 25 AIR 1938 Mad 100 (102) : 176 Ind Cas 402 (DB), *Ratnaswami Moopanar* v. *Navaraja Moopanar*.

Note 7

1. ('14) 1 AIR 1914 Low Bur 200 (201) : 7 Low Bur Rul 95 : 22 Ind Cas 940, *Dickman Brothers & Co.* v. *Sulaiman Haji Brothers & Co.* (Though the benefit of a contract (an actionable claim) can be assigned, the burden or obligations under a contract cannot be assigned without the consent of the promisor.)
('08) 9 Bom L R 114 (118), *Nathu* v. *Hansraj*. (33 Cal 702 followed.)
('92) 16 Bom 441 (449), *J. H. Tod* v. *Lakhmidas*.
('03) 5 Bom L R 373 (376), *Jiwan* v. *Haji Oosman*.

Note 8

1. ('40) 27 AIR 1940 Pat 170 (173) : 185 Ind Cas 514 : 18 Pat 839 (DB), *Durga Singh* v. *Kesho Lal*.
(1910) 79 L J K B 664 (668) : (1910) 2 K B 636 : 102 L T 29, *Forster* v. *Baker*. (Per Bray, J.)
(1921) 1 Ch 349 (355) : 90 L J Ch 116 : 124 L T 664, *In re Steel Wing Co.*
2. (1921) 90 L J Ch 116 (119, 121) : (1921) 1 Ch 349 : 124 L T 664, *In re Steel Wing Co.*
3. ('25) 12 AIR 1925 Mad 753 (756) : 87 Ind Cas 382, *Doraisami Mudaliar* v. *Doraiswami Ayangar*.
('38) 25 AIR 1938 Cal 377 (381) : 164 Ind Cas 111 : 62 Cal 510 (DB), *Ghisulal Ganeshilal* v. *Gumbhirmull*.

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Notes 8-10

validly assigned for the reason that a debtor cannot be harassed by different creditors attempting to enforce parts of a single debt. In the case noted below[4] the High Court of Patna has held that where A transfers a part of a debt to B who enforces the same in a suit against the debtor, O. 2, R. 2 of the Civil Procedure Code will prevent A from suing the debtor for the remaining portion of the debt, that A's right to the remaining portion of the debt is not therefore an actionable claim since it is not a claim which the Civil Courts recognise as affording grounds for granting relief, and that A cannot transfer the remaining part as an actionable claim. A contrary view, namely, that an assignment of even a part of the debt is valid, has been held in other cases.[5] It is submitted that the last view is to be preferred.

9. Debts due to a joint Hindu family.—It is the essential characteristic of a joint Hindu family that no member is entitled to a definite share in the joint family property. No assignment is therefore necessary where one coparcener retires from the membership of the joint family business and renounces his share therein. Any member can drop out of the business and the business will thenceforward belong to the other members who remain in the family. Thus, if there are debts due to a joint Hindu family from a certain person, the member renouncing his share in the debts need not execute a formal deed of transfer in favour of the remaining members.[1] So also, where in a partition of a joint Hindu family a debt evidenced by a pronote falls to the share of a particular member, he can sue to recover the amount due under the pronote without an assignment under this section. The right to sue is not dependent upon the assignment and the suit, in such a case, is regarded as a suit on the original debt irrespective of the pronote.[2]

10. Transfer by operation of law. — The section does not affect a transfer of an actionable claim by operation of law or by or in execution of a decree of Court, as such transfers are expressly saved by

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4. ('40) 27 AIR 1940 Pat 170 (174) : 18 Pat 839 : 185 Ind Cas 514 (DB), *Durga Singh* v. *Kesho Lal.*

5. ('28) 15 AIR 1928 Mad 1201 (1207) : 116 Ind Cas 827: 52 Mad 465 (DB), *S. A. Rajamier* v. *Subramaniam Chettiar.* (AIR 1925 Mad 753 not approved.)
('40) 27 AIR 1940 Mad 258 (265), *Travancore National Bank Subsidiary Co., Ltd.* v. *T. N. & Q. Bank Ltd.*
('41) 28 AIR 1941 Lah 337 (338) : 197 Ind Cas 735 (DB), *Firm Ram Kishen-Mohanlal* v. *Firm Gurdial Mal-Sagar Mal.*
[*See also* ('18) 5 AIR 1918 Mad 1337 (1345) : 42 Ind Cas 684 (DB), *Sabjan Sahib* v. *Abdul Azeez Sahib.* (Quære)]

Note 9

1. ('36) 63 Cal 194 (204) : 40 Cal W N 808 (813), *Brijmohan* v. *Mahabeer.*
2. ('37) 1937 Mad W N 134 (134), *Chinna Chenchu Reddi* v. *Subbaroya Chetti.* (AIR 1934 Mad 529 : 57 Mad 1082 followed.)
('10) 8 Ind Cas 33 (34) (DB) (Mad), *Chandana* v, *Majati.*
('34) 21 AIR 1934 Mad 529 (532) : 153 Ind Cas 916 : 57 Mad 1082 (DB), *Gopalu Pillai* v. *Kothandarama Ayyar.*
[But see ('07) 17 Mad L Jour 393 (393) : 3 Mad L Tim 7 (DB), *Arunachala Reddi* v. *Subba Reddi.*]

section 2, clause (d).[1]

11. "Whether with or without consideration." — In English law, an assignment *at law*, may validly be made without consideration. But equitable assignments not falling within the statute are given effect to in Courts of Equity only if supported by consideration.[1]

The words "whether with or without consideration" in this section make it clear that a *gift* of an actionable claim can validly be made under this section.[2] The said words did not exist in the section before the year 1929.

It was, however, held that the section was wide enough to cover transfers with or without consideration[2a] and that gifts of actionable claims were not governed by Chap. VII which relates to *gifts generally* but by the special rules laid down in Chap. VIII for the transfer of actionable claims.[3] Chapter VII was held inapplicable to gifts of actionable claims for another reason also. An actionable claim, though a moveable property, was not such a moveable property as could be transferred by mere delivery under S. 123. The provisions in S. 123 that delivery may be made in the same way as goods sold and delivered showed that what was dealt with under that section was a gift of tangible property such as a horse or a book and not an intangible property like a book-debt.[4]

By the Transfer of Property (Amendment) Act, XXXVIII of 1925, the clause "notwithstanding anything contained in S. 123" was inserted after the words "authorised agent and," the object of the amendment being to give effect to representations made by certain insurance

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Note 10

1. ('39) 26 AIR 1939 Sind 288 (289) : 185 Ind Cas 28 : ILR (1939) Kar 344 (DB), *Virbhandas Shamsing* v. *Dasumal Keshodas.* (AIR 1926 Sind 78 distinguished.)
('26) 13 AIR 1926 Sind 78 (79, 80) : 90 Ind Cas 111, *Mulibai* v. *Shevaram, Menghraj.*

Note 11

1. Halsbury, *Laws of England*, (Hailsham Edition) Vol. 4 Paras. 797 and 805.
('21) 8 AIR 1921 Mad 137 (139) : 61 Ind Cas 461 : 44 Mad 196 (DB), *Perumal Ammal* v. *Perumal Naicker.*
('14) 1 AIR 1914 Cal 566 (567): 22 Ind Cas 500 (DB), *Akhoy Kumar Pal* v. *Hari Dasi Basak.*
('37) 24 AIR 1937 All 424 (427) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Brij Ratan Das.*
('14) 1 AIR 1914 All 279 (280) : 36 All 507 : 24 Ind Cas 385 (DB), *Gur Prasad* v. *Gorakhpur Bank, Ltd.*
2. ('38) 25 AIR 1938 Mad 236 (238): 176 Ind Cas 617 (DB), *Ramaswamy Chettiar* v. *Manickam Chettiar.*
2a. ('21) 8 AIR 1921 Mad 137 (138) : 61 Ind Cas 461 : 44 Mad 196 (DB), *Perumal Ammal* v. *Perumal Naicker.*
3. ('17) 4 AIR 1917 Mad 20 (26) : 38 Ind Cas 248 (DB), *Yacoob Sahib* v. *Pacha Bibi.*
('21) 8 AIR 1921 Mad 137 (138) 61 Ind Cas 461 : 44 Mad 196 (DB), *Perumal Ammal* v. *Perumal Naicker.*
4. ('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 ; 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*

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companies that gifts of life policies involved considerable hardships, as, under S. 123 they were required to be made by registered instruments. By the insertion of the above words, however, doubts appear to have arisen as to whether the words applied to gifts of actionable claims made by Mahomedans. In order to remove these doubts, therefore, the words "notwithstanding anything contained in S. 123" were omitted from the section by the Transfer of Property (Amendment) Act, XX of 1929, and the words "whether with or without consideration" were inserted after the words "The transfer of an actionable claim."[5]

An idol not being a living person within the meaning of S. 5, a dedication of property to an idol is not a gift within the meaning of the Transfer of Property Act. A dedication of an actionable claim to an idol, therefore, is not governed by this section and may be made orally.[6] (See section 5 also.)

12. Form of assignment. — The section requires that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing.[1] Under the old S. 131 it was held that a transfer in writing was not necessary as there were no words to that effect in the section.[2]

The object of reducing the transfer to writing is to put the arrangement entered into between the parties beyond dispute.[3] Thus, in *Raman Chetty* v. *Nagarathna Naicker*,[4] it was observed:

"The intention of the Legislature in amending this chapter of the Transfer of Property Act, was to bring the law in India generally into conformity with the law in England, which under the Judicature Act requires assignments of chose in action to be in writing, a provision which is, in my opinion, highly necessary for the benefit of the other party to the contract who ought not to be embarrassed

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5. See Report of the Special Committee, 1927, printed on page 22 (68).

6. ('26) 13 AIR 1926 Nag 469 (470) : 96 Ind Cas 1004, *Bhopatrao* v. *Shri Ramachandra Sansthan Kund Sarjapur.*

Note 12

1. ('32) 19 AIR 1932 Bom 446 (448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivraj Joharmal* v. *Lalchand Shreekison and Co.*

('36) 23 AIR 1936 Pat 527 (530) : 165 Ind Cas 298, *Alimunnisa Bibi* v. *Abdul Aziz.*

('23) 10 AIR 1923 Pat 165 (166) : 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Riknath Koeri.*

('26) 13 AIR 1926 Cal 447 (448) : 89 Ind Cas 735 (DB), *Kissen Gopal* v. *L. J. Bavin.*

('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Jhangaldas Chimandas Firm* v. *Firm Chetumal Bulchand.*

('40) 27 AIR 1940 Mad 157 (159) : 187 Ind Cas 531, *In re Travancore National and Quilon Bank, Ltd.*

('10) 9 Ind Cas 287 (288) (DB) (Mad), *Velayutham* v. *Pillaiyar Chetti.*

[But see ('37) 24 AIR 1937 All 424 (425) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Brij Ratan Das.*]

2. ('87) 9 All 249 (251) : 1887 All W N 27 (DB), *Autu Singh* v. *Ajudhia Sahu.*

3. ('39) 26 AIR 1939 Mad 543 (546) : 188 Ind Cas 878 (DB), *Govardhandas* v. *F. D. T. Co. Ltd.*

4. ('12) 15 Ind Cas 380 (381) (Mad).

by mere oral allegations of transfer which may easily be distinguished and upon which it may be very difficult for him to act with any degree of safety to himself."

As transfers by way of charge on or hypothecation of actionable claims fall under this section, such transfers also must be effected by execution of an instrument in writing.[5] Thus, a mere deposit of a life policy[6] or a deposit of securities lying with the creditor, by the creditor[7] will not create any charge on the life policy or debts due by the debtor.

13. No particular words are necessary to constitute assignment. — Although a transfer of an actionable claim is required to be in writing, the section does not require the transfer to be in any particular form or to be couched in technical language, provided the words used sufficiently indicate the transferor's intention to transfer the claim due to him to the transferee.[1] In *William Brandt's Sons* v. *Dunlop Rubber Co.*,[2] Lord Macnaghten observed :

"The Lord Chief Justice came to the conclusion that the document did not, on the face of it, purport to be an assignment nor use the language of an assignment. An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a

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5. ('12) 17 Ind Cas 627 (628) : 37 Bom 198 : 40 Ind App 24 (PC), *Mulraj Khatau* v. *Vishwanath.*

('29) 16 AIR 1929 Rang 318 (319) : 120 Ind Cas 238 : 7 Rang 365 (DB), *Sidambaram Nadar* v. *Maganlal Bros.*

6. ('12) 17 Ind Cas 627 (628) : 37 Bom 198 : 40 Ind App 24 (PC), *Mulraj* v. *Vishwanath.*

('41) 28 AIR 1941 Mad 147 (148) : 195 Ind Cas 422 : ILR (1941) Mad 378 (DB), *Official Assignee Madras* v. *Hukumchand.* (An instrument evidencing the deposit of the policy of insurance by way of pledge does not amount to an assignment. 17 Ind Cas 627 followed.)

7. ('29) 16 AIR 1929 Rang 318 (319) : 120 Ind Cas 238 : 7 Rang 365 (DB), *Sidambaram Nadar* v. *D. R. Maganlall Bros.* (37 Bom 198 followed.)

Note 13

1. ('38) 25 A I R 1938 Mad 236 (238) : 176 Ind Cas 617 (DB), *Ramaswami Chettiar* v. *Manikkam Chettiar.*

('84) 1884 Pun Re No. 60, *Gurditta Mal* v. *Sultan Muhammad.* (Equitable assignments or as they are called in the Transfer of Property Act, transfers of actionable claims, are recognized in India.)

('24) 11 AIR 1924 Lah 684 (685) : 78 Ind Cas 163, *Nanak Chand Kishori Lal* v. *Ram Sarup Gujar Mal.*

('26) 13 A I R 1926 Cal 447 (448, 449) : 89 Ind Cas 735 (DB), *Kishen Gopal* v. *L. J. Bavin.*

('19) 6 A I R 1919 Mad 1076 (1076) : 47 Ind Cas 749 (DB), *Seetarama Ayyar* v. *Narayanaswami Pillai.*

('37) 24 A I R 1937 All 424 (426) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Birj Ratan.*

('41) 28 A I R 1941 Mad 147 (148) : ILR (1941) Mad 378 : 195 Ind Cas 422 (DB), *Official Assignee, Madras* v. *Hukum Chand.*

2. (1905) 74 L J K B 898 (902) : 1905 App Cas 454.

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courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

The following are all illustrations of valid assignments of actionable claim :

(1) Endorsement on an instrument which represents the debt.[3]

(2) Endorsement on a money bond to the effect 'I have sold the document,'[4] or to the effect 'the balance due should be paid into the hands of my son.'[5]

(3) A direction in writing to pay the amount due on an instrument endorsed on the instrument by the payee thereof coupled with the delivery of the instrument so endorsed to the person to whom the payment is directed.[6] But a mere acknowledgment of the payment by the payee is not an assignment under the section, there being no operative words of transfer.[7]

(4) A partition list allotting a pronote to a particular member of a joint family.[8]

(5) An assignment by way of an entry made in a statement of accounts is sufficient.[9]

(6) A letter given by a person to another, directing the latter to receive from the former's debtor the amount due to him under an instalment bond.[10]

(7) Where there is a verbal transfer of an actionable claim on a certain date and the transfer is reduced to writing the next day and the instrument refers to the transfer as having been made on the previous day, the instrument is a deed of transfer and cannot be held otherwise simply because it is expressed in the past tense.[11]

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3. ('35) 22 AIR 1935 All 837 (838) : 158 Ind Cas 525, *Gopi Nath* v. *Mt. Bekali.*
('37) 24 AIR 1937 Sind 181 (183) : 31 Sind L R 98 : 170 Ind Cas 225 (DB), *Shamdas* v. *Savitribai.*

4. ('24) 11 AIR 1924 Lah 684 (685) : 78 Ind Cas 163, *Nanak Chand Kishori Lal* v. *Ram Sarup Gujar Mal.*

5. ('09) 1 Ind Cas 212 (213) (DB) (Mad), *Saminatha Pillai* v. *Doraswami Naick.* (30 Mad 75 followed.)

6. ('26) 13 AIR 1926 Cal 447 (449) : 89 Ind Cas 735 (DB), *Kissen Gopal Bogree* v. *L. J. Bavin.*
('06) 30 Mad 75 (77, 78) : 16 Mad L Jour 554 (DB), *Rama Iyen* v. *Venkatachellam.*
('21) 8 AIR 1921 Mad 122 (124) : 59 Ind Cas 943 (DB), *Chandu* v. *Ramunni.*

7. ('21) 8 AIR 1921 Mad 122 (123) : 59 Ind Cas 943 (DB), *Chandu* v. *Ramunni.*

8. ('10) 8 Ind Cas 33 (34) (DB) (Mad), *Chandana* v. *Majati.*

9. ('19) 6 AIR 1919 Mad 1076 (1076) : 47 Ind Cas 749 (DB), *Seetarama Ayyar* v. *Narayanaswami Pillai.*

10. ('12) 16 Ind Cas 708 (708) (DB) (Mad), *Konijetti Veerasami* v. *Varada Veerasami.*

11. ('32) 19 AIR 1932 Bom 446 (448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivraj Joharmal* v. *Lalchand Shreekison.*

(8) An arrangement by all the partners, on the dissolution of a firm, that some of them would be entitled to the debt due to the firm.[12]

(9) Where a sum of money is lying with a banker as a deposit in the name of one A but by a subsequent arrangement in writing between A and B it is agreed that a portion of the deposit should be transferred to B while the other portion should go to the benefit of A, the arrangement operates as an assignment of an actionable claim.[13]

(10) A was awarded compensation in a Magistrate's Court and the money was kept in Court deposit. B brought a suit against A for a certain amount and effected an attachment before judgment of the deposit. On the date of hearing, A admitted the claim of B and requested the Court that out of the deposit in the Magistrate's Court, the amount of B's claim be sent for and given to B in satisfaction of his claim. Thereupon, the Court passed an order that a decree under O. 12, R. 6, Civil Procedure Code, be passed, and the sum be requisitioned from the Court of the Magistrate. It was held that the declaration made by A and given effect to by the Court amounted to an assignment.[14]

It is a well settled rule that title cannot pass by mere admission or relinquishment where the statute requires a *deed of transfer*. Therefore, under the section a mere admission or relinquishment by a person of his rights in an actionable claim would not be sufficient.[15] Thus, where A and C were partners of a firm and C executed a deed of release whereby he gave up his claim to the business of the firm and declared that thenceforth the partnership would be conducted by A and D, it was held that no title vested in A and D under this section as a deed of transfer was necessary.[16]

14. Registration not necessary. — The section only requires that the transfer should be in *writing* signed by the transferor, and not that it should be *registered*. No registration is therefore necessary for the transfer of an actionable claim.[1] The contrary view expressed in the undermentioned case,[2] without any reasons being assigned for the view, is not correct.

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12. ('39) 26 AIR 1939 Sind 288 (289) : I L R (1939) Kar 344 : 185 Ind Cas 288 (DB), *Virbhandas Shamsingh* v. *Dasumal Keshowdas.*

13. ('38) 25 AIR 1938 Mad 236 (238) : 173 Ind Cas 955 (DB), *Ramaswami Chettiar* v. *Manikkam Chettiar.*

14. ('37) 24 AIR 1937 All 424 (426) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Brij Ratan Das.*

15. ('12) 16 Ind Cas 440 (440) (DB) (Cal), *Dharam Chand Boid* v. *Mouji Shahu.*

16. ('12) 16 Ind Cas 440 (440) (DB) (Cal), *Dharam Chand Boid* v. *Mauji Shahu.*

Note 14

1. ('21) 8 AIR 1921 Mad 137 (139) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*

2. ('27) 14 AIR 1927 Rang 39 (40): 99 Ind Cas 735, *K. V. of Tiruvarur* v. *P. L. P. K. R. M. K. Chettiar.*

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15. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment. — Under the English law an agreement between the debtor and the creditor that the debt owing shall be paid out of a *specific fund* coming to the debtor or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order relates.[1] Such an order or agreement would operate under this section also as a transfer of an actionable claim provided the requirement of this section as to writing is satisfied. Thus, an agreement between a debtor and a creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third person, would be an assignment of the debt.[2] So also, where, on an instrument executed by B in favour of A, A makes an endorsement directing B to pay C, and then delivers the instrument so endorsed to C, the transaction will be an assignment of the debt.[3] See also the undermentioned cases.[4] But a mere direction by A to his debtor B that he should pay C, does not amount to a transfer of the debt to C in the absence of any *agreement between* A *and* C that he should get the amount. It is merely an order for payment.[5] A applied to a credit society for a loan and in his application gave his salary bills which would be due to him from his employee, as security. The society granted the application and a bond was executed by A in favour of the society, which, however, did not state that the loan would be paid up from his salary. A also wrote to his employer to pay the society such sums out

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Note 15

1. Chitty on *Contracts*, 18th Edn., page 970.

2. ('40) 27 AIR 1940 Mad 258 (261, 263), *Travancore National Bank Subsidiary Co., Ltd.* v. *T. N. & Q. Bank Ltd.* (Where a subscriber to a chit fund conducted by a company deposits money in a bank and authorises the bank to pay the future instalments of subscriptions in respect of the chit to the company as and when they fall due from and out of the deposit in the bank, it operates as an assignment of the moneys in favour of the company under S. 130 of the T. P. Act.)
('33) 20 AIR 1933 Lah 102 (103) : 14 Lah 325 : 144 Ind Cas 6 (DB), *Thakar Das Bhatia* v. *Malik Chand.*
('18) 5 A I R 1918 Mad 172 (177) : 43 Ind Cas 385 (SB), *Rama Aiyar* v. *Partha Sarathy Chetty.*
('97) 1897 Pun Re No. 43, *Jhaman Lal* v. *Sant Lal.*
('30) 17 AI R 1930 Cal 782 (785) : 57 Cal 1101 : 127 Ind Cas 545 (D B), *Probodh Chandra Mitra* v. *Road Oils (India) Ltd.*

3. ('07) 30 Mad 75 (77, 78) : 16 Mad L Jour 554 (DB), *Rama Iyen* v. *Venkatachellam Pattar.*

4. ('84) 1884 Pun Re No. 60, *Gurditta Mal* v. *Sultan Muhammad.*
('14) 1 AIR 1914 Mad 281 (284) : 38 Mad 500 : 22 Ind Cas 566 (DB), *Navajee* v. *Administrator-General of Madras.*
('14) 1 AIR 1914 All 279 (280) : 36 All 507 : 24 Ind Cas 385 (DB), *Gur Prasad* v. *Gorakhpur Bank Ltd.*

5. ('26) 13 AIR 1926 Cal 447 (449) : 89 Ind Cas 735 (DB), *Kisen Gopal* v. *L. J. Bavin.*
('25) 12 AIR 1925 Mad 753 (756) : 87 Ind Cas 382, *Doraisami Mudaliar* v. *Doraiswami Iyengar.*

of his salary as the society may apply for. It was held that this was not an equitable assignment of the salary in favour of the society.[6]

16. "Duly authorised agent." — The instrument of transfer under this section may be signed by the transferor or his duly authorised agent. The word "duly" must be taken to mean "lawfully." Where, at the time of the transfer by the agent, he was not authorised to do so, but subsequently the principal ratifies the act, the ratification dates back retrospectively to the date of the transfer and cures the defect in the transfer. The transfer must be taken to have been made by an agent duly authorised in that behalf.[1]

17. Completeness of the transfer and notice to the debtor. — Under S. 131 as it stood prior to 1900,[1] transfer of an actionable claim was *not complete* until express notice was given to the debtor unless he was a party to the transfer or was otherwise aware of such transfer. In other words, the operation of the transfer was *suspended* until the required notice was given.[2] This was also the English law, under which the title of the assignee of a chose in action was not complete until the required notice was given, so that a subsequent assignee could obtain priority over a prior one, by the mere fact of his giving notice to the debtor.[3]

The present section has changed the law in this respect. A transfer of an actionable claim is now complete *on the execution* of the instrument signed by the transferor[4] and does not depend upon the giving of notice to the debtor.[5] The result under the present section is that if there are several transfers of the debts in favour of different persons,

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6. ('42) 29 AIR 1942 Pat 307 (308): 201 Ind Cas 342 (DB), *B. N. Ry. Employees' Urban Bank Ltd.* v. *E. W. Seager.*

Note 16

1. ('39) 26 AIR 1939 Mad 543 (545) : 188 Ind Cas 878 (DB), *Govardhandas Jamnadas* v. *Friedman's Diamond Trading Co., Ltd.*

Note 17

1. See Note 1 where the old section is reproduced.

2. ('88) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka* v. *Chandan Singh.*
('11) 10 Ind Cas 510 (511) (DB) (Cal), *Ismail Mollah* v. *Jadu Nath.*
('97) 21 Bom 60 (62, 63) (DB), *Ragho* v. *Narayan.*
('09) 4 Ind Cas 420 (423) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*
('71) 8 Bom H C R (O C) 169 (177), *Megji Hansraj et al* v. *Ramji Jotia.*
('02) 26 Bom 577 (587, 588) : 4 Bom L R 180, *Ebrahim* v. *Ful Bai.*
('87) 2 C P L R 1 (5), *Aba Balaji* v. *Nilkant.*
[*See also* ('85) 1885 All W N 282 (283), *Vilayat Ali* v. *Gullo.*]
[See however (1900) 24 Bom 502 (503): 2 Bom L R 414 (DB), *Dagdu* v. *Vanji.*]

3. ('86) 12 Cal 505 (509) (DB), *Lala Jagdeo Sahai* v. *Brij Behari Lal.*

4. ('35) 22 AIR 1935 Cal 756 (758) : 160 Ind Cas 219 (DB), *Bhupati Mohan Das* v. *Phanindra Chandra,*

5. ('12) 11 Ind Cas 964 (968) (DB) (Bom), *Vishwanatha* v. *Mulraj.*
('38) 25 AIR 1938 Rang 426 (428) : 1938 Rang L R 480 : 179 Ind Cas 541 (DB), *Balthazar & Son* v. *Official Assignee.*
('12) 14 Ind Cas 144 (145) (DB) (Mad), *Venkatachalam Iyer* v. *Subramania Iyer.*

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they take in the order of the dates of these transfers and not in the order of the dates on which notices were given to the debtor.[6]

A subsequent transferee without notice of the earlier transfer may, however, even now, obtain priority over the earlier transferee if the latter has been guilty of gross negligence or is barred by estoppel from setting up his rights.[7]

Although the title of the transferee becomes perfect on the execution of an instrument of transfer without any notice to the debtor, a dealing by the debtor with the debt without notice of the transfer will, under the second paragraph of the section, be valid against the transferee.[8] Under the repealed S. 131, a dealing by the debtor, after the transfer was not valid against the transferee, if he was a *party* to the transfer or even if he was *aware otherwise* of the transfer, although he had received no express notice of the transfer.[9] Under the present section, however, a dealing by the debtor after the transfer will not be binding on the transferee only if the debtor was either a *party* to the transfer or had been given *express notice* of the transfer. A mere knowledge of the transfer is not sufficient.

('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanaswami Pillai.*

('84) 1884 Pun Re No. 60, *Gurdittamal* v. *Sultan Muhammad.*

('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

('40) 27 AIR 1940 Pat 683 (691) : 19 Pat 715 : 192 Ind Cas 187 (DB), *Karnidan Sarda* v. *Sailaja Kanta.*

6. ('11) 11 Ind Cas 964 (968) (DB) (Bom), *Vishwanatha* v. *Mulraj.* (The English rule permitting assignees to obtain priority by giving notice does not find a place in the present section.)

('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramesubba Ayyar.*

7. ('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

8. ('38) 25 AIR 1938 Rang 1 (5) : 175 Ind Cas 786, *In the matter of Aviet Stephens,*

('87) 3 C P L R 147 (149), *Jugraj Hemraj* v. *Kissan Singh.*

(1866) 35 L J Q B 99 (100, 101) : 1 Q B 372, *Jeffs* v. *Day.*

('11) 11 Ind Cas 964 (968) (DB) (Bom), *Vishvanath* v. *Mulraj Khatau.*

('24) 11 AIR 1924 Pat 118 (119) : 2 Pat 754 : 76 Ind Cas 55 (DB), *Tata Iron and Steel Co., Ltd.* v. *Baidyanath Laik.*

[*See also* (1888) 58 L J Q B 75 (79, 80) : 37 W R (Eng) 513 : 13 App Cas 523 : 60 L T 62, *Tailby* v. *The Official Receiver.*

('87) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka Prasad* v. *Chandan Singh.*

('86) 12 Cal 505 (509) (DB), *Lala Jugdeo Sahai* v. *Brij Behari Lal.*]

9. ('87) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka Prasad* v. *Chandan Singh.*

As to what amounetd to sufficient notice under the old section, see the under-mentioned cases :

('11) 10 Ind Cas 510 (511) (DB) (Cal), *Ismail Mollah* v. *Jadu Nath.* (Constructive notice was held sufficient but actual knowledge of the transfer need not have been brought home to the debtor.)

('05) 29 Bom 199 (202) : 6 Bom L R 836 (DB), *Sahadev* v. *Papa Miya.* (Registration not sufficient notice.)

('78) 1 All 732 (734) (DB), *Kanhaiya Lal* v. *Domingo.* (Filing of suit against the debtor was held sufficient notice.)

('97) 21 Bom 60 (62, 63) (DB), *Ragho* v. *Narayan.* (Do.)

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The notice required by this section must be an *express notice* conforming to the provisions of S. 131.[9a] If the notice does not conform to the provisions of that section the debtor is not bound by it and is not debarred from treating the debt as payable to the original creditor.[10] After the receipt of notice, the debtor cannot refuse to pay the debt to the transferee; if he still makes payment to the transferor he is not absolved from liability to make payment to the transferee.[11] It was held in the undermentioned case[12] that after a notice is given to the debtor of the assignment he cannot make any payment to anyone else even under the order of the Court unless the assignee was a party to the proceeding in which the order is passed.

A conditional or qualified notice is, however, not invalid.[13] Thus, where A transfers a debt due to him by B to C and gives notice of the transfer to B but requests him to pay C only if the liability which forms the consideration of the transfer has not already been discharged by A himself, the notice is 'valid' and B would be justified in paying A, if A after giving notice, represents to B that he has satisfied the claim of C and C himself takes no steps to realise the debt from B.[14]

The section, however, does not make any provision as to what the debtor is to do when the fact of the transfer or its validity and operation is disputed. The only safe course for him, in such a case, is not to pay the debt to anyone but to ask the claimants to interplead. If he pays one of them he does so at his peril and will be obliged to pay over again to the right person if the person to whom he paid the amount is found to have no title.[15]

The notice of transfer must be given to the debtor himself or some person duly authorised by him to receive such notice.[16]

('94) 1894 Pun Re No. 12, *Jhoki Ram* v. *Malik Kadir Bakhsh.* (Do.)
('86) 12 Cal 505 (510) (DB), *Jugdeo Sahai* v. *Brij Behari Lal.* (Do.)
(1889) 2 C P L R 1 (4), *Aba Balaji* v. *Nilkanth.* (Notice not given by the transferor but given by the transferee not held sufficient.)
('87) 10 Mad 289 (290) (DB), *Subbamal* v. *Venkatarama.* (Filing of suit sufficient notice.)

9a. ('23) 10 AIR 1923 Cal 719 (720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
('38) 25 AIR 1938 Rang 1 (5) : 175 Ind Cas 786, *In the matter of Aviet Stephens.*
('09) 4 Ind Cas 420 (423) : 33 Mad 123 (DB), *Gopalakrishna Aiyar* v. *Gopalakrishna Aiyer.*

10. ('15) 2 AIR 1915 Low Bur 10 (11) : 30 Ind Cas 278 : 8 Low Bur Rul 288, *Basant Singh* v. *Burma Railways Co., Ltd.*

11. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Ayer* v. *Gopalakrishna Iyer.*

12. ('43) 30 AIR 1943 Mad 244 (245) (DB), *Burma Shell Oil Storage and Distributing Co.* v. *Official Receiver, Tinnevelly.*

13. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopal Krishna* v. *Gopala Krishna.*

14. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

15. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

16. ('15) 2 AIR 1915 Low Bur 10 (11) : 30 Ind Cas 278 : 8 Low Bur Rul 288, *Basant Singh* v. *Burma Railways Co.*

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The provisions of S. 130, however, presuppose a *valid* transfer. If the procedure laid down in this section is strictly followed but the transfer contravenes some other provisions of law, no rights under this section can pass from the transferor to the transferee.[17] Thus, if the object or consideration of the transfer is unlawful within the meaning of S. 23, Contract Act, the transfer will fail. (See S. 6.) So also where a debt is transferred with the object of defeating the creditors of the transferor, the creditors are not bound by the transfer and can treat the debt as still being the property of the transferor.[18]

18. Transfer of mortgage debt — Equities between mortgagor and mortgagee, if available against transferee. — A mortgage debt is not an actionable claim,[1] and a transfer thereof is not governed by this section. But it is well recognised in England, that until he receives notice of the transfer, the mortgagor may validly make payments to the mortgagee (transferor) and to have credit for them against the transferee.[2] The same principle has been held to apply in this country also.[3] But other equities, such as a right to set off an independent claim against the mortgagee, have been held not to be available to the mortgagor.[4]

19. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."— All rights and remedies of the transferor, whether by way of damages or otherwise, in respect of the actionable claim vest in the transferee.[1] In the undermentioned case,[2] one Mangal Ram had

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[*See also* (1880) 49 L J Ch 465 (468) : 28 W R (Eng) 681 : 14 Ch D 406 : 43 L T 3, *The Saffron Walden Building Society* v. *Rayner*.]

17. ('36) 23 AIR 1936 Oudh 275 (276) : 12 Luck 150 : 162 Ind Cas 229(DB), *Sitla-Bux Singh* v. *Mahabir Prasad*.

18. ('12) 15 Ind Cas 193 (193) (Mad), *Subramania Pillai* v. *Dakshnamurti Mudaliar*.

Note 18

1. See Section 3.

[*See also* ('85) 1885 All W N 282 (283) (DB), *Shyam Kuar* v. *Sumar Singh*. (Case under the old section 131.)]

2. Halsbury, *Laws of England*, Vol. 21, Para. 334.

3. ('20) 7 AIR 1920 Mad 742 (743) : 60 Ind Cas 255 : 43 Mad 803 (DB), *Neelamani Patnaik* v. *Sukadva Behara*.
('24) 11 AIR 1924 Nag 401 (404) : 78 Ind Cas 127 , *Basantrao* v. *Narayan*.
('80) 2 Mad 212 (214) (DB), *Chinnayya Rawuthan* v. *Chidambaram Chetti*.
See also Note 5 on Section 58.

4. ('17) 4 AIR 1917 Mad 928 (930) : 34 Ind Cas 859 : 40 Mad 683 (DB), *Subramania Aiyar* v. *Subramania Pattar*.

Note 19

1. ('36) 23 AIR 1936 Oudh 105 (106) : 159 Ind Cas 320 (DB), *Ram Sahai* v. *Bhagwan Din*.
('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanswami Pillai*.
('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *D. A. David*.

2. ('36) 23 AIR 1936 Oudh 105 (106) : 159 Ind Cas 320 (DB), *Ram Sahai* v. *Bhagwan Din*.

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Note 19

executed in favour of one Mt. Suraj, a bond for Rs. 150. The bond contained a stipulation that the loan was to be repaid in yearly instalments of Rs. 5 without interest. It was also provided that if the debtor made default in payment of any instalment, the creditor could sue only for the one instalment. It was held that these stipulations were voidable by Mt. Suraj on the ground of undue influence and that a transferee of the bond from Mt. Suraj was also entitled to exercise the same option and avoid the stipulations.

As all the rights and remedies of the transferor in respect of the actionable claim transferred pass to the transferee, the transferee is after the date of the transfer, the only party entitled to sue the debtor or the other person for the recovery of the actionable claim.[3] The contrary view taken in the undermentioned case[4] to the effect that the transferor can maintain an action against the debtor or the other person for the benefit of the transferee appears to be incorrect in view of the express terms of the section.

Section 135 of the repealed Chapter VIII[5] provided that a buyer of an actionable claim could not, except in certain specified cases, claim from the debtor anything more than what he paid for his purchase.[6] Under the present section it is clear that the transferee can claim the full amount due under the actionable claim even though he obtained his transfer in consideration of a lesser amount.

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3. ('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanswami Pillai.* (21 Ind Cas 316 followed.)
('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*

4. ('27) 14 AIR 1927 Mad 817 (818) : 104 Ind Cas 409, *Chandrasekaralingam* v. *Nagabhushanam.*

5. The old Section 135 ran as follows :

"Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies :—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold ;

(b) where it is made to a creditor in payment of what is due to him ;

(c) where it is made to the possessor of a property subject to the actionable claim ;

(d) where the judgment of a competent Court has been delivered affirming the claim or where the claim has been made clear by evidence and is ready for judgment."

6. ('88) 11 Mad 56 (63) (FB), *Rathnasami* v. *Subramanya.*
('90) 13 Mad 225 (227, 228) (FB), *Nilakanta* v. *Krishnasami.*
('87) 9 All 476 (479) (DB), *Jani Begam* v. *Jehangir Khan.*
('91) 13 All 102 (106, 108) (DB), *Hakim-un-nissa* v. *Deonarain.*
('97) 21 Bom 572 (575), *In re Runchod Khushal.*
('91) 5 C P L R 13 (18), *Deochand* v. *Maniram.*
('99) 22 Mad 301 (302) (DB), *Rama Sastri* v. *Narasimha Ayyar.*
('10) 7 Ind Cas 871 (872) (DB) (Mad), *Burle Jaganna* v. *Yelugula Latchanna.*
See also the following cases under that section :
('98) 22 Bom 761 (763) (DB), *Anandrao Babaji* v. *Durgabai.*
('91) 18 Cal 510 (513, 514) (DB), *Rajendra Narain* v. *Watsan & Co.*

Section 130
Note 20

20. Assignor's liability after the assignment. — Even though a payment made by the debtor, before notice of the assignment of the debt, to the assignor is valid against the assignee, the assignor has no right, as between himself and his assignee, to receive the debt after the date of the transfer. If he receives it he will be liable to pay it up to the assignee.[1] Nor can the assignor do anything in derogation of his transfer,[2] the principle being that a grantor cannot derogate from his own grant. Thus, in the undermentioned case[3] A and B, co-partners transferred to C all the co-partnership stock, debts, sums of money, etc. At the time of such transfer A had in his possession a bill of exchange payable to his order, the property of A and B as such co-partners. A made default in transferring the bill to C and later on incapacitated himself from so doing by parting with the bill. It was held that there was an implied covenant on the part of A not to do anything in derogation of the deed of transfer and that, as he acted in derogation of it, C could recover the amount of the bill from A. In another case[4] a deed of transfer of an actionable claim contained a clear and unambiguous statement that no part payment of any sort had ever been made to the transferor; there was also a provision that the transferee should collect the amount of the claim by recourse to litigation if he could not recover it otherwise. The transferee having failed to recover the debt

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('96) 23 Cal 713 (722), *Debendra Nath* v. *Pulin Behary.*
('86) 13 Cal 145 (146) (DB), *Grish Chandra* v. *Kashisauri Debi.*
('88) 15 Cal 436 (437) (DB), *Khoshdeb Biswas* v. *Satar Mondol.* (This section did not apply where the money was recovered by a suit after a contest as to the liability of the defendant.)
('95) 19 Bom 290 (292) (DB), *Vishnu* v. *Dagadu.* (Assignee can recover the whole debt and not the price he paid.)
('98) 2 Cal W N 147 (150) (DB), *Charan Sirkar* v. *Gangadhar Das.*
('92) 15 Mad 382 (383), *Krishnan* v. *Perachan.*
('11) 9 Ind Cas 729 (730) (DB) (Mad), *Palaniappa* v. *Shadagopa.*
('06) 29 Mad 155 (159) (DB), *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao.*
('02) 24 All 517 (518, 519) : 1902 All W N 150, *Mathura Das* v. *Murlidhar.*
('99) 3 Oudh Cas 18 (19), *Azim Ali* v. *Chowharja Bakhsh.*
('98) 21 Mad 253 (255) (DB), *Suryanarayana Sastri* v. *Ramamurti Pantulu.*
('98) 20 All 327 (335, 336) : 1898 All W N 54 (DB), *Phul Chand* v. *Chhoote Lal.*

Note 20

1. ('27) 14 AIR 1927 Rang 129 (129) : 101 Ind Cas 202, *Toyam Gulal* v. *Sheo Mullock.*
(1891) 60 L J Ch 111 (114) : 39 W R (Eng) 113 : (1891) 1 Ch 82 : 63 L T 752, *In re Patrick*; *Bills* v. *Tatham.*
(1834) 3 My & K 36 (43) : 40 E R 14 : 4 L J (NS) Ch 106 : 41 R R 5, *Fortiscue* v. *Barnett.*
(1866) 35 L J Q B 99 (100, 101) : 1 Q B 372, *Jeffs* v. *Day.*
2. (1856) 25 L J C P 229 (232) : 2 Jur (N S) 812: 27 L T (O S) 135: 107 R R 277, *Aulton* v. *Atkins.*
(1867) 36 L J C P 173 (176) : L R 2 C P 305 : 15 L T 663 : 15 W R (Eng) 581, *Gerard* v. *Lewis.*
3. (1856) 25 L J C P 229 (232) : 2 Jur (N S) 812 : 27 L T (O S) 135 : 107 R R 277, *Aulton* v. *Atkins.*
4. ('27) 14 AIR 1927 Rang 129 (129) : 101 Ind Cas 202, *Toyam Gulal* v. *Sheo Mullock.*

from the debtor sued the transferor for the price he paid for the transfer and for the costs of litigation against the debtor. It was held that the statement in the deed of transfer was a guarantee that the claim was in full force and it was also clear that the litigation was within the contemplation of parties and so the costs of litigation also. The transferee was, therefore, entitled to get a decree against the transferee not only for the price he paid but also for the costs of the suit against the debtor, and of the appeal and second appeal.

21. The right of a tenant in Malabar to compensation.— The right of a tenant in Malabar to compensation for improvements made on the tenancy land, is of a peculiar nature. It is dependent on the state of accounts existing at the time the question of compensation comes to be settled between the tenant and the landlord as to the claims which the landlord has against the tenant on account of rents or other dues payable under the lease. Such a right, however, is analogous to an actionable claim and a transfer of such right by the tenant to a third person cannot affect the rights of the landlord unless he has notice of the transfer when he accepts the surrender of the property leased and settles the account with the tenant.[1]

22. Sub-section (2). — As seen in Note 19 after the execution of the instrument of transfer the transferee is the only party entitled to maintain action against the debtor or other person for the recovery of the actionable claim. The sub-section makes it clear that the transferee is not required to obtain the consent of the transferor to the suit or proceeding against the debtor or other person and need not make the transferor a party to such suit or proceeding.[1]

23. Exception. — Transfers of fire and marine policies have been excepted from the general provisions of this section. They are governed by the special rule provided in S. 135.[1]

Until the amendment of the Exception in 1938 (see Note 1) transfers of life policies were required to be made in accordance with the provisions of this section.[2] But by the amendment of 1938 it is now provided that this section will not affect the provisions of S. 38 of the

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Note 21

1. ('99) 23 Mad 86 (88) (DB), *Vasudeva Shenoi* v. *Damodaran.*
('26) 13 AIR 1926 Mad 650 (651) : 95 Ind Cas 3, *Vishwanatha Iyer* v. *Chimmukutti Amma.*
('84) 7 Mad 545 (547) (DB), *Achuta* v. *Kali.*

Note 22

1. ('35) 22 AIR 1935 Cal 756 (758) : 160 Ind Cas 219 (DB), *Bhupati Mohan* v. *Phanindra Chandra.*

Note 23

1. ('37) 24 AIR 1937 Sind 181 (183) : 170 Ind Cas 225 : 31 Sind L R 98 (DB), *Shamdas Govindram* v. *Mt. Savtribai.*
2. ('13) 19 Ind Cas 736 (737) : 37 Bom 471 (DB), *Shankar Vishwanath* v. *Umabai Sadasiva.*
('37) 24 AIR 1937 Sind 181 (183) : 170 Ind Cas 225 : 31 Sind L R 98 (DB), *Shamdas Gobindram* v. *Mt. Savitribai.*

Section 130 Notes 23–25

Insurance Act, 1938, which now provides for the transfer of life policies. However the rights and remedies of a transferee of a life policy existing prior to the commencement of the Insurance Act, 1938, are not affected by the provisions of S. 38 of the Act (See cl. (6) of section 38, Insurance Act, 1938).

24. **The principle of 'caveat emptor' applies to the purchase of an actionable claim.** — It has been held that the principle of '*caveat emptor*' applies to the purchase of an actionable claim.[1] Thus, where a person held a promissory note for a certain amount and was paid off by the executant, but after the death of such person his widow sold it in good faith, not knowing that it was paid off, it was held that the principle of '*caveat emptor*' applied, and that the purchaser had no remedy; he should have inquired from the executant whether the note was not paid off, as he was purchasing *a mere claim*.[2]

25. **Law in the Punjab.**—The Act does not apply to the Punjab.[1] The technical provisions contained in this section as to the requirement of writing for the transfer of an actionable claim have not been applied in that province.[2] The Courts are guided in such matters by the rules of justice, equity and good conscience.[3] In the undermentioned case[4] the Court applied the provisions of S. 25, sub-section (6) of the English Judicature Act, 1873, as being in consonance with justice, equity and good conscience. In another case where a part of a debt was assigned, it was held that if this section enabled the transfer of a part of the debt, the principle underlying the section may be applied to the cases arising in the Punjab also, and that if it did not, then even according to the rules of justice, equity and good conscience, the assignee's rights were enforceable where the assignor and all other persons interested were made parties and there was no question of any harassment of the debtor by a multiplicity of proceedings.[5]

Section 131

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized

Notice to be in writing, signed.

Note 24

1. ('15) 2 AIR 1915 Lah 86 (86) : 29 Ind Cas 887, *Kishen Sarup* v. *Tara Chand.*
2. ('15) 2 AIR 1915 Lah 86 (86) : 29 Ind Cas 887, *Kishen Sarup* v. *Tara Chand.*

Note 25

1. ('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Baksh.*
('94) 1894 Pun Re No. 12, *Jhoki Ram* v. *Malik Kadir Bakhsh.*
2. ('36) 23 AIR 1936 Lah 547 (548) : 164 Ind Cas 271, *Brij Lal* v. *Dhanna Ram.*
('25) 12 A I R 1925 Lah 575 (575) : 91 Ind Cas 784, *Teja Singh* v. *Firm Kalyan Das Chet Ram.*
('32) 19 AIR 1932 Lah 30 (31) : 134 Ind Cas 121, *Lacha Ram* v. *Hem Raj.*
3. ('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*
4. ('07) 1907 Pun Re No. 9 : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*
5. ('41) 28 AIR 1941 Lah 337 (337, 338) : 197 Ind Cas 735 (DB), *Kishen Mohan Lal* v. *Gurdial Mal Sagar Mal.*

in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee. Section 131 Note 1

Synopsis

1. Legislative changes.
2. Scope.
3. Notice by transferee or by his agent.
4. "Shall state the name and address of the transferee."
5. Notice with a condition or qualification.
6. Waiver of defects in the notice.

1. **Legislative changes.** — The corresponding section in Chap. VIII, as it stood before 1900 was S. 132 which ran as follows:

> "Every such notice must be in writing signed by the person making the transfer or by his agent duly authorised in this behalf."

The section made no provision for a notice by the transferee and it was, therefore, held in the undermentioned case[1] that a notice sent by the transferee could not, under the terms of S. 131 (now S. 130), make the transfer of a debt operative. The change introduced by the present section seems to have been suggested by the decision of Farran, C. J., in *Ragho* v. *Narayan*.[2] His Lordship observed in that case:

> "Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of his assignment to the debtor. There was no particular reason why the assignor should give it. We cannot help thinking that there has been a slip made in S. 132 in throwing *upon the person making the transfer* the obligation of giving express notice to the debtor. The English Act 36 & 37 Vict. C. 66, S. 25, only requires that express notice in writing shall be given. It does not enact who is to give it. It may be given either by assignee or assignor. It may even be given after the death of the assignor. (*Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.) But, however this may be (and the attention of the Legislature may well be directed to the point), we must construe the Act as it stands. No provision is made in it for the assignee giving notice in any particular way."

Regarding the change the Select Committee observed in their report:

> "In S. 132 (now 131) we propose to enact that a notice of transfer shall be signed by the transferor, or his agent, or, in case of the transferor's refusal, by the transferee, and shall state the name and address of the transferee. The latter part of this rule goes beyond the requirements of the English law, but we submit that a notice in general terms, not stating the name and address of the transferee, would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him."

Section 131 — Note 1

1. ('89) 2 C P L R 1 (3, 4), *Aba Balaji* v. *Nilkant*.
2. ('97) 21 Bom 60 (62) (DB).

Section 131
Notes 2–5

2. **Scope.** — This section deals with the form and essentials of the notice required to be given under S. 130. In order that the saving provision in the second paragraph of sub-section (1) may be operative,[1] the requirements of this section must be strictly complied with.[2]

3. **Notice by transferee or by his agent.** — The transferee or his agent can sign the notice only if the transferor refuses to sign it.[1] The fact of such refusal need not be mentioned in the notice.[2] The section does not require that the debtor must have knowledge of the refusal by the transferor to sign, either from the notice or otherwise, in order that the debtor may be liable to the transferee. In the under-mentioned case[3] where a notice was served by the transferee on the debtor and it was not proved that the transferor refused to sign the notice, it was held that a payment made by the debtor to the transferor was valid.

4. **"Shall state the name and address of the transferee."** — The notice must state both the name and address of the transferee. So where the notice states the name of the transferee but does not state his address the provisions of this section are not complied with and the notice is not effective to bring the exception mentioned in the proviso to sub-s. (1) of S. 130 into operation.[1] Similarly, the name and address of the solicitor of the transferee cannot be substituted for the name and address of the transferee himself,[2] as the word 'shall' in the section means the very same thing and not a substitute for it.[3]

5. **Notice with a condition or qualification.** — It has been held by the High Court of Madras[1] that a notice under this section will

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Note 2

1. ('23) 10 AIR 1923 Cal 719 (719) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
('07) 9 Bom L R 838 (843) (DB), *Hunsraj* v. *Nathoo.*
2. ('23) 10 AIR 1923 Cal 719 (720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
('07) 9 Bom L R 838 (843) (DB), *Hunsraj* v. *Nathoo.*

Note 3

1. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.* (Transferor giving an invalid notice and subsequently refusing to give proper notice—Transferee is entitled to give a legal notice.)
2. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*
3. ('15) 2 AIR 1915 Low Bur 10 (11): 30 Ind Cas 278: 8 Low Bur Rul 288, *Basant Singh* v. *Burma Railways Co., Ltd.*

Note 4

1. ('23) 10 A I R 1923 Cal 719 (719, 720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller and Co.*
2. ('23) 10 A I R 1923 Cal 719 (720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
3. ('23) 10 A I R 1923 Cal 719 (721) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.* (Per Rankin, J.)

Note 5

1. ('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

not be bad merely because it is coupled with a condition or qualification, provided the other requirements of the section are complied with. Thus, where the transferor, a contractor, in a notice to the debtor, a railway company, asked the company to pay to the transferee, one G, the amount due on his final bill when the bill would be ripe for payment in due course, *unless in the meantime, the contractor had himself otherwise paid off the debt due by him to* G, it was held that the notice, though conditional or qualified, was valid and the company, therefore, could not deal with the contractor after the receipt of the notice.

6. Waiver of defects in the notice. — Where the notice does not strictly comply with the provisions of this section and is defective in form a question arises, whether the debtor himself can waive the defects in a notice. It was observed by Mukerjee, J., in *Saadasook* v. *Hoare Miller & Co.*[1] :

> "The answer to the question whether it is permissible to waive a particular provision depends upon its true nature. If the object of the Legislature is to protect or benefit an individual litigant, it is open to him to waive the positive provisions of the statute. On the other hand, if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of S. 131 fall, in my judgment, within the latter category, but I am not prepared to maintain as an abstract proposition of law, that under no conceivable circumstance can the provisions of S. 131 be waived by the debtor."

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132. Liability of transferee of actionable claim. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

(i) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him; although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Liabilities and equities.
4. Assignee need not be aware of the liability or equity.
5. Debtor may lose the benefit of the section by his own conduct.
6. Mortgage-debt. See N. 18 on S. 130.
7. Assignment in execution of decree.

Note 6

1. ('23) 10 AIR 1923 Cal 719 (720) : 80 Ind Cas 632 (DB).

Section 132 Notes 1-2

1. Legislative changes. — The corresponding section of the old chapter VIII, section 137, ran as follows :

"The person to whom a *debt or charge* is transferred, shall take it subject to all the *liabilities* to which the transferor was subject in respect thereof at the date of the transfer.

Illustration.

A debenture is issued in fraud of public company to *A*. *A* sells and transfers the debenture to *B* who has no notice of the fraud. The debenture is valid in the hands of *B*."

2. Scope of the section. — It is a general principle of law that no one can transfer to another a right or title greater than he himself has, the maxim being *nemo plus juris ad alium transferee potest quam ipse haberet*.[1] It is also a principle of equity that the assignee of a chose in action takes it subject to all the equities which subsist against the assignor.[2] This section is based on the above principles,[3] and merely enacts the law as it existed before the Act was passed.[4] Other provisions of law in which the same principles are found enacted are S. 49 of the Code of Civil Procedure[5] and Ss. 231 and 232 of the Contract Act.

The section, of course, has no application where the transfer is not of *an actionable* claim, but of an interest in immovable property. Where the right to recover arrears of profits was assigned to a cosharer in a conveyance of a village share and the cosharer sued the *lambardar* to recover the arrears, and the *lambardar* claimed to set off against

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Section 132 — Note 2

1. (1863) 32 L J C P 161 (163, 164) : 14 C B (N S) 248 : 8 L T 317 : 11 W R (Eng) 648, *Whistler* v. *Forster*. (Bill of exchange assigned without endorsement—Assignor guilty of fraud — *Held*, assignee is affected by the same as assignor cannot give a better title than himself.)

2. (1874) 23 W R (Eng) 286 (287) : 10 Eq 302 : 44 L J Ch 450 : 31 L T 747, *In re Hercules Insurance Co. ; Ex parte Brunton's Claim*.

('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Firm Jhangaldas Chimandas* v. *Firm Chetumal Bulchand*.

(1856) 25 L J Ch 896 (898) : 2 Jur (N S) 981 : 4 W R (Eng) 533, *Brandon* v. *Brandon*.

('17) 4 AIR 1917 Mad 928 (929) : 40 Mad 683 : 34 Ind Cas 859 (DB), *Subramania Iyer* v. *Subramania Pattar*.

(1868) 16 W R (Eng) 637 (639) : 3 Ch 355 : 37 L J Ch 362 : 18 L T 171, *In re Natal Investment Co.* (But the depositee of debentures though not an assignee of actual claim is held to be bound by the equities and liabilities of the depositor.)

(1858-59) 121 R R 128 (133) : 3 De G & J 294 : 5 Jur (N S) 129 : 28 L J Ch 119 : 7 W R (Eng) 167, *Athenoeum Life Asurance Society* v. *Pooley*. (The rule is not subject to his having made proper enquiries.)

('16) 3 AIR 1916 Mad 242 (246) : 31 Ind Cas 152 (DB), *Venkata Subbiah Chetty* v. *Subba Naidu*.

[*See* (1848-52) 88 R R 296 (314) : 3 H L C 702, *Mangles* v. *Dixon*.]

3. ('78) 1 All 732 (734) (DB), *Kanhaiya Lal* v. *Domingo*. (Whatever defences were available against assignor are available against assignee.)

4. ('12) 16 Ind Cas 686 (687) (DB) (Mad), *Subramanian Pattar* v. *Kiradadasan*.

5. (1900) 10 Mad L Jour 211 (212), *Subbaraya Aiyar* v. *Srinivasa Raghavaiyangar*.

[*See also* ('14) 1 AIR 1914 Bom 299 (299) : 38 Bom 631 : 25 Ind Cas 375 (DB), *Tyaballi* v. *Atmaram*.]

the claim, amounts due to him, it was held that the right to recover the profits was an interest in immovable property and not an actionable claim, and that this section had no application to the case.[6]

3. Liabilities and equities. — Where no amount is due to the assignor the assignee can get nothing. Where only a portion of the debt is due, the assignee can get nothing more. Where the debtor is entitled to set off against the assigned debt another debt due to him, the assignee can, as the first illustration shows, take the assignment only subject to this right of set off.[1] A debtor can also claim as against the assignee a right of *equitable set off*.[2] Thus, where the debtor is entitled to claim *unliquidated damages* from the assignor *arising out of the same transaction* as the assigned debt, he can set off the same against the assigned debt, even as against the assignee.[3] Where A executes a bond in favour of B under circumstances in which it is voidable by A on the ground of undue influence, fraud, etc., the option of avoiding the bond is available not only against the original creditor but also his assignee.[4] This is, in fact, illustration (ii) to the section.

But the liability or equity must be existing at the time of the assignment. In *Brice* v. *Bannister*,[5] G had contracted to build a ship for the defendant, to be paid for in four instalments. G owed money to the plaintiff, and, before the completion of the contract gave the plaintiff an order upon the defendant for the defendant to pay the plaintiff £100 out of the moneys due to G from the defendant. Notice was given of this to the defendant. The defendant, however, made subsequent advances to G to enable him to complete the contract, with the result that at the completion of the contract G had no more to receive on account of the contract. It was held that the advances made by the defendant to G, after notice of the assignment to plaintiff was not an equity existing at the date of the assignment and could not be set up against the plaintiff's claim for the amount assigned to him.

See also the undermentioned cases.[6]

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6. ('36) 23 AIR 1936 Nag 217 (218) : 165 Ind Cas 414, *Kamal Narayan* v. *Shyam Lal Udairam*.

Note 3

1. (1869) L R 4 Ch 242 (245) : 17 W R (Eng) 423 (424) : 38 L J Ch 396 : 10 L T 155, *Tooth* v. *Hallet*.
('07) 30 Mad 235 (238) : 17 Mad L Jour 87 (DB), *Arunachellam* v. *Subramaniam*.

2. As to the right of equitable set off between a debtor and creditor, see generally Note 5 on O. 8 R. 6 of the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn.

3. (1878) 26 W R (Eng) 403 (404) : 3 Ex D 127 : 47 L J Ex 579, *Young* v. *Kitchin*.
(1888) 57 L J P C 35 (41) : 13 App Cas 199 : 58 L T 285, *Government of Newfoundland* v. *Newfoundland Rly. Co.*

4. (1869) 17 W R (Eng) 810 (811) : L R 8 Eq 36 : 38 L J Ch 374 : 20 L T 77, *Graham* v. *Johnson*.

5. (1878) 3 Q B D 568 (569) : 47 L J Q B 722 : 38 L T 739 : 26 W R (Eng) 670 (671).

6. (1893) 41 W R (Eng) 475 (477) : 2 Ch 175 : 3 R 404 : 68 L T 638, *Christie* v. v. *Taunton Delmard, Lane & Co.*

Section 132
Notes 4-7

4. Assignee need not be aware of the liability or equity. — The fact that the assignee of the actionable claim is *not aware* at the date of the assignment, of the existence of the liability or equity, does not, as the illustrations show, affect the rule that he takes it only subject to such liabilities or equities.[1] It is the duty of the assignee before he takes the assignment to make enquiries as to any equities or liabilities affecting the subject-matter of the assignment.[2] It is not the duty of the debtor to inform the assignee, on the receipt of notice of assignment, that the assignment is burdened with liabilities, unless there are circumstances leading him to think that the assignee is being defrauded and is likely to sustain further loss.[3]

5. Debtor may lose the benefit of the section by his own conduct. — A debtor may by his conduct be estopped from raising against an assignee an equity which would have availed him against the original obligee. Thus, where his conduct has been such that it may be regarded as representation that there were no equities affecting the subject-matter of the assignment, and the assignee has taken the assignment on the faith of such representation, he cannot set up the equity against the assignee.[1] Where the debtor, on receiving notice of the assignment, sees that the assignee has been deceived and stands by and allows him to be defrauded, he cannot be allowed to set up his equity against the assignee.[2]

6. Mortgage-debt. — See Note 18 on Section 130.

7. Assignment in execution of decree. — The principle of this section has been held applicable even where the transfer of the actionable claim is by way of sale in execution of a decree. Where A owed a debt to B, and B owed another debt to A and in execution of a decree against B, the debt due by A to B was sold and was purchased by C, it was held that in a suit by C against A to enforce the debt, A

(1863) 11 W R (Eng) 803 (803) : 4 B & S 243 : 8 L T 502, *Wilson* v. *Gabriel.*
(1880) 50 L J Ch 772 (773) : 17 Ch D 520 : 45 L T 225 : 30 W R (Eng) 74, *Roxburgh* v. *Cox.*

Note 4

1. (1856) 25 L J Ch 896 (898) : 2 Jur (NS) 981 : 4 W R (Eng) 533, *Brandon* v. *Brandon.*
(1848-52) 88 R R 296 (311) : 3 H L C 702, *Mangles* v. *Dixon.*
2. (1848-52) 88 R R 296 (312) : 3 H L C 702, *Mangles* v. *Dixon.*
('16) 3 AIR 1916 Mad 242 (246) : 31 Ind Cas 152 (DB), *Venkata Subbiah* v. *Subba Naidu.* (Onus lies upon assignee that the assignment is free from an existing right.)
3. (1848-52) 88 R R 296 (313) : 3 H L C 702, *Mangles* v. *Dixon.*

Note 5

1. (1870) 19 W R Eng 430 (430) : 11 Eq 157 : 40 L J Ch 153, *In re South Essex Estuary Co.*; *Ex parte Chorley.*
(1874) 23 W R (Eng) 286 (287) : 10 Eq 302 : 44 L J Ch 450 : 31 L T 747, *In re Hercules Insurance Co.*; *Ex parte Brunton's Case.*
(1837) 45 R R 538 (541) : 6 Ad & E 469 (474), *Pickard* v. *Scars.*
2. (1848-52) 88 R R 296 (317) : 3 H L C 702, *Mangles* v. *Dixon.*

can set off the debt due by B to him.[1]

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Debt," meaning of.
4. "Solvency" and "warranty", meaning of.
5. "In the absence of a contract to the contrary."

Other Topics (miscellaneous)

Limits of warranty of solvency of debtor. See Note 2.

Transfer of debt—No implied warranty as to solvency of debtor. See Note 2.

1. Legislative changes.—This section was originally numbered as S. 134 of the Transfer of Property Act, 1882. By Act II of 1900 certain amendments and alterations were effected in the chapter relating to actionable claims and this section was then numbered as 133 of the Act.

2. Scope of the section. — This section deals with a case of transfer of a debt accompanied by a warranty of the solvency of the debtor. It declares that, in the absence of a contract to the contrary, the warranty will apply only to the solvency of the debtor *at the date of the transfer* and not to his continued solvency after the date of the transfer. It further declares that the liability under the warranty is limited *to the extent of the consideration* for the transfer, where the transfer is one for consideration.

Just as title to property is important in transfers of immovable property, title to goods, in the sale of goods, the solvency of a debtor is important in the transfer of a debt. But while, in the case of immovable property[1] and of goods,[2] the law *implies* a warranty of title to the property or the goods as the case may be, there is no warranty by implication of the solvency of the debtor in the case of transfers of debts.

As to warranty in various other transfers of property, see the undermentioned provisions.[3]

3. "Debt," meaning of. — The word "debt" has not been defined in this Act or in the General Clauses Act. Wharton in his *Law*

Note 7

1. ('12) 16 Ind Cas 686 (687) (DB) (Mad), *Subramanian Pattar* v. *Kiradadasan.*
('23) 10 AIR 1923 Lah 261 (262) : 3 Lah 414 : 69 Ind Cas 720 (DB), *Ram Bhaj Datta* v. *Ram Das.*
[*See also* ('14) 1 AIR 1914 Bom 299 (299) : 25 Ind Cas 375 : 38 Bom 631 (DB), *Tayabali Ghulam Hussain* v. *Atmaram Sakharam.*]

Section 133 — Note 2

1. Section 55 (2).
2. Section 14 of the Sale of Goods Act, 1930.
3. Sections 55 (2), 65 (a) and 108 (c); Negotiable Instruments Act, Section 35; Sale of Goods Act, Section 14.

Section 133
Notes 3–5

Lexicon, defines it as "a sum of money due from one person to another." In *Webb* v. *Stenton*,[1] Lord Justice Lindley defined it as a sum of money which is now payable or which will become payable in the future by reason of a present obligation.

The section speaks of the transfer of a *debt* and not of the transfer of an *actionable claim*. It is conceived, however, that the word debt must be taken to be a debt which is an *actionable claim*, inasmuch as the whole chapter in which this section occurs deals only with actionable claims.

4. "Solvency" and "warranty," meaning of. — The "solvency" of a debtor means his ability to discharge all his debts and obligations in full.[1]

The term "warranty" is not defined in this Act. It has been held to be a stipulation collateral to the main purpose of a contract, the breach of which will give rise to claim for damages,[2] against the warrantor. Section 12, sub-s. (3) of the Sale of Goods Act which follows generally the English Sale of Goods Act[3] defines "warranty" as follows:

> "A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

A warranty is in the nature of a guarantee though all the incidents of a contract of guarantee are not applicable to the case of a warranty. The liability of the transferor who warrants the solvency of his debtor is not *co-extensive* with that of the debtor as in the case of a guarantor. Further, the liability of the warrantor-transferor arises on the date of the transfer itself, whereas the liability of a guarantor arises on the non-payment of the debt by the debtor.[4]

5. "In the absence of a contract to the contrary." — Parties can contract, so as to create rights and liabilities other than those contemplated under this section. When they so contract, they will be bound by the terms of their contract and this section will not be applicable.

Under the English law, an implied covenant, on the part of the transferor, that he will not do anything in derogation of his transfer, will be presumed; thus, if a debt is rendered irrecoverable by any act of the transferor, subsequent to the transfer he will be held liable on the basis of a breach of such implied covenant.[1] He will, however, not be

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Note 3

1. (1883) 52 L J Q B 584 (588) : 11 Q B D 518 : 49 L T 532.

Note 4

1. Wharton's *Law Lexicon*, 9 Edn., page 699.

2. (1911) 80 L J K B 1058 (1060, 1062) : 1911 A C 394 : 105 L T 146 : 55 S J 496, *Wallis* v. *Prath*.

3. (1893) 56 & 57 Victoria, Ch. 71, Section 62.

4. Sections 126 to 128 of the Contract Act, 1872.

Note 5

1. (1845) 153 E R 1441 (1447) : 16 Mee & W 862: 73 R R 745, *Ward* v. *Audland*.
(1810) 104 E R 290 (296, 297) : 13 East 63 : 12 R R 299, *Seddon* v. *Senate*.
(1674) 86 E R 772 (772, 773) : 1 Mod 113, *Deering* v. *Farington*.

liable to pay the entire amount due under the debt transferred but only such amount as has been rendered irrecoverable.[2] Section 133 Note 5

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134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery: secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same. Section 134

Mortgaged debt.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Transfer of a secured debt.
4. "Existing or future debt."
5. Rights and duties of the transferee.
6. "The residue, if any, belongs to the transferor or other person entitled to receive the same."

1. Legislative changes. — This section corresponds to S. 138 of the old Chap. VIII. That section ran as follows:

> "When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue (if any) belongs to the transferor."

2. Scope of the section. — It has already been seen in Note 3 on S. 130 that the word 'transfer' in this chapter is wide enough to include a transfer by way of security also. This section deals with such cases[1] and provides for the mode of application of the amount of the transferred debt when it is received by the transferor or recovered by the transferee.

In cases of transfers of a book-debt for the purpose of securing a debt the transfer sometimes takes the form of an absolute assignment but it can be shown that the transfer was not absolute, but was intended to be merely by way of security.[2]

(1856) 25 L J C P 229 (232) : 18 C B 249 : 2 Jur (NS) 812 : 4 W R (Eng.) 592, *Aulton* v. *Atkins.*

(1867) 36 L J C P 173 (176) : 2 C P 305 : 15 L T 663 : 15 W R (Eng) 581, *Gerard* v. *Lewis.*

2. (1856) 25 L J C P 229 (232): 18 C B 249 : 2 Jur (NS) 812 : 4 W R (Eng) 592, *Aulton* v. *Atkin.*

Section 134 — Note 2

1. ('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Ray* v. *D. A. David.*

('09) 4 Ind Cas 420 (424) : 33 Mad 123 (DB), *Gopalakrishna* v. *Gopalakrishna.*

2. ('35) 22 AIR 1935 Cal 218 (220, 221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Ray* v. *D. A. David.* (When there is an assignment of a book-debt by way of security in order to secure re-payment of a debt, it amounts to a mortgage of the debt and S. 134 of the Transfer of Property Act applies to the case.)

(1913) 29 T L R 579 (580), *Sanderson & Co.* v. *Clarke.*

Section 134 Notes 3–5

3. Transfer of a secured debt. — It has been seen in Note 22 on S. 3 that a debt separated from the security given therefor is a 'debt' within the meaning of this Act. A claim to a debt is an "actionable claim" within the definition of that expression. It follows that where a debt is due to A from C and it is secured by pledge or hypothecation of C's property, A can transfer such a debt, *separated from the* security given therefor, to B in order to secure the debt which is due to him (B) by A; the result, in such a case, will be that though B will get no right or interest in the property of C which is hypothecated with A, he (B) will be entitled to the benefit of all the sums received by A from C in reduction of his own debt whether recovered from the secured property or otherwise.[1]

4. "Existing or future debt." — As to the meaning of this expression, see Note 13 on section 58.

5. Rights and duties of the transferee. — After a debt is transferred by way of security, the remedy of the transferor as a creditor regarding the recovery of the debt passes to the transferee and what remains in the transferor is only the right to redeem the transferee.[1] Consequently, the transferor cannot proceed against his debtor,[2] and the only person who can sue for the recovery of the debt in his own name being the transferee himself,[3] it is his duty to use reasonable diligence to recover the debt from the debtor.[4] If he fails to do so owing to his own default he will be deemed to have recovered the amount and will not be allowed to claim it again from the transferor on the ground that he could not recover it.[5]

Note 3

1. ('31) 18 AIR 1931 P C 245 (247, 248) : 59 Cal 377 :58 Ind App 323:134 Ind Cas 651 (PC), *Imperial Bank of India* v. *Bengal National Bank.*
[See however ('21) 8 AIR 1921 Mad 681 (681) : 68 Ind Cas 752 (DB), *Official Receiver, Trichinopoly* v. *Lakshman Aiyar.*]

Note 5

1. ('15) 2 AIR 1915 Mad 1031 (1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Iiyer* v. *Veeraraghava Aiyar.*
2. ('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*
3. ('15) 2 AIR 1915 Mad 1031 (1031, 1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Aiyar* v. *Veeraraghava Aiyar.* (Letters Patent Appeal from 16 Ind Cas 604.)
('10) 5 Ind Cas 834 (834) : 34 Mad 53 (DB), *Ramasamy Pillai* v. *Muthoo Chetty.*
('97) 20 Mad 35 (38) : 6 Mad L Jour 235 (DB), *Muthu Vijaya* v. *Venkatachellam Chetti.* (It is a recognised rule of Roman law that when what is hypothecated is a claim the hypothecatee may alienate it or enforce it in the action instituted in his own name.)
('20) 7 AIR 1920 Mad 426 (426) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*
[*See also* ('09) 3 Ind Cas 311 (314) (DB) (Cal), *Isri Prosad* v. *Gunga Prosad.*]
4. ('04) 32 Cal 27 (36) : 31 Ind App 176 (PC), *Shyam Kumari* v. *Rameswar Singh.*
5. ('04) 32 Cal 27 (36) : 31 Ind App 176 (PC), *Shyam Kumari* v. *Rameswar Singh.*
('15) 2 AIR 1915 Mad 1031 (1032) : 38 Mad 297 : 21 Ind Cas 316 (317) (FB), *Muthukrishna Aiyar* v. *Veeraraghava Aiyar.*

Section 134 Notes 5-6

Where a charge is created on a debt by way of security it amounts to a transfer and the charge-holder can sue to recover the debt from the transferor's debtor.[6]

When the transferee brings a suit against the transferor's debtor for the recovery of his debt, he must implead the transferor as a party to the suit, so that the matter may be settled in his presence.[7]

6. **"The residue, if any, belongs to the transferor or other person entitled to receive the same."** — The residue remaining after the payment of the costs of recovery and the debt secured, belongs to the transferor. The reason is that when a debt is transferred by way of security only, the transferee does not become the absolute owner thereof. He becomes entitled to recover out of the transferred debt only the amount which is secured, the residuary interest being still left in the transferor[1] who can at any time pay off the debt due to the transferee and have the security released.[2]

Section 135

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

Synopsis

1. Legislative changes.
2. Scope.
3. "By endorsement or other writing."

1. **Legislative changes.**—There was no section corresponding to this in the old Chapter VIII. It was introduced for the first time in this Act by the Transfer of Property Act (II of 1900) and was a re-enactment, with verbal alterations, of the provisions in S. 15 of the Policies

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('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*

[*See also* ('10) 7 Ind Cas 972 (976) : 35 Bom 1 (DB), *Ganpatrao Balakrishna* v. *Madhavrao Shinde.*]

6. ('10) 5 Ind Cas 834 (834) : 34 Mad 53 (DB), *Ramaswamy Pillai* v. *Mothoo Chetty.*

('09) 4 Ind Cas 804 (807) : 33 Bom 610 (DB), *Ardesir* v. *Sirdar Ali.*

7. ('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam* v. *Madaswami.*

[*See also* ('10) 5 Ind Cas 834 (834) : 34 Mad 53 (DB), *Ramasami Pillai* v. *Muthu Chetty.*]

Note 6

1. ('35) 22 A I R 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *David.*

2. ('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *David.*

('40) 27 A I R 1940 Mad 258 (264), *Travancore National Bank Subsidiary Co. Ltd.* v. *T. N. & Q. Bank, Ltd.*

Section 135 Notes 1–3

of Insurance (Marine and Fire) Assignment Act (V of 1866) which was repealed.

2. **Scope.**—A policy of insurance is a contract of indemnity. It is not an incident to the property insured, and does not pass, as such, with the transfer of the property to the transferee. In order that the latter should get the benefit of the policy it must be assigned to him by endorsement or other writing. In the undermentioned case[1] where A mortgaged certain property to B and then insured the same against fire it was held that B, who did not take an assignment of the policy, was not entitled to claim the insurance amount from the insurer, when the property was destroyed by fire.

3. **"By endorsement or other writing."** — The word 'endorsement' means "anything written or printed upon the back of a deed or writing".[1] A policy of marine or fire insurance can, therefore, be assigned by writing the words of transfer on the back of the policy itself or by executing a separate document.

Section 136

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

Incapacity of officers connected with Courts of Justice.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Buy or traffic in . . . . actionable claim."
4. Legal practitioner.
5. This section does not apply to purchases in execution.

1. Legislative changes. — Section 136 of the old Chap. VIII for which this section was substituted by the Transfer of Property Act, II of 1900, ran as follows:

"No Judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions."

2. Scope of the section. — This section prohibits a Judge, a legal practitioner or an officer connected with any Court of Justice from trafficking or dealing in any actionable claim[1] and further provides that

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Section 135—Note 2

1. ('23) 10 AIR 1923 Rang 6 (7, 8) : 67 Ind Cas 777 : 11 Low Bur Rul 294, *P. V. Chetty Firm* v. *Motor Union Isurance Co.*

Note 3

1. Wharton, *Law Lexicon.*

Section 136 — Note 2

1. ('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 13 Cr L J 800 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkat Rao.*

an actionable claim so dealt with cannot be enforced in any Court.[2] The class of persons named hold a privileged position in the administration of justice and the law imposes on them certain restrictions and disabilities in order to safeguard the interests of the litigants and the pure administration of justice.[3] "It is of great importance in all countries and more particularly in a country like India" observed their Lordships of the Privy Council in *Kera Koose* v. *Serle*,[4] "that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration."

The prohibition being absolute, any transfer in defiance of it, is void.[5]

The section as it now stands is wider in its scope than the section as it originally stood. The prohibition under the old section was restricted only to *buying* and in respect of those actionable claims, which fell under the jurisdiction of the Court in which the transferor exercised his functions. Under the present section, the prohibition extends to trafficking in, or stipulating for or agreeing to receive any share of or any interest in, any actionable claim, whether the claim is within the jurisdiction of the Court with which the transferor is connected or of any other Court. The view[6] under the old section, that a pleader or an officer who did not practise or exercise his functions in the Court by which the claim was cognizable, was not prevented from purchasing it, is no longer law.

This section may be compared to O. 21, R. 73 of the Code of Civil Procedure, 1908.

3. **"Buy or traffic in . . . . . actionable claim."**—The prohibition under this section extends to buying, or trafficking in or stipulating for, or agreeing to receive any share of or interest in, any actionable claim. Thus, a sale,[1] or an assignment by way of

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2. ('13) 19 Ind Cas 129 (129) : 40 Cal 650 (FB), *Hari Lal Sinha* v. *Tripura Charan Roy.*
('36) 23 AIR 936 Oudh 275 (276) : 162 Ind Cas 229 : 12 Luck 150 (DB), *Sitla Bux Singh* v. *Mahabir Prasad.* (Transfer to a Special Magistrate and Honorary Assistant Collector.)
('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkata Rao.*

3. ('14) 1 AIR 1914 Mad 512 (525) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkata Rao.*

4. (1846) 3 Moo Ind App 329 (346) (PC).

5. ('32) 19 AIR 1932 All 345 (347) : 136 Ind Cas 833 : 54 All 499 (DB), *Amir Hasan* v. *Md. Nazir.*

6. ('88) 11 Mad 56 (61) (DB), *Rathnasami* v. *Subramanya.*
('88) 11 Mad 498 (499) (DB), *Singaracharlu* v. *Sivabai.*

Note 3

1. ('25) 12 AIR 1925 Pat 310 (312) : 4 Pat 43 : 83 Ind Cas 81 (DB), *Sheo Gobind Singh* v. *Gowri Prasad.*
('32) 19 A I R 1932 All 345 (347) : 136 Ind Cas 833 : 54 All 499 (DB), *M. Amir Hasan Khan* v. *H. Mohammad Nazir Hasan.*
('13) 19 Ind Cas 129 (137) : 40 Cal 650(FB), *Hari Lal Singh* v. *Tripura Charan.*

Section 136
Notes 3–5

security[2] of an actionable claim to any of the persons named in the section comes within the prohibition and is therefore void. In the undermentioned case[3] where a Judge made a gift to his nephew, a Barrister, of his rights under the contract to purchase certain immovable property, it was held by the High Court of Lahore that there was no buying or trafficking in or stipulation for any share of or interest in an actionable claim.

The section does not prohibit a mere sale by any of the persons named.[4] The words "traffic in" may in certain circumstances include the transaction of sale, but it connotes something more than a mere sale.[5]

Where a pleader advanced money to his client on a usufructuary mortgage, for the purpose of paying off a redemption decree passed in the client's favour, it was held that the transaction of mortgage did not in any way amount to the taking of a transfer of an actionable claim.[6]

4. Legal practitioner. — The old section was limited to legal practitioners who were *pleaders* or *mukhtars*. This section is wider and includes *all* legal practitioners. The term "legal practitioner" has not been defined by this Act, or by the General Clauses Act. Section 3 of the Legal Practitioners' Act, XVIII of 1879, defines it to mean, "an advocate, a vakil, or attorney of any High Court, a pleader, a mukhtar or revenue agent." It is conceived that the term "legal practitioner" in this Act will also include an advocate, a vakil, attorney of a High Court, a pleader, a mukhtar or revenue agent.[1]

A pleader's clerk,[2] however, is not disqualified from dealing in actionable claim.

5. This section does not apply to purchases in execution. —By virtue of S. 2 (d), this section does not affect transfers in execution

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('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkata Rao.*
[*See also* ('87) 11 Mad 56 (61) (DB), *Rathnasami* v. *Subramanya.*
('88) 11 Mad 498 (499) (DB), *Singaracharlu* v. *Sivabai.*]

2. ('35) 22 AIR 1935 Cal 756 (759) : 63 Cal 578 : 160 Ind Cas 219 (DB), *Bhupati Mohan* v. *Phanindra Chandra.*

3. ('24) 11 AIR 1924 Lah 709 (710) : 78 Ind Cas 87 (DB), *Akhtar Beg* v. *Haq Nawaz.*

4. ('27) 14 AIR 1927 Pat 2 (4) : 97 Ind Cas 373 (DB), *Hirday Narain Singh* v. *Jugal Prasad Singh.*
('25) 12 A I R 1925 Pat 310 (312) : 4 Pat 43 : 83 Ind Cas 81 (DB), *Sheo Gobind Singh* v. *Gouri Prasad.*

5. ('27) 14 A I R 1927 Pat 2 (4) : 97 Ind Cas 373 (DB), *Hirday Narain Singh* v. *Jugal Prasad Singh.*

6. ('16) 3 A I R 1916 Oudh 219 (220) : 34 Ind Cas 360 (361) : 19 Oudh Cas 60, *Mt. Shibunnissa* v. *Abdul Ghaffur.*

Note 4

1. ('32) 19 A I R 1932 All 345 (347) : 54 All 499 : 136 Ind Cas 833 (DB), *Amir Hasan Khan* v. *Mahomed Nazir.* (Vakil.)
('25) 12 AIR 1925 Pat 310 (311; 312) : 4 Pat 43 : 83 Ind Cas 81 (DB), *Sheogobind Singh* v. *Gauri Prasad.* (Mukhtar.)
('13) 19 Ind Cas 129 (129) : 40 Cal 650 (FB), *Hari Lal Singh* v. *Tripura Charan Roy.* (Pleader.)

2. ('96) 9 C P L R 35 (35), *Hira Lal* v. *Mt. Dhammo Kurmin.*

of a decree. But by O. 21, R. 73 of the Code of Civil Procedure "no officer or other person having any duty to perform in connexion with any sale shall either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold." A purchase by a *pleader* of an actionable claim under a life insurance policy in execution of a decree is not vitiated by this section.[1]

Section 136 Note 5

Section 137

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Stocks and shares.
4. "Instruments which are for the time being, by law or custom, negotiable."
5. "Any mercantile document of title to goods."

1. Legislative changes. — The present section was substituted for S. 139 of the old Chap. VIII, by the Transfer of Property Act, II of 1900. The old S. 139 ran as follows:

"Nothing in this section applies to negotiable instruments."

Under the section as it now stands, the exemption is extended to stocks, shares or debentures and mercantile documents of title to goods.

2. Scope of the section. — This section provides that nothing in this chapter will apply to stocks, shares or debentures, or to instruments which are for the time being negotiable by law or custom or to any mercantile document of title. It enables the transfer of the things specified in the section, to be made otherwise than in the manner provided by S. 130 and the effect of such transfer is not controlled by the

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Note 5

1. ('27) 14 AIR 1927 Cal 691 (692) : 104 Ind Cas 729 (DB), *National Insurance Co.* v. *Haridas Basu.*

See also Notes on O. 21, R. 73 of the Authors' Commentaries on the *Code of Civil Procedure*, 3rd (1940) Edn.

Section 137 Notes 2–4

subsequent sections.[1] Transfers of these things mentioned in the section have been provided for by special Acts of the Legislature or by the Law Merchant. Thus, the Negotiable Instruments Act, 1881, deals with the mode and the effect of the transfers of certain negotiable instruments such as promissory notes, bills of exchange and cheques. These instruments, though in themselves actionable claims within the meaning of S. 3 of the Act, are thus differentiated from other kinds of actionable claims by this section.

As seen in Note 3 on S. 4, this section, as it relates to contracts, forms part of the Indian Contract Act by virtue of section 4.

3. Stocks and shares. — In England a share is regarded as a chose in action.[1] It is not a chose in action in India.[2] A share is a moveable property within the meaning of the Indian Companies Act, 1913, and is transferable in the manner stated in that Act.[3] The Sale of Goods Act, 1930, also expressly includes shares in the definition of 'goods' in that Act.[4] They have been exempted by this section from the operation of this chapter.

Under S. 2 (16) of the Indian Companies Act, 'share' includes 'stock.' It has also been exempted by this section from the provisions of this chapter.

4. "Instruments which are for the time being by law or custom negotiable."

(A) 'Negotiable Instrument' — Meaning of.

An instrument is negotiable when it is, by the custom of trade, transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore* in his own name.[1] The two essentials of negotiability are thus, (i) that the instrument is transferable like cash, merely by delivery, and (ii) that the person holding it is able

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Section 137 — Note 2

1. ('31) 18 AIR 1931 Cal 223 (231) : 131 Ind Cas 689 : 58 Cal 136 (DB), *Imperial Bank of India* v. *Bengal National Bank, Ltd.*

Note 3

1. ('26) 13 AIR 1926 P C 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*
('43) 30 AIR 1943 Mad 74 (76) : 205 Ind Cas 210 : ILR (1943) Mad 115, *Elaya Nayar* v. *P. N. Krishna Pattar.* (Letters Patent Appeal from AIR 1941 Mad 394 reversing it.)
2. ('26) 13 AIR 1926 P C 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*
('43) 30 AIR 1943 Mad 74 (76) : 205 Ind Cas 210 : I L R (1943) Mad 115 (DB), *Elaya Nayar* v. *Krishna Pattar.*
3. See Section 28 of the Indian Companies Act (VII of 1913).
[*See* (1902) 2 K B 427 (430) : 71 L J K B 712 (714) : 87 L T 304 : 18 T L R 703, *Torkington* v. *Magee.*]
4. See Section 2 (7) of the Sale of Goods Act, 1930.
[*See also* ('26) 13 AIR 1926 P C 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*]

Note 4

1. Halsbury, *Laws of England*, Vol. 2, page 429, Para. 776.

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Note 4

to sue, in due course, in his own name.[1a] Thus, a *bona fide* transferee for value of negotiable instrument acquires a good title thereto, even though his transferor had none, just as a *bona fide* transferee of cash obtains a good title to it, although his transferor might have stolen it.[2] It has, therefore, been remarked that 'negotiable' is a term which, perhaps should be strictly reserved for instruments which may give to a transferee a *better title* than that possessed by the transferor.[3] A negotiable instrument partakes of the nature of a contract also, as it contains either an order or a promise to pay money.[4]

(B) Negotiable instruments under statutes.

The Negotiable Instruments Act, 1881, deals, as it states in its Preamble, only with promissory notes, bills of exchange and cheques, and such instruments are 'negotiable' within the meaning of that statute when they are payable either to order or to bearer.[5]

(C) Negotiable instruments under custom or Law Merchant.

The Negotiable Instruments Act is, however, not exhaustive of all instruments which are negotiable. Apart from the instruments recognised by that Act as 'negotiable,' there are other instruments such as various kinds of hundis,[6] debentures payable to bearer,[7] or scrips

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1a. ('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Firm Jhangaldas Chimadas* v. *Fiam Chetumal Bulchand.*

2. ('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath.*

(1863) 32 L J C P 161 (164) : 8 L T 317 : 14 C B (N S) 248 : 11 W R (Eng) 648. *Whistler* v. *Forster.*

3. Scrutton on *Charter Parties*, Note 1, page 155.

4. ('34) 21 AIR 1934 Cal 549 (549): 61 Cal 425 : 150 Ind Cas 925 (DB), *Surath Chandra* v. *Kripanath.*

5. Section 13, Negotiable Instruments Act, 1881.

('70) 14 Suth W R (O C) 5 (6) : Bourke O C 157 (DB), *Mohendro Lall Bose* v. *Jadub Kissen Singh.* (A bill of exchange.)

('34) 21 AIR 1934 Bom 356 (358) : 153 Ind Cas 352, *Virappa* v. *Mahadevappa.* (Pronote payable to bearer or order.)

('20) 7 AIR 1920 Low Bur 42 (43) : 55 Ind Cas 718 : 10 Low Bur Rul 96, *T. A. R. A. R. M. Chetty Firm* v. *S. E. Soloman.* (Do.)

('31) 18 AIR 1931 Cal 387 (388) : 58 Cal 752: 131 Ind Cas 570 (DB), *Harkishore Barua* v. *Gura Mia.* (Do.)

('69) 12 Suth W R (O C) 9 (10) : 3 Ben L R (O C) 130, *Ramlal Mookerjee* v. *Haran Chandra Dhar.* (Do.)

(1836) 4 Add & E 785 (790, 791) : 111 E R 979, *Wise* v. *Charlton.* (Do.)

('93) 17 Mad 85 (86) (DB), *Ramchandra* v. *Sesha.* (Do.)

('10) 8 Ind Cas 796 (797, 798) (DB) (Cal), *Hira Lal* v. *Raj Kumar.* (Do.)

('97) 21 Mad 49 (50) : 7 Mad L Jour 291 (DB), *Tirupathi* v. *Rama.* (Do.)

('35) 22 AIR 1935 Rang 156 (157) : 156 Ind Cas 788, *Mangaban* v. *B. B. Upadhaya.* (Do.)

6. ('19) 6 AIR 1919 Lah 85 (86) : 51 Ind Cas 250 : 1919 Pun Rs No. 29 (DB), *Panna Lal Lachman Das* v. *Hargopal Khubi Ram.*

7. (1898) 67 L J Q B 986 (995) : (1898) 2 Q B 658 : 3 Com Cas 285 : 79 L T 270, *Bechuanaland Exploration Co.* v. *London Trading Co.*

[*See* ('31) 18 AIR 1931 Cal 223 (231) : 58 Cal 186 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank.* (Rankin, C. J.—Section 137 does not make reference to debentures considered as transfers, but only as the subject-matter of a transfer.)]

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Note 4

or bonds,[8] which have been regarded as negotiable instruments by the custom of trade. Indeed, with the growth of the trade and wide expansion of commerce, new kinds of securities emerge and claim recognition from the Courts of law as negotiable instruments. These instruments owe their validity to the Law Merchant which is 'nothing more nor less than the usages of merchants and traders in different departments of trade, ratified by the decisions of Courts of Law, which upon such usages being proved before them have adopted them as settled law, with a view to the interests of trade and public convenience'.[9] In order to be included in the category of negotiable instruments, these instruments must possess the essentials stated above. Otherwise, they will not be recognised as negotiable instruments.[9a] Thus, a document of title to goods cannot be negotiable in the strict sense of the word as the endorsee of it does not get a better title than his assignor.[10] See also the undermentioned cases in which the instruments were held not to be 'negotiable instruments'.[11]

(D) Transfer of negotiable instruments.

The usual mode of transfer of a negotiable instrument is by endorsement or by delivery.[12] Such instruments, however, may be transferred otherwise than by *negotiation*.[13] What the Negotiable

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8. ('18) 5 AIR 1918 Low Bur 122 (128) : 40 Ind Cas 86 : 9 Low Bur Rul 143 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*

9. Halsbury, *Laws of England*, Vol. 2, Para. 775.

9a. ('38) 25 AIR 1938 Sind 24 (27) : 173 Ind Cas 591 : 32 Sind L R 640, *Firm Jhangaldas Chimandas* v. *Firm Chetumal Bulchand.*

10. Scrutton on *Charter Parties*, Note 1, page 155.
('18) 5 A I R 1918 Low Bur 122 (128) : 40 Ind Cas 86 : 9 Low Bur Rul 143 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*
[But see (1869) L R 2 P C 393 (405, 406) : 38 L J P C 30 (34) : 21 L T 33 : 3 Moo P C (NS) 538, *Rodger* v. *The Comptoie, D' Escompte De Paris.*]

11. ('75) 1 All 732 (734) (DB), *Kanhaiyalal* v. *Domingo.* (A promissory note made payable simply to the payee is not negotiable.)
('02) 12 Mad L Jour 351 (353), *Sugappa* v. *Govindappa.* (Pronote.)
('97) 7 Mad L Jour 231 (232) (DB), *Udayar Pillai* v. *Muthia Pillai.* (Do.)
('06) 1906 Pun Re No. 144 p. 518 : 1907 Pun L R No. 106, *Parfitt* v. *Chain Sukh.* (Promissory note made payable to the payee.)
('14) 1 AIR 1914 Bom 286 (287) : 38 Bom 618 : 28 Ind Cas 114 (DB), *R. D. Sethna* v. *Hemmingway.* (A deposit receipt is not a negotiable instrument.)
('07) 30 Mad 88 (90) : 16 Mad L Jour 508 (FB), *Subba Narayana* v. *Ramaswami Aiyar.* (A promissory note.)

12. ('35) 22 A I R 1935 Bom 343 (346) : 59 Bom 573 : 158 Ind Cas 145, *Kamala kant* v. *Madhavji.*
('37) 24 A I R 1937 Pat 100 (102) : 16 Pat 74 : 167 Ind Cas 57 (FB), *Ghanshyam Das* v. *Ragho Sahu.*
[*See* ('26) 13 AIR 1926 Cal 447 (449, 450) : 89 Ind Cas 735 (DB), *Kisen Gopal* v. *L. J. Bavin.*
('27) 14 AIR 1927 Lah 89 (90) : 95 Ind Cas 704 (DB), *Ram Jas* v. *Shahabuddin.*
('07) 17 Mad L Jour 393 (393, 394) : 3 Mad L Tim 7 (DB), *Arunachela Reddi* v. *Subba Reddi.*
('09) 2 Ind Cas 553 (559) : 36 Cal 493 (DB), *Shamaldhone Dutt* v. *Lakshimani Debi.*
(1909) 4 Ind Cas 288 (288) : 5 Low Bur Rul 93 (DB), *Aw Nin* v. *Raman Chetty.*]

13. ('37) 24 AIR 1937 Oudh 405 (405, 406) : 168 Ind Cas 922 : 13 Luck 373 (DB), *Jailal* v. *Jagmohan Lal.*

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Note 4

Instruments Act does is to prohibit *negotiation* except in the manner specified by it, but it does not prohibit assignment in any of the several ways allowed by law.[14] Negotiable instruments are actionable claims and as such they can also be transferred by assignment under S. 130.[15] The view, that they could be transferred only by endorsement or by

('37) 24 AIR 1937 Pat 100 (102) : 16 Pat 74 : 167 Ind Cas 57 (FB), *Ghanshyam Das* v. *Ragho Sahu.* (Transfer by registered instrument—AIR 1934 Pat 382 overruled.)

('39) 26 AIR 1939 Lah 501 (502) : 185 Ind Cas 426 : ILR (1940) Lah 84, *Ram Rattan* v. *Gobind Ram.* (Oral assignment is valid in the Punjab.)

('19) 6 AIR 1919 Lah 85 (86) : 51 Ind Cas 250 : 1919 Pun Re No. 29 (DB), *Panna Lal Lachman Das* v. *Hargopal Khubi Ram.* (Do.)

('25) 12 AIR 1925 Lah 575 (575) : 6 Lah 487 : 91 Ind Cas 778, *Teja Singh* v. *Kalyan Das Chet Ram.* (Do.)

('32) 19 AIR 1932 Lah 30 (31) : 134 Ind Cas 121, *Lacha Ram* v. *Hemraj.* (Do.)

('41) 28 AIR 1941 Pesh 45 (47): 195 Ind Cas 185 (DB), *Kaluram* v. *Feroze Shah.* (In the Punjab and N. W. F. P. hundis can be assigned orally.)

('21) 8 AIR 1921 Low Bur 92 (93): 66 Ind Cas 501: 11 Low Bur Rul 174, *Palawan* v. *B. Kanu.*

('10) 8 Ind Cas 881 (882) (DB) (Mad), *Lodd Govind Das* v. *Munuswamy Pillai.*

[*See* ('43) 30 AIR 1943 Sind 67 (72) : I L R (1942) Kar 516 (DB), *Dowlat Ram Mohandas* v. *Vasdeo Manghumal.* (But not by a mere book entry.)]

[*See also* ('12) 14 Ind Cas 720 (721) (DB) (Cal), *Binode Kishore Goswami* v. *Ashutosh Mukherjee.*]

14. ('33) 20 AIR 1933 Mad 133 (133) : 138 Ind Cas 262, *Venkatarama Ayyar* v. v. *Krishnaswami Chettiar.*

15. ('05) 28 Mad 544 (545, 546) : 15 Mad L Jour 384 (DB), *Muthar Sahib* v. *Kadir Sahib.*

('01) 24 Mad 654 (656) (DB), *Muhammad Khumarali* v. *Ranga Rao.*

('14) 1 AIR 1914 Cal 566 (566) : 22 Ind Cas 500 (DB), *Akhoy Kumar Pal* v. *Hari Das Basack.*

('21) 8 AIR 1921 Low Bur 92 (94) : 66 Ind Cas 501 (502) : 11 Low Bur Rul 174, *Palawan* v. *B. Kanu.*

('33) 20 A I R 1933 Mad 133 (133) : 138 Ind Cas 262 (DB), *Venkatarama Ayyar* v. *Krishnaswami Chettiar.*

('35) 22 AIR 1935 Bom 343 (346) : 158 Ind Cas 145 : 59 Bom 573, *Kamalakant Gopalji* v. *Madhavji Vaghji.*

('32) 19 A I R 1932 Nag 23 (24) : 137 Ind Cas 33 : 27 Nag L R 327, *Gulabgir* v. *Nathmal.*

('34) 21 A I R 1934 Cal 549 (549) : 150 Ind Cas 925 : 61 Cal 425 (DB), *Surat Chandra Saha* v. *Kripanath Chowdhury.*

('12) 15 Ind Cas 380 (381) (Mad), *Raman Chetty* v. *P. Nagarathna Naicker.*

('21) 8 AIR 1921 Mad 137 (139) : 61 Ind Cas 461 : 44 Mad 196 (DB), *Perumal Ammal* v. *Perumal Naicker.*

('15) 2 AIR 1915 Mad 1031 (1031, 1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Aiyar* v. *Veeraraghava Iyer.*

('06) 9 Oudh Cas 174 (177) (DB), *Jagan Nath* v. *Allahabad Bank Ltd.*

('07) 17 Mad L Jour 393 (393) (DB), *Arunachella Reddi* v. *Subba Reddi.*

('21) 8 AIR 1921 Mad 122 (122, 123) : 59 Ind Cas 943 (DB), *Kunhi Koramath Chandu* v. *A. T. Ramunni.* (Mere acknowledgment of payment is neither endorsement nor assignment.)

('12) 14 Ind Cas 279 (281) (DB) (Mad), *Kattick Ramunni* v. *Udayamangalath Mithale.*

('26) 13 AIR 1926 Nag 206 (207): 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.*

[*See* ('34) 21 A I R 1934 Mad 529 (533) : 57 Mad 1082 : 153 Ind Cas 916 (D B), *Gopalu Pillai* v. *Kothandarama Ayyar.*]

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Notes 4–5

delivery[16] is no longer good law.

The incidents, however, of a transfer by assignment and of a transfer by endorsement are different. In the former case, the assignee acquires all the right, title and interest of the assignor, while an endorsee is clothed with the rights and advantages of a holder in due course.[17] Similarly, in the former case the assignment being subject to the rules in Chap. VIII the transfer is subject to all the equities and liabilities to which the transferor was subject, while in the latter case it is not.[17a] The assignee, on the other hand, being an assignee of the *debt*, can sue all the persons liable for the debt, while an endorsee who gets only the property in the 'instrument' by the endorsement, has merely the rights on the instrument and, therefore, can sue only the person whose name appears thereon.[17b]

(E) Railway receipt.

A railway receipt is not a negotiable instrument unless by special custom.[18]

5. "'Any mercantile document of title to goods." — Compare S. 2, sub-s. (4) of the Sale of Goods Act, 1930. In order that a document may be a 'mercantile document of title to goods' it must be a document —

(a) which is used in business as proof of the possession or control of the goods, or

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16. ('94) 17 Mad 461 (462), *Abboy Chetti* v. *Ramachandra. Rau* (11 Mad 290, followed which is overruled in 24 Mad 654.)
('80) 5 Bom 268 (277), *Merbai* v. *Perozbai.*
[*See* ('20) 7 AIR 1920 Low Bur 42 (43) : 10 Low Bur Rul 96 : 55 Ind Cas 718, *T. A. R. A. R. M. Chetty Firm* v. *Solomon.*]

17. ('35) 22 AIR 1935 Bom 343 (346) : 59 Bom 573 : 158 Ind Cas 145, *Kamalakant* v. *Madhavji.*
('32) 19 AIR 1932 Nag 23 (25) : 27 Nag L R 327 : 137 Ind Cas 33, *Gulabgir* v. *Nathmal.*
('05) 28 Mad 544 (545, 546) : 15 Mad L Jour 384 (DB), *Muthar Sahib* v. *Kadir Sahib.*
('38) 25 AIR 1938 Mad 377 (379) : 174 Ind Cas 577 : ILR (1938) Mad 568 (FB), *Maruthamuthu Naicker* v. *Kadir Badsha.*
('01) 24 Mad 654 (656) (DB), *Muhammad Kumarhali* v. *Ranga Rao.*
('01) 24 Mad 657*n* (657*n*) (DB), *Ramchandra Rao* v. *Abeeb Rowthan.*
('06) 9 Oudh Cas 174 (177) (DB), *Jagannath* v. *Allahabad Bank.*
('19) 6 AIR 1919 Lah 85 (86) : 51 Ind Cas 250 : 1919 Pun Re No. 29 (DB), *Pannalal* v. *Hargopal.*

17a. ('34) 21 AIR 1934 Cal 549 (549, 550) : 150 Ind Cas 925 : 61 Cal 425 (DB), *Surath Chandra* v. *Kripanath.*

17b. ('38) 25 AIR 1938 Mad 377 (377, 378) : 174 Ind Cas 577 : I L R (1938) Mad 568 (FB), *Maruthamuthu Naicker* v. *Kadir Badsha.*
[*See* ('35) 22 AIR 1935 Mad 240 (242) : 156 Ind Cas 455, *Periakaruppan* v. *Mottayya.* (Where the endorsement is in blank, it only operates to transfer the property in the instrument and not as an assignment of the debt : Approved in A I R 1938 Mad 377 (FB).)]

18. ('23) 10 AIR 1923 Rang 1 (3, 4) : 68 Ind Cas 694 : 11 Low Bur Rul 341 (DB), *Firm Arunachalam* v. *Ko Po.* (Railway receipt not negotiable by the custom of the paddy trade in Rangoon.)

(b) which authorises or purports to authorise the possessor of the document to transfer or receive the goods thereby represented.[1]

Section 137 Note 5

A railway receipt,[2] a bill of lading,[3] delivery order,[4] dock warrant and warehouse-keeper's certificate, are all illustrations of mercantile documents of title to goods. But a document called a "mate's receipt" by a shipping company, containing stipulations as to freight, carriage and other conditions appropriate to a bill of lading, was held by their Lordships of the Privy Council not to amount to a document of title to goods.[5] A railway receipt which provides for delivery of goods only to the consignee or his endorsee as his agent is not an instrument of title within the meaning of this section.[5a]

A document of title to goods represents the goods to which it relates, and the law governing its transferability is the same as the law which governs the transferability of the goods themselves.[6] The transfer of a railway receipt does not effect a transfer of the *ownership*

Note 5

1. ('14) 1 AIR 1914 Bom 290 (292, 293) : 21 Ind Cas 343 : 38 Bom 255 (DB), *S. Amarchand & Co.* v. *Ramdas V. Darbar.* (Affirmed in A I R 1916 P C 7.)

2. ('16) 3 AIR 1916 P C 7 (8) : 40 Bom 630 : 43 Ind App 164 : 35 Ind Cas 954, *Ramdas Vithaldas Darbar* v. *S. Amarchand & Co.*

('33) 20 AIR 1933 Mad 207 (209) : 143 Ind Cas 641 : 56 Mad 177 (DB), *Mercantile Bank of India* v. *Official Assignee of Madras.*

('16) 3 AIR 1916 Mad 750(751): 38 Mad 664: 30 Ind Cas 950,(DB), *Fakeerappa* v. *Thippanna.*

('34) 21 AIR 1934 P C 246 (248) : 152 Ind Cas 730 : 61 Ind App 416 : 58 Mad 181 (PC), *Official Assignee Madras* v. *Mercantile Bank of India.* (AIR 1916 P C 7 followed.)

('28) 15 A I R 1928 All 145 (146) : 50 All 227 : 108 Ind 457 (DB), *Secretary of State* v. *Rishi Ram.* (Railway receipts should be endorsed.)

('23) 10 A I R 1923 Rang 1 (5, 6) 68 Ind Cas 694(DB), *S. R. M. S. Arunachalam Chetty* v. *Ko Po Yan.*

('14) 1 A I R 1914 Bom 178 (178) : 38 Bom 659 : 25 Ind Cas 380 (DB), *Dolatram Dwarkadas* v. *B. B. and C. I. Ry. Co.*

[*See* ('19) 6 A I R 1919 Mad 140 (145) : 49 Ind Cas 69 : 41 Mad 871 (DB), *M. & S. M. Ry Co. Ltd.* v. *Haridoss Bonmali Dass.*]

[But see ('13) 24 Ind Cas 798 (801) : 7 Sind L R 163, *Firm of Kalu Ram Shuduram* v. *Firm of Budhuram Parmanand.*]

3. (1869-70) 18 W R (Eng) 1041 (1043) : L R 4 H L 317 : 39 L J C P 187 : 22 L T 808, *Barber* v. *Meyerstein.*

[*See* ('19) 6 AIR 1919 Mad 140 (143) : 41 Mad 871: 49 Ind Cas 69 (DB), *Madras and Southern Mahratta Railway Co. Ltd.* v. *Haridas.*]

4. ('11) 10 Ind Cas 859 (861) : 38 Cal 127 (DB), *Anglo Indian Jute Mills Co.* v. *Omademull.*

('84) 8 Bom 501 (509, 510) (DB), *Le Geyt* v. *Harvey.*

('18) 5 AIR 1918 Low Bur 122 (127) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jaganath Firm.*

(1810) 11 R R 491 (495) : 12 East 614, *Whitehouse* v. *Frost.*

5. ('14) 22 Ind Cas 311 (313) : 41 Cal 670 (PC), *Natcheappa Chetty* v. *Irrawaddy Flotilla Co. Ltd.*

5a. ('12) 16 Ind Cas 61 (64) (Bom), *The Bombay Steam Navigation Co. Ltd.* v. *Ramdas Vithaldas.*

6. ('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Firm.*

Section 137 Note 5

of goods unless the instrument is negotiable by the custom of the trade.[6a]

A bill of lading transferred by endorsement and delivery transfers *ownership* of the goods; no other documents, though they may be mercantile documents of title to goods, can transfer by mere assignment and delivery the *ownership* of the goods though they may transfer the right to *receive* the goods.[6b]

See also the undermentioned cases.[7]

6a. ('23) 10 AIR 1923 Rang 1 (4) : 11 Low Bur Rul 341 : 68 Ind Cas 694 (DB), *Arunachalam* v. *Ko Po Yan.*

6b. ('23) 10 AIR 1923 Rang 1 (4) : 11 Low Bur Rul 341 : 68 Ind Cas 694 (DB), *Arunachalam* v. *Ko Po Yan*

[*See also* ('16) 3 AIR 1916 P C 7 (9) : 40 Bom 630 (635) : 43 Ind App 164 : 35 Ind Cas 954 (PC), *Ramdas Vithaldas* v. *Amerchand Co.* (Bill of lading differs from other documents of title in that its assignment operates as a constructive delivery of the goods to which it refers.)

7. ('84) 8 Bom 501 (508, 509) (DB), *Le Geyt* v. *Harvey.*

(1787-1794) 1 R R 425 (427) : 5 Term Rep 683 : 2 T R 63 : 4 Bro P C 57 : 6 East 20 : 6 T R 831 : 1 H Bl 357, *Lickbarrow* v. *Mason.*

THE SCHEDULE.

Year and chapter.	Subject.	Extent of repeal.
	(a) STATUTES.	
27 Hen. VIII, c. 10 . .	Uses	The whole.
13 Eliz., c. 5 . . .	Fraudulent conveyances . .	The whole.
27 Eliz., c. 4 . . .	Fraudulent conveyances . .	The whole.
4 Wm. and Mary, c. 16 .	Clandestine mortgages . . .	The whole.
	(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.	
IX of 1842 . . .	Lease and release . . .	The whole.
XXXI of 1854 . .	Modes of conveying land . .	Section 17.
XI of 1855 . . .	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866 . .	Indian Trustee Act . . .	Section 31.
IV of 1872 . . .	Punjab Laws Act . . .	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 . . .	Central Provinces Laws Act. .	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 . .	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 . . .	Specific Relief Act . . .	In sections 35 and 36, the words "in writing."
	(c) REGULATIONS.	
Bengal Regulation I of 1798.	Conditional sales . . .	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgagees in possession.	Section 15.

APPENDICES.

Appendix I

THE MESNE PROFITS AND IMPROVEMENTS ACT, 1855.

ACT NO. XI OF 1855.

(27th March, 1855.)

An Act relating to mesne profits and to improvements made by holders under defective titles in cases to which the English law is applicable.

Preamble.

WHEREAS it is expedient, in cases to which the English law is applicable, to limit the liability for mesne profits and to secure to bona fide holders under defective titles the value of improvements made by them; It is enacted as follows :

No person chargeable with rent bona fide paid to holder under defective title.

1. No person shall be chargeable with any rents or profits of any immoveable property which he has bona fide paid over to any person of whom he bona fide held the same, notwithstanding it may afterwards appear that the person to whom such payment was made had no right to receive such rents or profits.

Value of improvements made by bona fide holders under defective titles secured to them.

2. If any person shall erect any building or make an improvement upon any lands held by him *bona fide* in the belief that he had an estate in fee-simple, or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof, irrespective of the value of such building or improvement :

Amount how fixed.

Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction.

Act to apply only to cases governed by English law.

3. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

THE CROWN GRANTS ACT, 1895.

ACT NO. XV OF 1895.

(10th October, 1895.)

An Act to explain the Transfer of Property Act, 1882, so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, IV of 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows : —

Title and extent.

1. (1) This Act may be called the Crown Grants Act, 1895.

(2) It extends to the whole of British India.

Transfer of Property Act, 1882, not to apply to Crown grants.

2. Nothing in the Transfer of Property Act, IV of 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Crown to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

Crown grants to take effect according to their tenor.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

THE MUSSALMAN WAKF VALIDATING ACT, 1913.

ACT NO. VI OF 1913.

(7th March, 1913.)

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

WHEREAS doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context, —

(1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi School of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

THE HINDU TRANSFERS AND BEQUESTS ACT, 1914.

MADRAS ACT NO. I OF 1914.

(Came into force on the 14th February 1914.)

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons (in the Mufassal of Madras.)

Preamble.

WHEREAS it is expedient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons; It is hereby enacted as follows :—

Short title.

1. This Act may be called "The Hindu Transfers and Bequests Act, 1914."

Application and extent.

2. (1) This Act shall apply to all transfers inter vivos and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(2) In the case of transfers inter vivos or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect bona fide transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation.— Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

Disposition for the benefit of person not in existence.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer inter vivos or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Limitations and conditions.

4. The limitations and provisions referred to in S. 3 shall be the following, namely —

(*a*) in respect of dispositions by transfers inter vivos, those contained in Chap. 2 of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note.*— Sections 3 and 4 were substituted for the original Ss. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, S. 11, which came into force on the 1st April 1930. The original Ss. 3, 4 and 5 were as follows :—

Transfers and bequests in favour of unborn persons.

3. A transfer inter vivos or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Rule against perpetuity in regard to transfers.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.]

Rule against perpetuity in regard to bequests.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

THE HINDU DISPOSITION OF PROPERTY ACT, 1916.

ACT NO. XV OF 1916.

(Received the assent of the Governor-General on 28th September, 1916.)

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows : —

Short title and extent.

1. *(1)* This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance, to the whole of British India, except the province of Madras : Provided that the Governor-General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras.

Dispositions for the benefit of person not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer inter vivos or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in S. 2 shall be the following, namely :—

(a) in respect of dispositions by transfer inter vivos those contained in Chap. II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in SS. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note.*— "Chapter II" was substituted for "SS. 13, 14 and 20," by the Transfer of Property (Amendment) Supplementary Act, 21 of 1929, S. 12, which came into force on the 1st April 1930,

The words and figures "SS. 113, 114, 115 and 116 of the Indian Succession Act, 1925" were substituted for the words and figures "SS. 100 and 101 of the Indian Succession Act, 1865" by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, S. 12.]

4. (Omitted by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, section 12.)

[The original S. 4 was as follows :

Failure of prior disposition.

4. Where a disposition of property fails by reason of any of the limitations referred to in S. 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.]

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

Application of this Act to the Khoja community.

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT, 1921.

ACT VIII OF 1921.

(Received the assent of the Governor-General on the 27th March, 1921.)

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent.

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February 1914:

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation.—Hindus governed by the Marumakkattayyam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

Disposition for the benefit of person not in existence.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfers *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Limitations and conditions.

4. The limitations and provisions referred to in section 3 shall be the following, namely —

(a) in respect of disposition by transfer *inter vivos*, those contained in Chap. II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note*:— Sections 3 and 4 were substituted for the original Ss. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act XXI of 1929, S. 13, which came into force on the 1st April 1930. The original Ss. 3, 4 and 5 were as follows:

Transfers and bequests in favour of unborn persons.

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Rule against perpetuity in regard to transfers.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age, the interest created is to belong.]

Rule against perpetuity in regard to bequests.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

THE MUSSALMAN WAKF VALIDATING ACT, 1930.

ACT NO. XXXII OF 1930.

(25th July, 1930.)

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

WHEREAS the Mussalman Wakf Validating Act, VI of 1913, does not apply to wakfs created before its enactment;

AND WHEREAS it is expedient to validate such wakfs without infringing any rights contrary thereto which may have already accrued or been acquired;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Mussalman Wakf Validating Act, 1930.

Act VI of 1913 to apply retrospectively.

2. The Mussalman Wakf Validating Act, VI of 1913, shall be deemed to apply to wakfs created before its commencement :

Provided that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

Appendix II.

RULES FRAMED BY HIGH COURTS (ORIGINAL SIDE).

RULES OF THE ORIGINAL SIDE OF THE HIGH COURT OF BOMBAY MADE UNDER THE TRANSFER OF PROPERTY ACT, 1882.

CHAPTER XXX.

Application under Section 83.

585. Every application under S. 83 shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under S. 83, or any subsequent section.

586. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under S. 83 or any subsequent section, a sum sufficient to provide for the fees and charges of the Court and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under S. 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the Taxing Master.

Cost to be estimated and certified.

Order for payment of money into Court under S. 83.

587. Every order for payment of money into Court, under S. 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Service of notice under S. 83.

588. Unless otherwise ordered, the applicant or his Attorney shall serve, or cause to bo served, the notice to be given under S. 83.

Of notice of payment under any subsequent rule.

589. When money is paid into Court under O. 34, R. 2 of the Code of Civil Procedure, or under any subsequent rules of the said order, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application for mortgagee.

590. Every application by a mortgagee to obtain payment of money out of Court shall be on a verified petition.

Affidavit of service of notice or order.

591. Unless otherwise ordered, whenever any notice or order is served under the Act or under the rules, an affidavit in proof of such service shall be filed as soon as possible thereafter.

Disallowances where tender refused.

592. Where it shall appear that previous to any payment into Court under S. 83 or any subsequent section a sufficient tender was made to, and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Court, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

593. If through default on the part of the mortgagee it becomes necessary to obtain an enlargement of time under O. XXXIV, R. 3 or R. 8 of the Code of Civil Procedure, no interest shall be allowed for the enlarged time without a special order in that behalf.

Order for payment of money out of Court under S. 83 or any subsequent section.

594. On an application for payment of money out of Court, under S. 83 or any subsequent section by a mortgagee who has complied with the orders of the Court and the provisions of the Act and of the rules made in this behalf, so far as they relate to him, or apply to his case, and has, when required so to do, transferred the property and

possession free from encumbrance, and caused such transfer to be registered and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Decree absolute for foreclosure, O. XXXIV, R. 3 or R. 8, C. P. C.

595. Every decree absolute for foreclosure under O. XXXIV, R. 3 or R. 8 of C. P. C., shall direct that possession of the property be given to the mortgagee except where he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had thereunder and with a full description of the property.

Conveyance of property sold under O. XXXIV, R. 4 of C. P. C. or any subsequent rule.

596. Where immoveable property is sold under O. XXXIV, R. 4 of C. P. C., or any subsequent rule the purchaser may on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

Order under S. 83 how enforced.

597. Every enforceable order made under S. 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Rules relating to sales by Commissioner to apply to sales under the Civil Procedure Code.

598. Rules relating to sales by the Commissioner for taking accounts so far as they are applicable shall apply to all sales by the Court under O. XXXIV, Rr. 4 and 5 or 7 and 8 of Civil Procedure Code.

Meaning of the Act in this Chapter.

599. In this Chapter the Act means "The Transfer of Property Act, 1882," and the sections referred to are the sections of that Act.

RULES FRAMED BY THE CALCUTTA HIGH COURT

Rules.

Application under S. 83.

1. Every application under S. 83 shall be made by a verified petition, stating the facts.

Payment into Court and expenses under S. 83.

Costs to be estimated and certified.

2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under S. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under S. 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered, and costs to be estimated and certified by the Taxing Officer.

Order of payment of money into Court under S. 83.

3. Every order for payment of money into Court under S. 83, shall specify the sums to be paid, and purpose for which such sum is intended.

Service of notice under S. 83.

4. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under S. 83.

Of notice of payment under any subsequent section.

5. When money is paid into Court under S. 86 or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application for payment of money out of Court under S. 87 (c).

6. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

And, when made under S. 83, it shall be shown where the property has been transferred, and where the applicant was in possession, possession delivered up, free from encumbrance and whether the transfer has been registered. The documents of title which were held by the applicant, shall also be accounted for.

Or under S. 86 or S. 92.

Or, when made under S. 86 or S. 92, it shall be shown that the provisions of such section have been complied with.

To be on notice.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

Affidavit of service of notice or order.

8. Unless otherwise ordered, whenever any notice, or order, is served under the Act, or under these rules an affidavit, or affirmation, in proof of such service, shall be filed as soon as possible thereafter.

Cost of mortgage. Disallowances where tender refused.

9. Where it shall appear that previous to any payment into Court under S. 83, or any subsequent section a sufficient tender was made to, and refused by the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant-General and the Bank, nor shall he be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

10. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under S. 87, no interest shall be allowed for the enlarged time.

Order for payment of money out of Court under S. 83 or any subsequent section.

11. On an application for payment of money out of Court, under S. 83, or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules, so far as they relate to him, or apply to his case and has when required so to do, transferred the property and possession, free from incumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Decree for sale to provide for payment of amount of deficiency.

12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant (if the original mortgagor) shall personally (or if the representative in estate of the original mortgagor shall out of his estate) pay the amount of the deficiency.

Final foreclosure order under S. 87 or S. 93.

13. Every final order for foreclosure, under S. 87 or S. 93, shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital or description.

Conveyance of property sold under S. 88 or any subsequent section.

14. Where immoveable property is sold under S. 88 or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale, as evidence of the title to the property sold to him, and may also, at his own costs, obtain a conveyance from the mortgagor.

15. Every enforceable order made under S. 83, may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Order under S. 83 how enforced.

16. Rules 45 and 46 of the rules of the 1st August 1877 (Rules 431 and 432 Belchambers' R. & O., pp. 200, 201), relating to sale by the Registrar, are hereby repealed.

Rules repealed.

From R. 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such applications in the case of a person under disability shall be part of the costs of the sale, and in other cases shall be borne and paid by the defaulting party."

Rules amended.

At the end of R. 58 of the same rules shall be added the words "or the grant to him of a certificate of sale."

17. Rules 387 to 449 (Belchambers' R. and O., pp. 189 to 295), relating to sales by the Registrar as modified by the last preceding rule, and so far as they are applicable shall apply to all sales by the Court under Ss. 88 and 89 or 92 and 93.

Rules relating to sales by Registrar to apply to sales under the Act.

18. The money Rr. 579 (a) to 641 (Belchambers' R. and O., pp. 240 to 253) shall also, so far as they are applicable, apply to the payment of money into Court, and out of Court, under these rules.

Money rules to apply to payments under these rules.

19. The form set forth in the annexed schedule shall be followed with such variations as the circumstances of each case may require.

Form.

The following additional rule has also been made by the Calcutta High Court.

Every certificate or report of the Registrar or other reference stating what is due to the mortgagee in mortgage-suit, shall, on being confirmed by effluxion of time or otherwise, be submitted in open Court to a Judge exercising original civil jurisdiction, in order that it may be countersigned by him, and the period for payment under Ss. 86, 88 or 92 of the Transfer of Property Act shall run from the date of such counter-signature, which shall be deemed to be a declaration of the amount under the provisions of those sections.

The procedure of the Courts was regulated by the following Circular Order.

(1) An application under S. 89 of the Transfer of Property Act shall be made by means of a verified petition stating the facts.

(2) If the Court passes an order directing that the property or any part of it shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamation regarding the sale of immoveable property.

(3) Sections 286 to 294, both inclusive of the Code of Civil Procedure shall apply to such sales.

(4) Sections 304 to 319, both inclusive and Ss. 328 to 335 of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under S. 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.

ORIGINAL SIDE RULES OF THE HIGH COURT OF JUDICATURE AT MADRAS.

ORDER XXIX — MORTGAGES AND CHARGES.

(A) — General.

1. Every plaint shall contain an allegation that the plaintiff has caused a search to be made in the office of the Registrar of Assurances of the district, or sub-district, in which the immoveable property comprised in the mortgage, or subject to the charge sued on, is situate, for a period of not less than twelve years prior to the date of presentation of the plaint, or, for the period subsequent to the mortgage sued on, whichever may be shorter, and that he is not aware that any person, other than the persons mentioned in the plaint, has any interest in the said property. The certificate of the Registrar of Assurances, stating the result of the search, shall be filed with the plaint.

The cost of making the search, and filing the certificate shall be costs in the cause. Provided that a plaint which does not comply with the above provisions shall be returned for amendment under Order VI, Rule 17 of the Civil Procedure Code, and shall be rejected under Order VI, Rule 18 of the Code, if it be not amended within the time fixed.

2. The plaint shall be in one of Forms Nos. 47 to 50, inclusive with such variations as circumstances may require.

3. Where there are several parties to a suit claiming successive charges or incumbrances on the mortgaged property, the Court shall determine their respective rights and priorities, and insert in its decree a declaration with respect thereto as in Form No. 51.

4. The Court shall determine whether the defendant is responsible personally, and to any and what extent, for the repayment of the mortgage monies and a declaration with respect thereto shall be inserted in the decree as in Forms Nos. 57 and 58.

5. If, in any suit or matter, it is found necessary to take an account, an interim decree shall be drawn up in Form No. 56, with such variations, as circumstances may require.

6. A sale of mortgaged property shall be conducted in manner prescribed by Order XVIII of these rules. Provided that, if leave to bid is granted to the plaintiff or applicant, and, unless the Court otherwise orders, the sum allowed to be bid shall be not less than the whole amount then due for principal, interest, and costs; and, in the event of the property being sold in lots, not less than the market value of each lot in respect of which the bid is made.

7. If a money decree only is obtained, the decree shall not direct execution to issue against the mortgaged property.

(B) Simple mortgages and charges.

Suits for sale.

8. At the trial of the suit the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and shall determine the extent of the liability of the defendant therefor. A decree shall then be drawn up in Form No. 57, and the case shall be ordered to be posted in Chambers on the first convenient day after the day limited for payment by the defendant.

9. On the adjourned day—

(1) If the defendant has paid the amount due under the decree into Court, the Court may pass an order in Form No. 59.

(2) If the defendant has made default in payment, the Court may, on the oral application of any party for the sale of the mortgaged property, pass an order for sale in Form No. 60.

(3) If default being made by the defendant, the plaintiff does not appear and the defendant appears or if neither party appears, the Court may adjourn the suit and direct that no order for sale shall be passed except on notice to the other party.

10. If an order for sale is passed on the application of the defendant the Court may direct that the defendant shall have the conduct of the sale and be entitled to the further costs of the proceedings.

11. If at any time it is made to appear to the Court that the plaintiff, or other party having the conduct of the sale, has failed to comply with any order of the Court or any of the provisions of these rules, or is not proceeding with due diligence, the Court may give the further conduct of the suit to any other party; or may refuse to allow to the plaintiff or such other party any further costs of suit, or interest on the mortgage monies.

12. If the sale is confirmed, the Court may pass an order in Forms Nos. 61 or 62.

Suits for Redemption.

13. At the trial of the suit the Court shall determine whether the plaintiff is entitled to redeem the mortgaged property, and, if possible, shall ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for redemption, and a decree shall then be drawn up, in Form No. 63, and the case ordered to be posted in Chambers on the first convenient day after the day fixed for payment by the plaintiff.

14. If it is found necessary to take an account, an interim decree shall be drawn up in Form No. 56; and, at the adjourned hearing, the Judge may declare the amount due on taking the account, and, if the balance is found to be against the plaintiff, may appoint a day for payment by him, and declare the aggregate amount of principal, interest and costs due on that day, and thereupon an order shall be drawn up in Form No. 64, and the suit shall be adjourned to a day as soon as possible after the day so fixed. If the balance is found against the defendant, the Judge may at once pass a decree directing payment thereof to the plaintiff, and, if the defendant is in possession of the mortgaged property, directing delivery thereof to the plaintiff, and payment of mesne profits, and may make such order as to the costs of the suit as is just.

15. If the plaintiff proves that a valid tender of the mortgage money has been made, the Judge may pass a decree, as in Form No. 65.

16. On or before the day to which the case is posted the plaintiff may apply to the Judge by summons in Chambers, to appoint a further day for payment, and thereupon the Judge may, for sufficient cause, and upon such terms as he thinks fit, postpone payment to a fixed day, and adjourn the further hearing to a day as soon as possible after such day, as in Form No. 66.

17. If, on the adjourned day, it appears that the mortgage monies have not been paid by the plaintiff, and if no further time for payment is granted, the defendant may apply for the sale of the mortgaged property, and thereupon the Judge may pass an order for sale, as in Form No. 67.

(C) English Mortgages, and Mortgages by Conditional Sale, Suits for Foreclosure or Sale.

18. At the trial of the suit, the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment and a decree shall be drawn up, in FORM NO. 68; and the case shall be ordered to be posted in Chambers on the first convenient day after the day limited for payment by the defendant.

19. When there are several successive incumbrances, the Court may fix a day for payment by the defendants, or any of them, or may allow several periods of redemption to the several incumbrances, in succession, according to their respective priorities, as in FORMS NOS. 69 and 70.

20. Unless otherwise ordered a decree absolute for foreclosure, shall be drawn up in FORM NO. 71; and a final decree upon redemption by the defendant shall be drawn up in FORM NO. 72.

21. If, in a suit other than on a mortgage by a conditional sale, the Court, upon the application of any party, thinks fit to pass an order for sale of the mortgaged property, in lieu of a decree for foreclosure, the order may be made conditional upon the applicant paying into Court, within a fixed period, a sum sufficient to provide for the expenses of the sale, and upon the applicant, other than the plaintiff, also paying into Court the amount of interest at the date of the application due on the principal amount, the estimated costs of the plaintiff of the sale, and the costs of the suit already incurred by the plaintiff, or any of the said sums. If the application is made by the defendant, and unless otherwise ordered, the order shall direct that in default of compliance with any of the conditions, and of payment of the mortgage monies within the period fixed by the Court, the defendant shall be foreclosed as in FORM NO. 73.

Subject to the foregoing provisions, the rules relating to a suit for sale under a simple mortgage shall apply to a suit or decree for sale under an English mortgage.

Suits for Redemption.

22. If it is not necessary to take an account, and unless the Court otherwise orders, an interim decree for redemption by the mortgagor shall be drawn up in FORM NO. 74, and the suit shall be ordered to be posted in Chambers, on the first convenient day after the day fixed for redemption for further consideration.

23. If the plaintiff pays the amount fixed by the interim decree, a final decree may be made similar to that in FORM NO. 72.

24. If the plaintiff makes default in payment, and the mortgage is not by conditional sale, the Court may, on the application of the defendant, pass a decree absolute for foreclosure, similar to that in FORM NO. 71, or an order for sale of the mortgaged property or a sufficient part thereof as in FORM NO. 67.

If the mortgage is by conditional sale, the Court may pass a decree similar to that in FORM NO. 71.

25. In taxing the costs awarded by the interim decree, the taxing officer may include the costs of the stamp paper and other costs necessary for the preparation of the deed of reconveyance of the mortgaged property or of acknowledgment of payment of the mortgage monies.

26. Subject to the foregoing provisions, the rules relating to a suit for the redemption of a simlpe mortgage shall, so far as applicable, apply to a suit for the redemption of an English mortgage, a mortgage by conditional sale and a usufructuary mortgage.

(D) Deposit in Court of Mortgage Monies.

27. When a mortgagor desires, under the provisions of the Transfer of Property Act, 1882, to deposit in Court the amount due on his mortgage, he shall file an affidavit, entitled in the matter of the mortgage, and the said Act, and stating the facts of the case.

28. (1) Unless otherwise ordered, the mortgagor shall, in addition to the amount due on his mortgage, deposit in Court a sum sufficient to provide for the costs of the mortgagee, of obtaining payment out of Court of the mortgage monies, and of reconveying the mortgaged property, or executing an acknowledgment of the discharge of the mortgage, as the case may be and of registering the said reconveyance or acknowledgment in the office of the Registrar of Assurances of the district, or sub-distrtct in which the mortgaged property is situate.

(2) If, by the terms of the mortgage, the mortgagee is entitled to notice before payment or tender of the mortgage monies the mortgagor shall, in addition to the said sums, deposit in Court a sum sufficient to provide for any subsequent interest to which the mortgagee may be entitled.

29. Notice of the deposit shall be in FORM NO. 75, and shall, subject to the provisions of S. 102 of the said Act, be taken out and served on the mortgagee in manner prescribed for service of summons on a defendant. The notice shall require the mortgagee to deposit in Court the mortgage deed and all documents in his possession or power relating to the mortgaged property.

30. The Court by endorsement on the affidavit or otherwise may order the deposit to be received. Such order shall specify the several sums to be paid into Court, and the purpose for which each sum is intended.

31. Every application by a mortgagee for payment out of any monies paid into Court, under S. 83 or S. 102 of the said Act, shall be by original petition, as in FORM NO. 76, entitled in the matter of the mortgage, and shall specify the documents in his possession or power relating to the mortgaged property; and shall be accompanied by the mortgage deed and the said documents, and a draft deed of reconveyance of the mortgaged property, or acknowledgment of discharge of the mortgage, as the case may be. The Registrar shall appoint a day for the hearing of the petition, and notice thereof in FORM NO. 77, shall be served on the mortgagor, not less than five days before the said day.

32. The draft deed of reconveyance, or acknowledgment shall, if so required by either party, be settled by the Registrar and, if approved, shall be signed by him as approved.

At the hearing, the Court may, if the provisions of the said Act and these rules have been complied with, pass an order that upon the mortgagee bringing into Court a reconveyance or acknowledgment of discharge, as agreed on or settled by the Registrar, duly stamped and executed, the monies in Court be paid out to the mortgagee.

33. If it is made to appear to the Court that, previously to payment of any monies into Court, under S. 83 or S. 102 of the said Act, a sufficient tender was made to, and refused by the mortgagee, he shall not be allowed the costs of obtaining payment out of the said monies. Except as aforesaid, or unless the Court otherwise orders, a mortgagee shall be allowed all costs properly incurred by him and he shall not be compelled to execute the reconveyance or acknowledgment until such costs have been paid.

APPENDIX III.

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THE TRANSFER OF PROPERTY ACT, IV of 1882

VOLUME III.

SECTIONS WITH SYNOPSIS IN PARALLEL COLUMNS

SECTIONS

SYNOPSIS

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES *(contd.)*

Redemption.

91. *Persons who may sue for redemption.*

Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof ; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

1. Legislative changes.
2. Scope of the section.
3. "Besides the mortgagor."
4. Clause (a)—General.
5. Puisne mortgagee.
6. Sub-mortgagee of puisne mortgagee.
7. Prior mortgagee.
8. Purchaser of equity of redemption.
9. Person contracting to purchase mortgaged property.
10. Transferee pendente lite.
11. Donee.
12. Lessee of mortgaged property.
13. Landlord, if can redeem mortgage by tenant.
14. Superior proprietor under C. P. Land Revenue Act.
15. Tenant for life and remainderman.
16. Reversioner under Hindu law.
17. Surrender of mortgaged property by Hindu widow to next reversioner.
18. Transfer from limited owner under Hindu law.
19. Crown acquiring mortgagor's interest by escheat.
20. Heirs of mortgagor.
21. Son under Mitakshara law.
22. Mortgage by manager of joint Hindu family.
23. Member of malabar tarwad.
24. Tenants-in-common.
25. Attaching judgment-creditor.
26. Government attaching property under S. 88, Criminal Procedure Code.
27. Judgment-creditor obtaining order for appointment of receiver under S. 51, cl. (d), C.P. Code.
28. Person holding decree for sale of mortgaged property.
29. Trustee.
30. Benamidar.
31. Guardian of property of minor mortgagor and curator of lunatic mortgagor.
32. Trespasser.
33. Person having no interest redeeming mortgage — Effect of.
34. Person with imperfect title to equity of redemption.
35. Persons entitled to maintenance from an estate.
36. Mortgage by occupancy tenant—Right of person recognised by landlord as tenant to redeem.
37. Clause (b) — Surety.
38. Clause (c) — Creditors of the mortgagor.

39. "May redeem."
40. Partial redemption.
41. Order of redemption.
42. Onus of proof.
43. Whether section applies to redemption of charges.
44. Law in the Punjab.
45. Right of redemption of persons not made parties to suits relating to mortgages.
46. Limitation for suits for redemption of mortgages.

92. *Subrogation.*

Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

1. Doctrine of subrogation.
2. Law prior to 1929.
3. This section and section 69, Contract Act.
4. Law in the Punjab and N. W. F. Province.
5. Section, whether retrospective.
6. Whether section applies to charges.
7. Right of subrogation arises on redemption.
8. There must be relationship of mortgagor and mortgagee.
9. "Other than the mortgagor."
10. Covenant to pay mortgage—Effect of.
11. Redemption by subsequent mortgagee.
12. Redemption by prior mortgagee.
13. Redemption by purchaser.
14. Redemption by surety.
15. Redemption by co-mortgagor.
16. Redemption by volunteer.
17. Redemption by a person claiming under a void or voidable title.
18. Redemption by trespasser.
19. Third paragraph.
20. Person who has advanced money to a mortgagor.
21. "Mortgage has been redeemed."
22. Sale or mortgage to pay off prior mortgage — Whether the first or the third paragraph applies.
23. Fourth paragraph—Mortgage must be redeemed in full.
24. Rights of subrogee.
25. Right of subrogation is available to successors-in-interest.
26. Purchaser entitled to subrogation—Pre-emptor whether can claim that right.
27. Enforcement of rights acquired by subrogation.
28. Limitation.
29. Defence of subrogation is not barred even if suit to enforce it is time-barred.
30. Res judicata.
31. Plea of subrogation.

93. *Prohibition of tacking.*

No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

1. Legislative changes.
2. English and Indian law of tacking compared.
3. Scope.
4. "With or without notice."
5. "Intermediate mortgage."
6. "Subsequent advance"—Meaning of.
7. Except in the case provided for by Section 79.

94. *Rights of mesne mortgagee.*

Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

1. History of the section.
2. Principle.
3. "The same rights . . . . as he has against the mortgagor."
4. Rights of persons deriving title from mesne or prior mortgagees.

95. *Right of redeeming co-mortgagor to expenses.*

Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

1. Scope of the section.
2. "Redeems."
3. "Expenses properly incurred."
4. Interest.
5. Co-mortgagor's liability to contribute.
6. Such proportion as is attributable to their share in the property.
7. Persons deriving title from the mortgagor.
8. Personal remedy.
9. Limitation.
10. Section, if retrospective.

96. *Mortgage by deposit of title-deeds.*

The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

1. History of the section.
2. Scope.

97. [Application of proceeds.] *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*

Anomalous Mortgages.

98. *Rights and liabilities of parties to anomalous mortgages.*

In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

1. Scope of the section.
2. Provisions of section 60 apply to anomalous mortgages.
3. Applicability of other provisions of Act where contract is silent on the point.

3a. Applicability of general provisions of law.

4. Mortgagee entitled under deed to foreclosure and sale — Discretion of Court to grant decree for sale.
5. Combination of a simple mortgage and a usufructuary mortgage.
6. Combination of a usufructuary mortgage and a mortgage by conditional sale.
7. Kanom.
8. Otti.
9. Peruarthum.
10. Iladarawara.

99. [Attachment of mortgaged property.] *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*

Charges.

100. *Charges.*

Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another,

1. Scope of the section.
2. Liens and charges under the English law.
3. Charge on moveables.
4. Charge on future property.
5. "Made security."

and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

6. Property must be specified.
7. "By act of parties."
8. Security bond charging immovable property.
9. Contingent charge.
10. Floating charge.
11. "By operation of law."
12. Charge under Rent Acts.
13. "And the transaction does not amount to a mortgage."
14. Transfer invalid as a mortgage whether operates as a charge.
15. Mortgage or charge.
16. Creation of charge — Writing and registration, whether necessary.
17. Rights and liabilities of a charge-holder.
18. Priority as amongst several charges.
19. Assignment of a charge.
20. Section does not apply to a charge of a trustee.
21. "Save as otherwise expressly provided by any law for the time being in force."
22. Transferee for consideration without notice.
23. Subsequent transferee from a transferee, if protected.
24. Charge, whether binds auction purchaser.
25. Enforcement of charge.
26. Personal liability.
27. Sale in execution of a charge decree—Whether extinguishes the charge.
28. Charge created by a decree.
29. Payments in the nature of salvage.
30. Hindu widow's right of maintenance.
31. Debts of a deceased Muhammadan.
32. Nankar and dahyak rights.

101. *No merger in case of subsequent encumbrance.*

Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

1. Scope of the section.
2. Benefit under the rule of intention must be a benefit at the time the charge is paid off.
3. Renewal of one mortgage by another.
4. Mortgagee taking subsequent sale or mortgage in discharge of the prior mortgage — Latter transaction invalid—Effect.
5. Mortgagee purchasing portion of mortgaged property—Effect.
6. Purchase at sale in execution of decree for rent under the Bengal Tenancy Act.
7. Extinguishment of mortgage by decree of Court.
8. Who can claim benefit of section.
9. "As between himself and any subsequent mortgagee," etc.
10. Charge kept alive—Enforcement.
11. Section if retrospective.

Notice and Tender.

102. *Service or tender on or to agent.*

Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized

1. Legislative changes.
2. Scope.
3. Tender to a person who disclaims authority.

to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. *Notice, etc., to or by person incompetent to contract.*

Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served on or by, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to such application and to

1. Legislative changes.
2. Scope of the section.
3. "Person incompetent to contract."
4. "Legal curator."
5. "Requisite or desirable in the interests of such person."
6. Provisions of Order 32 of the Civil Procedure Code shall, so far as may be, apply.
7. Effect of deposit or tender without guardian ad litem being appointed.

the parties thereto and to the guardian appointed thereunder.

104. *Power to make rules.*

The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

1. Scope of the section.
2. "Consistent with this Act," etc.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. *Lease defined.*

A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

1. Applicability of chapter.
2. Essentials of a lease.
3. Lease is an interest in property.
4. Agreement to grant lease.
5. "Right to enjoy."
6. Lease and conveyance of interest in fee simple—Distinction.
7. Contract necessary for lease.
8. Tenancy by payment and acceptance of rent.
9. Kabuliat, rent-note, etc., whether lease.
10. Application for grant of lease with endorsement of sanction, whether lease.
11. Agreement varying rent or other terms of lease, whether lease.
12. Tenancy by acquiescence.
13. Lease and licence compared—General principles.
14. Lease or licence—Test for determination.
15. Occupation as lodger.
16. Occupation as tenant or servant.
17. Market rights.
18. Agreement for cultivation of land, if lease.
19. Possession under void lease—Effect.
20. Who can grant a lease.
21. Lease by de facto proprietor.
22. Lease by or in favour of a minor.
23. Lease of untransferable property.
24. Commencement of lease.
25. "Certain time."
26. Term of lease—Mode of determination.
27. Lease entitling lessee to hold as long as he pays rent or as long as he may wish.
28. Lease for indefinite period—Construction of.
29. Lease for a term certain with a provision for continuation thereafter.
30. Lease expressed to be terminable before end of term fixed.
31. Periodic leases.
32. Tenancy at will.
33. Tenancy at sufferance.
34. Lease for life.
35. Lease with a clause for renewal—General.
36. Covenant for renewal — Enforceability against assignee from lessor or lessee.
37. Lessee holding over after expiration of lease — General.
38. Lessee holding over after expiration of lease — Lessor's assent.
39. Lessee holding over after expiration of lease — Renewal clause in lease—Effect of.
40. Lessee holding over after expiry of lease—Basis of liability for compensation.

41. Permanent lease.
42. Permanent lease and creation of absolute estate —Difference.
43. Pemanent tenancy—Onus of proof.
44. Principle of lost grant as applied to permanent tenancies.
45. Permanent tenancy—Presumption of validity of grant in case of tenancies of unknown origin.
46. Permanent tenancy — Presumption of lawful origin.
47. Permanent tenancy—Construction of leases.
48. Permanent tenancy—Circumstantial evidence as to—General.
49. Circumstantial evidence as to permanent tenancy — Long and undisturbed possession at fixed rent.
50. Circumstantial evidence as to permanent tenancy —Lease for dwelling or residential purpose.
51. Circumstantial evidence as to permanent tenancy —Successions and transfers.
52. Subsequent arrangements between landlord and tenant—Effect on inference of permanence.
53. Acquisition of permanent tenancy after commencement of tenancy.
54. Permanent tenancy — Acquisition of, by prescription.
55. Permanency by estoppel.
56. Permanent lease of property belonging to religious and charitable endowments.
57. Consideration for lease.
58. Premium.
59. Rent—General features.
60. Rent—Illustrative cases.
61. Forms of rent.
62. Rent in kind—Payment of money value.
63. Rent—Service as rent.
64. Variation of rent.
65. Rent free grants.
66. Interest on rent.
67. Lease for a premium and usufructuary mortgage —Distinction.
68. Maintenance grants.
69. Resumption of service grants.
70. Damages for use and occupation.
71. Determination of lease.
72. Heritability of lease.
73. Construction of leases.
74. Escheat and reversion—Distinction.
75. Zamindari and ryotwari lands—Tenants of.
76. Zuripeshgi lease.
77. Kanom leases.
78. Landlord and tenant—Adverse possession.
79. Nature of tenant's possession during tenancy— Adverse possession.
80. Nature of tenant's possession after determination of tenancy—Adverse possession.
81. Tenant encroaching on other land of the landlord—Adverse possession.
82. Possession under invalid lease, how far adverse.
83. Dispossession of lessee by third person—Adverse possession.
84. Acquisition of tenancy by prescription by trespasser.

106. *Duration of certain leases in absence of written contract or local usage.*

In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or if such tender or delivery is not practicable affixed to a conspicuous part of the property.

1. Amendment of section.
2. Contract to the contrary.
3. Lease for a term certain — Notice.
4. Lease for life.
5. Perpetual lease.
6. Tenancy-at-will.
7. Lease for indefinite period.
8. Possession under agreement to grant lease for a term certain.
9. Law to the contrary.
10. Usage to the contrary.
11. Immovable property.
12. Presumption of yearly or monthly tenancy under this section.
13. Lease for agricultural or manufacturing purposes.
14. Lease for building purpose—Presumption as to.
15. Reservation of yearly or monthly rent—Effect.
16. Lease from year to year.
17. Lease from month to month.
18. Possession under invalid lease — Presumption under this section.
19. Notice to quit — General principles.
20. Notice to quit with an option to continue on different terms.
21. Notice required under other sections for determining lease.
22. Notice by lessee—Duty to give up possession.
23. Waiver of notice.
24. Suit for ejectment — Notice to quit.
25. Denial of lessor's title by lessee and notice to quit.
26. Other modes of determination of lease.
27. Effect of giving notice where it is not necessary.
28. Notice by lessor undertaking to pay compensation for improvements — Effect.
29. Determination of main lease by notice — Effect on sub-lease.
30. Resumption of possession by landlord without giving notice — Effect.
31. Lessee giving up possession before termination of lease — Liability for damages or rent.
32. Lessee holding over after expiry of notice to quit — Effect.
33. Notice to quit — Who can give.
34. Who can give notice to quit — Co-lessors.
35. Who can give notice to quit—Assignment by lessor.
36. Who can give notice — Miscellaneous.
37. Notice to quit to whom to be given.
38. Notice to or by agent.
39. Period of notice.
40. Expiring with end of year or month of tenancy.
41. Year or month of tenancy.
42. Calendar for calculation of time.
43. Form of notice.
44. Mode of service.
45. Service by post.
46. Service of notice on party's pleader or solicitor.
47. Leases by Government.
48. Lease by Municipality.
49. Notice in cases not governed by this section.

107. *Leases how made.*

A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

1. Scope of the section.
2. Law in the Punjab.
3. Term of a lease.
4. "From year to year."
5. For any term exceeding one year.
6. Reserving a yearly rent.
7. Effect of non-registration.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the Provincial Government may, from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

8. Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph.
9. Paragraph 2.
10. Paragraph 3.
11. Proviso.
12. Crown Grants Act and this section.
13. Lease embodied in a decree or order of a Court.
14. Leases and the doctrine of part performance.
15. Agreement to lease.

108. *Rights and liabilities of lessor and lessee.*

In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

1. Scope of the section.

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover:

1. Duty to disclose defect.
2. Defect in property, if includes defect in title.
3. Effect of breach of obligation.
4. Breach of obligation not fraudulent.

(b) the lessor is bound on the lessee's request to put him in possession of the property:

1. Obligation to give possession.
2. "On the lessee's request."
3. Failure to give possession—Effect.
4. Contract to the contrary.

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

1. Scope.
2. "Without interruption."
3. Interruption by holder of paramount title.
4. Interruption by trespasser.
5. "Shall be deemed to contract."
6. Benefit of covenant runs with the land.
7. Crown grants.
8. Effect of breach of covenant.

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to

1. Accession.
2. Accretion to land by alluvion.
3. Encroachment by tenant.
4. "Shall be deemed to be comprised in the lease."

alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

1. Scope.
2. "Flood."
3. "Substantially and permanently unfit."
4. "At the option of the lessee."
5. Proviso.
6. Effect of repudiation.

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

1. Scope.
2. Remedy of the lessee.
3. Contract to the contrary.

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

1. Scope.
2. "Which he is bound to make."
3. Right to damages and reimbursement.
4. Contract to the contrary.

(h) the lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth : provided he leaves the property in the state in which he received it :

1. Legislative changes.
2. Scope of the clause.
3. Time for removal.
4. Right to compensation.
5. "Attached to the earth."
6. Void lease.
7. Property acquired under the Land Acquisition Act.
8. Contract to the contrary.

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

1. Scope.
2. "Uncertain duration."
3. Lessee in fault.

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable

1. Scope.
2. Absolute transfer.
3. Rights of assignee.
4. Liabilities of assignee.
5. Mortgage or sub-lease by lessee.
6. Lessee continues liable.
7. Rights of lessee against assignee or sub-lessee.
8. Last paragraph.
9. Agricultural leases.
10. Clause not retrospective.

right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:

1. Scope.

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

1. Scope.
2. Interest on rent.
3. Rent not a charge.
4. Rent in kind.
5. Tender or payment at the proper time and place.
6. "To the lessor or his agent."
7. Payment must be by lessee.
8. Increase of rent.
9. Question of title.
10. Concurrent lease.
11. Covenant to pay rent runs with the land.
12. Void lease.
13. Non-payment of rent.
14. Suspension, abatement and reduction of rent.

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

1. Scope.
2. "Keep . . . in as good condition . . . possession."
3. "Reasonable wear and tear."
4. Irresistible force.
5. Right of entry upon the property.
6. Notice.
7. Contract to the contrary.
8. Liability to third persons for damage caused as a result of non-repair.

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

1. Scope.

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or

1. Scope.
2. Reasonable user of demised property.
3. User for purposes other than those for which the property is leased.
4. Cutting of trees on the land.
5. "Belonging to the lessor."
6. Working mines and quarries.
7. "Any other act which is destructive," etc.
8. Effect of breach of obligation.

quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

1. Scope.

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

1. Scope.

109. *Rights of lessor's transferee.*

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

1. Analogous law.
2. Scope of the section.
3. "Transfers the property."
4. "The property leased or any part thereof or any part of the interest therein."
5. "All the rights . . . . of the lessor as to the property or part transferred."
6. "If the lessee so elects, be subject to all the liabilities."
7. Notice.
8. Rent paid in advance.
9. Arrears of rent.
10. Apportionment of rent.

110. *Exclusion of day on which term commences.*

Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

1. Commencement of lease.
2. "Particular day."
3. Second paragraph.
4. Third paragraph.

Duration of lease for year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. *Determination of lease.*

A lease of immoveable property determines —

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event — by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(f) by implied surrender:

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

1. Scope of the section.
2. Clause (a)—Determination by efflux of time.
3. Renewal of lease.
4. Clause (b)—Term limited conditionally.
5. Clause (c)—Cesser of lessor's interest.
6. Death of lessor and lessee.
7. Clause (d)—Merger.
8. Surrender—General.
9. Express surrender—Clause (e).
10. Clause (f)—Implied surrender.
11. Clause (g)—Forfeiture—General.
12. Forfeiture—Permanent lease.
13. Forfeiture for breach of condition.
14. Forfeiture for denial of title.
15. Forfeiture on insolvency of lessee.
16. Notice of intention to determine lease on forfeiture.
17. Tenant cannot deny his landlord's title — Estoppel.
18. Re-entry on forfeiture under clause (g) need not be enforced by suit.
19. Who can enforce forfeiture.
20. Waiver of forfeiture.
21. Relief against forfeiture.
22. Forfeiture of service tenures.
23. Notice to quit or determine the lease—Clause (h).
24. Tenancy-at-will.
25. Leases not governed by the Act.
26. Joint lessors—Termination of lease.
27. Possession after determination of tenancy.

112. *Waiver of forfeiture.*

A forfeiture under section 111, clause *(g)*, is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

1. Scope of the section.
2. Acceptance of rent.
3. Distress for rent.
4. "Any other act."
5. Knowledge of breach.
6. Effect of waiver.
7. Second proviso.

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. *Waiver of notice to quit.*

A notice given under section 111, clause *(h)*, is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

1. Scope of the section.
2. "With the express or implied consent."
3. Act showing an intention to treat the lease as subsisting.
4. Effect of waiver.

114. *Relief against forfeiture for non-payment of rent.*

Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

1. Scope.
2. Law before the Transfer of Property Act of 1882.
3. "Lessor."
4. "Lessee."
5. "At the hearing of the suit."
6. "Rent in arrear."
7. "The Court may pass an order."
8. Relief where period of grace is provided for the payment of the rent.
9. Consent decree creating relation of lessor and lessee and providing for forfeiture on non-payment of rent—Relief.
10. Suit for ejectment on forfeiture — Court, if can pass decree for arrears of rent only.
11. Relief against forfeiture for breaches of other conditions.
12. Forfeiture under decree—Construction of decree.

114A. *Relief against forfeiture in certain other cases.*

Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing —

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

1. Scope of the section.
2. Notice before suit for ejectment.
3. Contents of notice.

115. *Effect of surrender and forfeiture on under-leases.*

The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

1. Scope of the section.
2. Surrender for obtaining new lease.
3. Sub-lease put an end to by forfeiture.
4. Agricultural leases.

116. *Effect of holding over.*

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

1. Scope of the section.
2. Remains in possession.
3. More lessees than one—Only some remaining in possession—Effect of.
4. Effect of lessee's legal representative remaining in possession.
5. Legal representative of the lessor.
6. "Accepts rent or otherwise assents to his continuing in possession."
7. More lessors than one—Acceptance by one only.
8. Clause for enhancement of rent in a quit notice —Whether amounts to an assent.
9. Suit for rent for the period of lessee's possession after determination — Whether amounts to assent.
10. Clause for renewal.
11. "In the absence of an agreement to the contrary."
12. Effect of renewal.
13. Nature of possession of tenant holding over without consent.
14. Possession under a lease valid for a part of the term only.

117. *Exemption of leases for agricultural purposes.*

None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Provincial Government may, by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

1. Legislative changes.
2. Scope of the section.
3. "Agricultural purposes."
4. Agricultural leases may be made orally.

CHAPTER VI.

OF EXCHANGES.

118. *"Exchange" defined.*

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

1. Scope of the section.
2. Distinction between sale and exchange.
3. Transfer of property partly for money and partly for other property—Nature of.
4. Mutual transfer of ownership necessary.
5. Partition is not exchange.
6. Two sale deeds, if may constitute exchange.
7. "Ownership of one thing for the ownership of another."
8. "Both things being money only."
9. Mode of effecting exchange.
10. Remedy of parties to exchange.

119. *Right of party deprived of thing received in exchange.*

If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

1. Legislative changes.
2. Scope of the section.
3. "Is by reason of any defect in the title of the other party deprived of the thing."
4. Defect in title does not ipso facto render completed exchange inoperative.
5. Party deprived of the thing obtained in exchange —Nature of remedy.
6. Party failing to get possession of property exchanged—Nature of remedy.
7. Exchange void — Property transferred if can be got back.
8. A contrary intention appearing from the terms of the exchange.
9. Limitation for enforcement of remedy.
10. Retrospective operation of new section.

120. *Rights and liabilities of parties.*

Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

1. Principle and scope.
2. Right of pre-emption on exchange.
3. Lien for the purchase money.

121. *Exchange of money.*

On an exchange of money, each party thereby warrants the genuineness of the money given by him.

1. Scope of the section.
2. "Money."

CHAPTER VII.

OF GIFTS.

122. *"Gift" defined.*

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

1. Scope of the section.
2. "Without consideration."
2a. Agreement to give.
3. Competency to give.
4. Competency to receive.
5. "Person."
5a. Gift to Hindu idol.
6. "Existing moveable or immoveable property."
7. "Accepted by or on behalf of the donee."
8. Donor dying before acceptance.
9. Accepted gift is complete though deed is registered later.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

10. Donee dying before acceptance.
11. Advancement.
12. Gift to a persona designata.
13. Gift for unlawful objects.
14. What passes under a gift.
15. Gift or trust.
16. Gift or sale.
17. Gift or will.
18. Gift is irrevocable.
19. Muhammadan law.
20. Hindu law.

123. *Transfer how effected.*

For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

1. Scope of the section.
2. Hindu law.
3. Buddhist law.
4. Muhammadan law.
5. Gifts of immovable property.
6. Registration and operation of gift.
7. "Signed by or on behalf of the donor."
8. "Attested by at least two witnesses."
9. Doctrine of part performance, whether applies to gifts.
10. Donee's possession under invalid gift of immovable property.
11. Section applies to gifts in Cantonment areas.
12. Delivery of property.
13. Incomplete gift does not constitute donor trustee for donee.
14. Gifts of actionable claims.
15. Law in places to which Transfer of Property Act is not extended.
16. Extent.

124. *Gift of existing and future property.*

A gift comprising both existing and future property is void as to the latter.

1. Scope of the section.
2. Gift of future property, if operates as contract to give future property.
3. Muhammadan law.

125. *Gift to several, of whom one does not accept.*

A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

1. Scope of the section.

126. *When gift may be suspended or revoked.*

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

1. Scope of the section.
2. Agreement for revocation.
3. Gift revocable at the will of the donor.
4. Resumability of service tenures.
5. Paragraph 2 — General.
6. Coercion.
7. Fraud.
8. Misrepresentation.
9. Undue influence.
10. Pardanashin women.
11. Mistake.
12. Limitation for suit to revoke gifts.
13. Right to revoke gift—When may be lost.
14. Who may suspend or revoke gifts.
15. Revocation—If need be express.
16. "Save as aforesaid a gift cannot be revoked"—Paragraph 3.
17. Transferees for consideration without notice — Paragraph 4.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

127. *Onerous gift.*

Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But, if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

1. Analogous law.
2. Scope of the section.
3. Gifts subject to conditions.
4. Onerous gift to disqualified person.
5. Effect of acceptance of onerous gift.

128. *Universal donee.*

Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

1. Legislative changes.
2. Scope of the section.
3. "Where a gift consists."
4. "Of the donor's whole property."
5. Liability of a universal donee.
6. Muhammadan law.
7. Onus of proof.

129. *Saving of donations mortis causa and Muhammadan law.*

Nothing in this Chapter relates to gifts of immoveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.

1. Legislative changes.
2. Scope of the section.
3. Gift in contemplation of death.
4. Hindu and Buddhist law—Gifts in contemplation of death.
5. "Any rule of Muhammadan law."

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. *Transfer of actionable claim.*

(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the fransferee, whether such notice of the transter as is hereinafter provided be given or not:

1. Legislative changes.
2. Scope of the section.
3. "Transfer."
4. There must be present transfer of an existing actionable claim.
5. Distinction between transfer of a debt and a novation.
6. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.
7. Assignment of beneficial interest in moveable property.
8. Assignment of part of debt.
9. Debts due to a joint Hindu family.
10. Transfer by operation of law.
11. "Whether with or without consideration."

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance, or affects the provisions of section 38 of the Insurance Act, 1938.

12. Form of assignment.
13. No particular words are necessary to constitute assignment.
14. Registration not necessary.
15. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.
16. "Duly authorised agent."
17. Completeness of the transfer and notice to the debtor.
18. Transfer of mortgage-debt — Equities between mortgagor and mortgagee, if available against transferee.
19. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."
20. Assignor's liability after the assignment.
21. The right of a tenant to compensation in Malabar.
22. Sub-section (2).
23. Exception.
24. The principle of 'caveat emptor' applies to the purchase of an actionable claim.
25. Law in the Punjab.

131. *Notice to be in writing, signed.*

Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

1. Legislative changes.
2. Scope.
3. Notice by transferee or by his agent.
4. "Shall state the name and address of the transferee."
5. Notice with a condition or qualification.
6. Waiver of defects in the notice.

132. *Liability of transferee of actionable claim.*

The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

1. Legislative changes.
2. Scope of the section.
3. Liabilities and equities.
4. Assignee need not be aware of the liability or equity.
5. Debtor may lose the benefit of the section by his own conduct.
6. Mortgage-debt.
7. Assignment in execution of decree.

133. *Warranty of solvency of debtor.*

Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

1. Legislative changes.
2. Scope of the section.
3. "Debt", meaning of.
4. "Solvency" and "warranty", meaning of.
5. "In the absence of a contract to the contrary."

134. *Mortgaged debt.*

Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is appli-

1. Legislative changes.
2. Scope of the section.
3. Transfer of a secured debt.
4. "Existing or future debt."
5. Rights and duties of the transferee.

cable, first, in payment of the costs of such recovery: secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

6. "The residue, if any, belongs to the transferor or other person entitled to receive the same."

135. *Assignment of rights under marine or fire policy of insurance.*

Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

1. Legislative changes.
2. Scope.
3. "By endorsement or other writing."

136. *Incapacity of officers connected with Courts of Justice.*

No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

1. Legislative changes.
2. Scope of the section.
3. "Buy or traffic in . . . . actionable claim."
4. Legal practitioner.
5. This section does not apply to purchases in execution.

137. *Saving of negotiable instruments, etc.*

Nothing in the foregoing sections of this chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

1. Legislative changes.
2. Scope of the section.
3. Stocks and shares.
4. "Instruments which are for the time being by law or custom negotiable."
5. "Any mercantile document of title to goods".

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286 105-60
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171 38- 8
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443 53A- 3
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631 60-14
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569 82- 7
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ILR 57 All.

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ILR 58 All.

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ILR 1937 All.

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ILR1940 All.

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344 41– 3
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542 53– 5
568 5– 4
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ILR1942 All.

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ILR 2 Bom.

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494 39– 1
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172 54–23
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186 8– 4
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ILR 5 Bom.

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496 44– 6
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543 60–50
571 52– 9
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ILR 9 Bom.

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435	65– 5
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ILR 10 Bom.

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105	48– 9
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485	8–19
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492	6–2a
517	123– 4
528	6–13
551	Pre– 2
609	38– 5
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620	53–34
644	106–34
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ILR 11 Bom.

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ILR 12 Bom.

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352	123– 4
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ILR 14 Bom.

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ILR 15 Bom.

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183	58– 4
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279	51–18
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,,	35–10
543	15– 3
549	126– 9
625	65– 4
,,	72– 4
647	105–49
652	15– 2
657	55– 3
673	6–2a
,,	7– 7
692	58– 5
704	105–47

ILR 16 Bom.

1	53– 6
,,	53–24
141	69– 4
,,	76–20
,,	84– 7
,,	84– 8
172	58–35
,,	67–15
217	18– 3
303	67–15
441	130– 7
486	67–11
,,	91– 8
492	13– 5
,,	16– 3
537	6–24
568	105– 1
,,	105–70
,,	108(l)–7
599	10–18
,,	60– 7
,,	60–37
,,	84– 5
705	60–28
,,	91– 8

ILR 17 Bom.

1	18– 5
232	6– 3
351	18– 4
365	60–50
425	58–35
,,	58–41
,,	67–15
,,	68– 2
,,	68–17
486	123– 2
503	8– 6
631	106–25
711	69– 4
736	51–22
,,	51–25
741	3–34
,,	48– 1
,,	92–17
771	51–10

ILR 18 Bom.

7	15– 2
22	91–20
66	51–25
86	92–17
,,	100– 1
107	106–24
,,	111–23
109	105–34
,,	107– 1
,,	107– 5
110	106–24
,,	111–14
,,	111–23
136	122–5a
160	1– 4
,,	56–13
,,	81–13
256	106– 4
,,	106–24
,,	106–25
,,	116–13
283	8–20
348	101– 1
372	53– 9
444	3–34
,,	78– 9
507	105–47
,,	105–80
,,	105–82
,,	116–13
591	61– 4
603	108(j)–1
670	126–16
684	48– 9
688	123– 2
739	3– 2
745	107– 1
755	60–35

ILR 19 Bom.

80	2– 5
133	108(p)–1
,,	111–17
133n	105– 7
,,	105– 9
150	105–31
,,	105–32
207	3– 3
271	7– 7
290	132–19
391	3–39
626	6–30

ILR 19 Bom.

647	13– 5
663	3– 2
697	7– 3
803	7– 7

ILR 20 Bom.

1	51–25
,,	108(h)–4
78	106–12
116	7– 7
150	7– 7
158	48– 9
,,	58– 2
279	2– 5
290	3–34
,,	3–49
296	67–15
298	51–22
310	12– 2
,,	12–12
316	35–14
346	60–28
354	111–14
,,	117– 2
390	67–20
439	108(h)–3
,,	108(j)–4
,,	108(j)–5
,,	112– 2
450	14– 5
,,	30– 2
467	44– 4
469	76–13
492	60–23
,,	73– 6
511	14– 4
522	55– 2
,,	55–13
549	58– 5
,,	60–19
553	59–14
565	2– 5
571	15– 2
615	82– 3
,,	82–23
636	6–31
677	60–32
759	2– 5
,,	106–49
,,	111–14
,,	111–23
,,	116–12

ILR 21 Bom.

60	130–17
,,	131– 1
154	106–34
175	55– 9
,,	108(c)–8
195	108(j)–1
,,	111–13
198	58–24
226	3– 2
267	58–28
,,	67–13
311	106–29
,,	108(j)–1
,,	108(j)–5
319	6– 4
349	35–14
387	3– 2
396	60–23
,,	73– 6

ILR 21 Bom.

509	105–79
,,	105–82
528	58–33
544	60–44
572	132–19
619	60–44
,,	60–45
704	58–33
709	13– 5
749	51–23
793	60–28
797	44– 7
808	38– 7
827	3–41
,,	55–20

ILR 22 Bom.

1	38– 1
,,	38– 5
,,	51– 9
,,	51–22
,,	51–25
164	58–39
176	4– 4
,,	54–14
,,	55– 1
213	3–34
,,	48– 9
235	3– 1
241	106–20
245	58–33
255	53– 5
,,	53–19
271	73– 6
304	56– 1
,,	56–13
,,	81–13
,,	82–18
348	106–22
,,	106–32
,,	108(q)–1
375	60–28
409	19– 6
,,	19– 8
428	111–17
440	72– 2
,,	72– 3
,,	84– 5
489	124– 3
533	15– 2
,,	15– 3
610	8– 4
,,	8–15
658	6–35
686	3–49
754	106–46
761	83– 8
,,	132–19
794	108(l)–6
893	105–37
,,	105–38
,,	116–13
939	52– 8
,,	52–11
,,	52–18
945	48– 9
,,	67–20
984	6– 4

ILR 23 Bom.

1	3– 2
,,	53– 5
,,	53– 6

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ILR 23 Bom.

15 108(e)-3
,, 108(e)-4
,, 108(e)-6
22 3- 2
56 55-20
73 44-10
80 45- 6
119 2- 5
131 6-2a
,, 123- 2
,, 126-16
181 54-23
184 44- 6
234 123- 2
287 7- 7
,, 58-25
342 39- 1
,, 39- 4
,, 39- 5
348 69-11
,, 69-23
,, 69-26
385 44- 7
,, 58-21
397 6- 9
510 108(c)-2
518 126-16
525 54-14
602 105-63
,, 105-69
,, 105-79
659 18- 4
682 123- 4
725 122-5a
781 67-13

ILR 24 Bom

31 3- 3
114 2-10
128 44- 6
170 6-2a
343 38- 5
400 53A-3
,, 54-23
,, 55-20
420 19- 6
426 106-25
,, 111-14
482 60-27
,, 64- 5
502 3-23
,, 130-17
504 105-37
,, 116-13
556 91-20
619 60- 7
622 6-27

ILR 25 Bom.

52 6-30
101 2- 5
104 60-26
,, 104- 1
126 4- 4
202 53- 1
,, 53- 2
,, 53- 6
,, 53-20
,, 53-22
,, 53-34
269 108(c)-1
,, 108(c)-3
433 105-14
556 105-59
563 8- 5
616 59-11
659 3- 7
696 118- 2
702 121- 1
,, 121- 2
750 55- 9

ILR 26 Bom.

33 58- 9
82 69-29
88 60-23
,, 82- 5
,, 82-18
,, 101- 5
140 40-22
159 48- 3
198 8- 9
241 67- 5
252 58-12
,, 58-33
,, 58-35
,, 58-40
,, 98- 1
,, 105-67
271 Pre- 4
,, 3-46
,, 51-22
305 8-17
312 83- 5
,, 84- 5
319 19- 9
326 38- 5
,, 38- 6
,, 38-11
360 106-24
363 76-12
,, 76-14
379 43- 9
,, 82-17
433 38- 5
,, 41- 8
437 100-29
445 45- 6
449 15- 2
,, 123- 2
500 82-17
,, 92-15
,, 95- 1
519 55- 9
538 3-34
,, 81-13
543 53- 6
577 53- 5
,, 130-17
632 122-5a
643 60-13
,, 60-18
,, 84- 8
750 55- 9

ILR 27 Bom.

23 83- 7
,, 83-16
,, 84- 2
,, 84-10
,, 103- 2
,, 103- 5
31 123- 2
91 3-11
146 53- 1
,, 53-12
146 53-24
154 60-28
262 116- 1
266 2- 6
,, 52- 1
,, 52-31
271 60-50
292 60-15
297 60-28
322 53- 1
,, 53- 6
,, 53-19
330 8-18
408 3-39
,, 48- 9
452 3-34
,, 3-39
,, 48- 9
500 10- 1
515 105-20
,, 105-79
,, 105-82
,, 106-25
600 58-41
,, 98- 5

ILR 28 Bom.

153 67-20
,, 91- 5
,, 91- 7
,, 91-41
181 3- 2
,, 72- 5
201 44- 7
215 5- 3
305 105-69
349 60-35
361 2- 5
,, 52-18
371 60-34
466 53A- 3
,, 54-23
,, 55-20
639 53-20

ILR 29 Bom.

19 8-20
42 48- 8
46 48- 7
,, 48- 8
,, 59-13
133 15- 2
199 3-34
,, 58- 5
,, 130-17
213 105-37
,, 108(q)-1
267 123- 2
,, 123- 4
275 123- 4
306 122-11
,, 123-12
323 3- 6
391 76- 8
,, 108(j)-1
,, 108(j)-5
415 8- 4
428 53- 6
,, 123- 4
435 52- 1
,, 52-42
468 123- 4
480 Pre- 4
480 8- 4
580 2- 5
,, 51-23
,, 105- 4
,, 105-12
,, 105-19
,, 105-25
,, 105-26
,, 105-31
,, 106-23

ILR 30 Bom.

119 58-33
137 106-37
156 67A- 1
167 84- 5
250 3- 2
,, 63- 3
,, 65A- 1
,, 116-10
304 6- 4
,, 21- 5
426 58-33
466 73- 1
,, 111-11
477 14-13
558 3- 1
578 126- 9

ILR 31 Bom.

15 114- 9
159 108(l)- 1
165 6- 3
,, 6- 7
,, 6-38
,, 21- 5
183 3- 3
,, 105-49
271 92-17
393 52-13
405 53- 9
527 76-21
,, 83-20
552 6-29
,, 58-18
566 3-43
,, 69-18
,, 69-21

ILR 32 Bom.

32 63A- 5
165 55- 9
172 19- 2
181 40-22
386 8-20
,, 62-12
,, 100- 5
432 Pre- 4
441 123- 6
449 6-29
,, 6-35
521 60-10
,, 84- 5
,, 102- 3
569 58-35
,, 105-67
581 6-34

ILR 33 Bom.

1 3-32
,, 8- 9
44 3-11
,, 59- 2
,, 59- 8
53 3-28
,, 8-20
,, 55-12
96 50- 1
,, 50- 2
122 18- 2
,, 18- 3
311 55-18
373 3- 2
610 107- 7
,, 107- 8
,, 130- 3
,, 134- 5

ILR 34 Bom.

59 58-33
128 2- 5
,, 67-15
139 5- 4
,, 54- 5
175 43- 7
,, 65- 4
202 3-38
,, 59- 6
287 3- 2
,, 54-12
,, 118- 2
,, 122- 2
,, 122-16
,, 123- 5
329 111-17
349 3- 2
462 58-41
,, 67-15
506 108(l)-4
604 19- 2
,, 126- 3

ILR 35 Bom.

93 58-33
169 6-2a
182 51-22
204 76- 4
239 114- 9
258 14-10
,, 58-33
269 3-28
,, 3-39
,, 41-23
288 58-35
,, 67-15
327 58-17
331 58-33
342 3-39
,, 41-21
395 56- 1
,, 58-18
,, 81-13
403 5- 8
412 3- 1
438 54-17
,, 92-17
507 65- 4

ILR 36 Bom.

139 6-12
185 65- 4
189 52-15
214 10- 1
,, 19- 2
,, 21- 2
,, 123- 4
438 Pre- 4
500 105-19
,, 105-70
,, 107- 7
510 7- 7
,, 43- 4
515 3-31
539 60-27
,, 64- 5
564 3-47
,, 100- 5
639 Pre- 4
,, 8- 4

ILR 37 Bom.

53 54- 5
,, 54-14
152 1- 1
198 3-27
,, 130- 2
,, 130- 3
,, 130-12
284 105-79
427 52-27
,, 52-35
471 130-23
621 52- 8
,, 52-11
,, 100-28
644 23- 4

ILR 38 Bom.

10 53- 9
24 67-20
,, 101- 1
177 68-13
240 106-16
,, 106-30
249 68-13
255 4- 3
,, 137- 5
272 6-26a
369 101- 1
372 58-39
613 132- 2
631 132- 7
659 137- 5
680 137- 4
703 54-23
716 108(h)-2

ILR 39 Bom.

26 6-2a
41 60-26
119 58-33
138 67A- 1
316 105-47
358 65- 4
,, 68-13
434 105-60
441 53-33
472 53A- 3
,, 54-23
507 53- 5
,, 53- 9
,, 53-10
,, 53-32
563 18- 5
625 105-35
,, 111- 2

ILR 40 Bom.

69 8- 9
74 8-20
,, 58-33

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ILR 40 Bom.
313 54–18
,, 91–13
378 58–33
483 60–23
,, 76– 8
498 40– 8
630 137– 5
646 92–16

ILR 41 Bom.
347 7– 7
,, 44– 6
,, 44– 7
372 40– 9
384 3–11
,, 3–16
,, 3–18
,, 59– 7
458 107– 5
550 4– 5
,, 54–21

ILR 42 Bom.
87 44– 5
103 108(j)– 3
136 51–11
159 72– 3
170 22– 3
195 111–16
215 2– 6
,, 52–18
,, 52–34
734 111–14

ILR 43 Bom.
17 44– 6
28 6– 8
,, 109– 5
,, 111–19
37 6–26a
69 63A– 1
88 21 –9
181 55–11
240 52–18
334 60–26
472 7– 7
,, 44– 6
487 60–15
531 105–37
,, 116–13
703 2– 5
707 53–15

ILR 44 Bom.
139 3–47
223 82–20
231 3–11
304 10– 4
,, 11– 4
,, 11– 9
341 7– 7
405 3–11
,, 3–18
,, 59– 8
488 6– 4
542 6–34
950 51–25
,, 108(h)–3
,, 108(h)–4
961 58–33

ILR 45 Bom.
8 105– 4
55 67A– 1
87 41– 6
105 91–11
,, 91–18
117 60–28
164 123–5
170 3–34
,, 3–38
,, 40–17
234 3– 2
300 114– 8
303 111–14
350 106–12
508 105–79
523 58–35
,, 68– 6
535 111–16
,, 112– 6
910 3–39
989 59– 7
1038 28– 3
,, 30– 2
,, 32– 5
1056 2– 9
,, 54– 4
1112 92– 2
1167 6– 4
1170 53A– 3
1197 10–17
,, 108(j)–1
,, 108(j)–6
1296 123–4
1301 63A– 1
1335 60–26

ILR 46 Bom.
28 44– 6
153 8– 6
162 8– 6
195 55–11
213 82–17
,, 95– 1
218 60–17
302 54– 4
409 60–28
,, 60–30
481 105–45
651 6–30
816 105–72
1009 101– 1
,, 101– 2

ILR 47 Bom.
4 105–43
,, 105–49
,, 106–12
65 122–12
137 59– 8
191 14–10
,, 54–23
327 8– 4
335 8–20
369 55– 3
529 6–2a
597 5– 4
,, 6–10
,, 6–11
,, 10– 3
621 3– 2
,, 53A– 1
,, 53A– 3
,, 58–33
652 61– 6
696 63A– 5
719 3–22
,, 6–16
790 36– 1
,, 36– 2
,, 36– 3
798 105–79

ILR 48 Bom.
38 106–13
,, 106–19
,, 116–12
341 116– 1
,, 116– 2
396 123– 4
404 72– 3
435 52–27
,, 123– 6
541 105–50
,, 111–14
,, 112– 4

ILR 49 Bom.
99 Pre– 4
,, 8– 4
,, 8–10
,, 8–20
167 21–13
245 55– 3
,, 60–14
,, 108(l)– 6
325 55– 2
,, 55–21
388 52–29
,, 123– 6
591 95– 4
662 58–33
821 38– 8
832 67–22
842 111–14
847 60–22
862 54–23
,, 58–33

ILR 50 Bom.
204 44– 6
331 60–41
,, 60–44
360 137– 3
450 114A– 1
547 100–10
566 14–10
,, 58–33
650 53A– 3
692 76–10

ILR 51 Bom.
37 52– 1
,, 52–40
133 126–14
149 106– 3
,, 106–34
,, 116–13
231 54–23
247 54–23
,, 55– 3
,, 55– 4
,, 55–20
274 105–14
,, 108(f)– 1
,, 108(m)–1
1040 51– 4
,, 51– 8
,, 51–16

ILR 52 Bom
142 108(e)–3
176 8–20
,, 13– 2
,, 15– 5
208 52– 1
,, 52–19
,, 52–40
219 3–11
,, 3–18
,, 3–19
,, 59– 8
307 51– 8
,, 63A– 1
313 123– 6
316 123– 4
459 104– 1
693 53A– 3
875 59–14
883 3–32
,, 55–21

ILR 53 Bom.
230 8–20
321 6–27
,, 53– 9
,, 54–14
,, 54–15
353 60–41
,, 91– 4
,, 91– 8
,, 92–16
,, 95– 1
360 60–28
453 52–11
589 3– 6
,, 51– 1
676 65– 4
773 3– 2
777 108(c)–4
819 8–17

ILR 54 Bom.
30 58–33
358 18– 5
,, 21– 3
487 111–17
495 67– 5
625 60–41

ILR 55 Bom.
525 84– 5

ILR 56 Bom.
374 12– 4
403 6–18
462 130–12
,, 130–13
556 54– 5
,, 54–14
,, 55–12
595 53–24

ILR 57 Bom.
134 95– 9
194 91–12
,, 91–13
,, 105–42
,, 105–50
234 Pre– 6
,, 5– 1
,, 58–39
593 58–31
709 3–31
737 19– 2

ILR 58 Bom.
75 91– 4
254 123– 4
327 108(j)–2
,, 108(j)–4
,, 108(j)–5
419 105–79
472 76– 3
650 53A– 5
,, 54–23

ILR 59 Bom.
83 55– 2
,, 55– 3
194 2– 5
,, 111–14
,, 111–25
,, 114A–1
573 137– 4
582 55– 5
681 100–11

ILR 60 Bom.
34 5– 4
,, 53– 5
220 54–19
226 53–10a
326 3–42
,, 5– 3
394 108(j)–6
,, 109– 5
736 53A– 3

1937 Bom.
1 7– 7
1 38– 5
18 8–12
,, 8–20
140 54–23
,, 55–20
432 7– 7
724 8–20
763 58–39
895 6– 4
,, 52– 9

1938 Bom.
155 6– 7
445 53–20
,, 53–24

1939 Bom.
36 21– 4
71 53A– 5
,, 54–19
,, 54–22
144 115– 1
,, 115– 2
454 8–20
713 91–12
763 58–39

1940 Bom.
50 53A– 5
328 108(j)–4
453 8–20
,, 58–12
,, 58–33
480 53A–13
645 76– 5
,, 76– 6
,, 76–13

1941 Bom.
1 52–20
55 55–10
136 100–19
,, 100–28
290 55–12
299 100–28
415 6–23
506 69– 7
,, 69–13
,, 69–26
521 108(l)–5
529 53A– 4
,, 53A–11
,, 53A–13

1942 Bom.
83 69– 4
,, 69–26
,, 69–26a
,, 69–27
,, 69–28
169 59A– 4
,, 91– 3
,, 92–13
,, 92–22

Bombay Printed Judgments

1872 Bom.PJ
33 10– 4
104 3–39

1873 Bom.PJ
66 106–49

1874 Bom.PJ
18 60–50
44 3–39
82 111–14
125 8– 9
189 52– 1
,, 52–18
279 111– 6
343 107– 1
409 107– 1

1875 Bom.PJ
35 123– 4
61 38– 5
140 44– 6
181 111–14
273 108(j)–4
308 108(j)–4
312 7– 7
325 8– 4
,, 8–20
364 111–14

1876 Bom.PJ
11 108(l)–9
36 105– 9
77 44– 6
191 76–15
227 105–47
272 123– 4

1877 Bom.PJ
26 3–34
81 52– 1
,, 52–29
171 108(q)–1
177 105–27
,, 106–26
,, 111– 6
182 106–12

1877 Bom.PJ
261 6-24
309 59-14
362 3-34

1879 Bom.PJ
407 72- 3
487 68- 7

1880 Bom.PJ
209 106-49
215 101- 4
300 95- 1

1881 Bom.PJ
44 108(h)-2
57 60-41
,, 82-17
,, 84- 5
,, 95- 1
180 106-24
195 72- 3
,, 76- 8
293 38-11
,, 58-25

1882 Bom.PJ
148 44- 6
157 43- 9
167 108(l)-14
167 108(n)-1
385 68-14

1883 Bom.PJ
104 114- 1
,, 114- 2
121 43- 9
258 58-33
310 111- 6

1884 Bom.PJ
33 108(l)-9
44 72- 5
174 6- 3
254 60-28
,, 60-49
286 108(l)-9

1885 Bom.PJ
20 8-13
130 3- 2
151 3- 4
157 44- 6
160 105-27
,, 105-43
,, 105-60
176 44- 6
205 105-47
237 44- 6

1886 Bom.PJ
33 9- 1
68 72- 3
78 108(q)-1
106 7- 7
,, 44- 6
130 3- 3
238 108(l)-6
247 60-50
252 39- 5
314 108(q)-1
,, 111-14

1887 Bom.PJ
12 76- 7
154 112- 2
154 114- 1
,, 114- 7
209 91- 8

1888 Bom.PJ
19 60-41
57 44- 6
75 55- 5
125 3- 9
,, 8- 2
131 60-50
139 41- 1
236 60-41
253 48- 9
304 114- 1
,, 114- 7

1889 Bom.PJ
18 77- 1
30 8- 4
37 53-22
42 9- 1
79 106-16
99 52- 8
160 60-23
,, 73- 6
246 60-41
321 105-47
,, 106-16
323 44- 6

1890 Bom.PJ
65 54-14
101 48- 9
164 100- 5
211 60-28
,, 76- 8
,, 105-47

1891 Bom.PJ
16 58-33
107 112- 5
147 54-14
234 Pre- 4
,, 6-26a
241 60-28
248 105-47
284 58- 4

1892 Bom.PJ
5 52-12
135 51- 8
284 53- 9
353 112- 4
,, 112- 6
405 111-23
412 82-17
,, 95- 1

1893 Bom.PJ
82 58-18
107 48- 9
292 106-24
,, 106-25
,, 111-14
,, 111-23
297 38- 5
,, 38-11
349 55-11

1894 Bom.PJ
76 109- 5
133 48- 9
173 100-31

1895 Bom.PJ
165 106-24
,, 111-14
206 114- 1
,, 114- 7
310 68- 2
321 106-24
545 115- 4

1896 Bom.PJ
381 44- 7
451 106-25
,, 111-14
518 116- 1
561 60-49
629 56- 1
,, 92-19
633 124- 3
710 72- 3
717 10-16

1897 Bom.PJ
182 112- 2
,, 117- 2
188 106-37
315 53-16
372 108(c)-8
407 48- 8
416 68-17
461 53-10

1898 Bom.PJ
8 73- 1
38 52-11
,, 52-18
49 105-58
,, 105-67
206 106-25
,, 106-40
,, 106-45
213 82-12
239 58-33
292 6-27
339 114- 7
355 111-14
357 116- 4
383 109-7
386 52-8
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1872 Pun Re

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1875 Pun Re

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1877 Pun Re

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1888 Pun Re

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1896 Pun Re

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1898 Pun Re

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The Synopsis for each Section shows where exactly to look for the point required.

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Overlooking of Precedents leads to Erroneous Decisions.

(1922) 9 A.I.R. 1922 Privy Council 11 (12) = I. L. R. 43 All. 469 (475) (P. C.) — Section 89, T. P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases. e.g., *Vanmikalinga* v. *Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, (1918) 45 I. A. 130 — therefore no longer arises."

(1943) 30 A. I. R. 1943 Calcutta 114 (118). — Regarding the decision in (1941) 45 C. W. N. 44 the following observations were made: "It seems that the earlier cases on the point decided by Division Benches of this Court were not brought to the notice of the Court or considered by it." . . . "There is, however, a decision of the Judicial Committee, relevant to the point we are considering, but unfortunately it was not noticed in 45 C. W. N. 44. That case is 61 I. A. 286."

(1943) 30 A. I. R. 1943 Patna 96 (101). *Per Chatterji, J.*, — "I may observe here that in 52 All. 1005, which was decided in May 1930, there is no reference to 17 Cal. 543 (F B) decided in 1890, or to 55 Cal. 1181, decided and reported in 1928."

(1942) 29 A. I. R. 1942 Bombay 268 (270, 271). — *Per Wassoodew, J.* — "That question does not seem to have been argued and the authorities which are binding on this Court on that point were not considered in (1934) 58 Bom. 419.

Now, that (case (1919) 46 I. A. 285 (P. C.)) does not seem to have been referred to either in argument or in the judgment of the learned Chief Justice who preferred to follow (1924) 51 I.A. 83 (P. C.) . . . . With extreme respect, if I may say so the authority in (1934) 58 Bom. 419 is weakened by the omission to consider the effect of the decision of the Privy Council. . . ."

Per Broomfield J.—As to the first point it may be pointed out that neither in the judgment of the learned Chief Justice nor in that of Barlee J. (in (1934) 58 Bom. 419) is there any reference to (1919) 46 I. A. 285 (P. C.) which does not appear to have been cited.

(1942) 29 A. I. R. 1942 Lahore 228 (230) (FB). — *Per Tek Chand, J.* — "This decision is not in accord with 12 P. R. 1911, in which the identical objection had been raised and overruled. That case was regarded in the Chief Court and this Court as the ruling authority on the subject for over 25 years, but there is no reference to it in the judgment in A.I.R. 1937 Lah. 637. Apparently, the attention of the learned Judge, who decided the latter case, was not drawn to it.

(1942) 29 A.I.R. 1942 Lahore 1 (4) = I. L. R. (1942) Lah. 59 (69) (FB). — In the Order of Reference, Tek Chand and Din Mohammad JJ., observed : — "These previous decisions do not appear to have been brought to the notice of the learned Judges who decided (1937) 18 Lah. 594 (F.B.) . . . ."

(1942) 29 A. I. R. 1942 Madras 136 (138). — "Neither the Full Bench decision in (1914) 37 Mad. 483 nor the decision in (1929) 52 Mad. 936 was noticed and considered in (1933) 65 M. L. J. 455."

(1942) 29 A. I. R. 1942 Patna 379 (381). — *Per Agarwala, J.* — "This Full Bench decision [*Balmukund* v. *Dalu*, (1903) 25 ALL. 498] of the Allahabad High Court was not considered by the Division Bench [*Gobindakumar Sur* v. *Mohinimohan Sen*, (1930) 57 Cal. 349] of the Calcutta High Court to which I have referred."

(1941) 28 A. I. R. 1941 Allahabad 396 (397) = I. L. R. 1941 All. 737 (740). — "The Full Bench decision in *Kalian Das* v. *Bhagirathi*, (1883) 6 ALL. 47 is binding on us . . . . The Full Bench case *in* 6 ALL. 47 was not cited in arguments in *Radhey Shiam* v. *Nazir Hussain*, 1941 A. L. J. 43. Had it been cited, the decision would have been the other way."

(1941) 28 A. I. R. 1941 Madras 933 (933, 934) = I.L.R. 1942 Mad. 264 (265, 266, 268, 270) (FB). — "The substantial question in this appeal is whether (1907) 30 Mad. 367 was rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in (1896) 23 Cal. 775 and therefore cannot be allowed to stand. . . . They (i. e., the learned Judges who decided 30 Mad. 367) did not, however, make any reference to the

Judgment of the Privy Council in 23 Cal. 775. Presumably it was not brought to their notice . . . We consider that the present case is governed by the decision of the Privy Council in 23 Cal. 775."

(1941) 28 A. I. R. 1941 Madras 898 (902)=I.L.R. 1942 Mad. 271 (278) (FB). — "The decision in (1884) 7 Mad. 255 was criticised by Ayling and Sheshagiri Iyer, JJ., in (1917) 5 M. L. W. 158. On the other hand, it receives support from the judgments given by Madhavan Nair and Stodart, JJ., in (1936) 71 M. L. J. 511, by Cornish, J., in (1937) 71 M. L. J. 725 and by Ramesam and Jackson, JJ., in A. I. R. 1928 Mad. 1270. It is, however, significant that in these cases no reference was made to the decisions in (1907) 30 Mad. 26, (1909) 32 Mad. 429 and (1917) 5 M. L. W. 158."

(1941) 28 A. I. R. 1941 Madras 699 (703) = I. L. R. 1941 Mad. 970 (984). — "Even in *Hanmant* v. *Krishna*, (1925) 49 Bom. 604, it does not appear from the report that the Courts were invited to consider the numerous cases to which we have been referred : *Bhoobun Moyee* v. *Ramkishore*, (1863-66) 10 M. I. A. 279, was cited but not *Collector of Madura* v. *Mootoo*, (1867-69) 12 M. I. A. 397 at page 443 nor *Ramaswami* v, *Venkataramayyan*, (1878) 2 Mad. 91 (P. C.) before the Bombay High Court."

(1941) 28 A. I. R. 1941 Rangoon 202 (204)=1941 R. L. R. 224 (229). — "It is surprising to note that 44 Mad. 417 was not cited before another Bench of the Madras High Court only two years later, in 46 Mad. 88, where it was briefly said . . . ."

(1940) 27 A. I. R. 1940 Madras 768 (772) = I. L. R. (1940) Mad. 969 (972) (FB). — "This view has been adopted in the case in *Venkataramana* v. *Varahalu*, (1939) M. W. N. 1028, a decision of Varadachariar and Pandrang Row, JJ., anterior to the decision of Burn and Stodart, JJ., [in *Mythili* v. *Janaki*, (1939) M. W. N. 1237] but apparently not brought to their notice."

(1934) 21 A. I. R. 1934 Allahabad 605 (605, 606). — "Unfortunately at that time the attention of the Bench was not dawn to the several previous cases which were relevant" . . . . "We must, therefore, hold that the view expressed in *Hira Lal's case*, A. I. R. 1925 ALL. 72, was not correct, as the attention of the Bench was not drawn to the rulings mentioned above."

1933) 20 A. I. R. 1933 Calcutta 886 (886) = I. L. R. 60 Cal. 1106 (1107). — Referring to the decision in *Khetter Mohun* v. *Kassy Nath*, (1893) 20 Cal. 899, Lort-Williams J. observed : "That is a decision of the Court sitting in appeal from the original side and is binding upon me. But it appears from the report that none of the English cases were cited to the learned Judges. In my opinion, the point decided requires further consideration by the Court sitting in appeal in the light of the English decisions."

(1931) 18 A. I. R. 1931 Madras 185 (188)=I. L. R. 54 Mad. 654 (659). — "It is true . . . . . that in *Narasimha* v. *Zamindar*, (1919) 42 Mad. 873, Phillips, J. dissented from that view and was of the opinion . . . . . But it appears that *Harinath* v. *Krishna*, (1887) 44 Cal. 147 was not quoted to the learned Judge in that case . . . . ."

(1928) 15 A. I. R. 1928 Madras 929 (930). — Referring to the order which he passed in Second Appeal No. 1266 of 1924 Srinivasa Ayyangar J. frankly states : "But that order was made without full argument and merely following the decision of Kumaraswami Sastriar J., in the case already referred to and without advertence further to the decision in the case of *Sekharan* v. *Eacharan*, (1910) 20 M.L.J. 121. I am satisfied that my order in the said case was not right."

(1927) 14 A. I. R. 1927 Allahabad 28 (31) = I. L. R. 49 All. 162 (169, 170). — "Their Lordships do throw out the clear hint that if the case of *Vanmikalinga* v. *Chidambara*, (1905) 29 Mad 37, [and we may for the matter of that, add the cases of *Shyamlal* v. *Bashir-ud-din*, (1906) 28 ALL. 778 and *Bibi Jan* v. *Sachi Bewa*, (1904) 31 Cal. 863] had been brought to their Lordships' notice, the opinion as to the interpretation of S. 89 in the case of *Het Ram*, (1918) 45 I.A. 130, would have been different."

(1926) 13 A. I. R. 1926 Allahabad 409 (409). — "We think that in all probability Walsh, J. would have decided this matter [see his decision in A. I. R. 1925 ALL. 572] differently if there had been called to his, attention the cases of *Desraj* v. *Karam*, (1896) 19 ALL. 71 and *Ruddar* v. *Dhanpal* (1903) 26 ALL. 156."

A. I. R. COMMENTARIES JUDICIALLY NOTICED

(1938) 25 A. I. R. 1938 Calcutta 730 (733)=I.L.R. (1939) 1 Cal. 112 (120).— "The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act [1st (1938) Edn.], pp. 567 to 572."

(1938) 25 A. I. R. 1938 Calcutta 287 (289 & 290) = I. L. R. (1938) 1 Cal. 53 (58 & 60). — "In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, [2nd (1935) Edn.] at p. 1388, I find the following comment: 'The first .... parties'.

'The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

(1937) 24 A. I. R. 1937 Calcutta 222 (224).—"On this point there is a considerable mass of case law which will be found set out in Chitaley's Commentary [2nd (1935) Edn.] on the Civil Procedure Code." [O. 21, R. 2, Note 6.]

(1943) 30 A. I. R. 1943 Allahabad 162 (167).—"In Chitley's Limitation Act (Edn.1) at p. 548 [now see 2nd (1942) Edn. p. 554] the learned commentator takes this same view. He says: "As regards proceedings before arbitrators ..... good law." [The view is approved and followed.]

(1942)29 A.I.R. 1942 Allahabad 77(78). —"So far as Art. 120 is concerned, there are a large number of cases quoted in Chitaley's Commentary ...." [1st (1938) Edn.]

(1941) 28 A. I. R. 1941 Allahabad 110 (FB) (117)=I. L. R. (1941) All. 77 (95). —"Where a decree is against *A* and another decree is against *A* and *B*, it has been held that the decrees are against the same judgment-debtor within the meaning of S. 73. The cases on the point are noted in Chitaley's Code of Civil Procedure, [1st (1932) Edn.], vol. 1, p. 647."

[This principle was cited with approval.]

(1940) 27 A. I. R. 1940 Allahabad 263 (266) = I. L. R. (1940) All. 396 (406).— "In Chitaley's Criminal Procedure Code, [1st (1936) Edn.], vol. 1, p. 797, the learned commentators say: 'It is ..... Evidence Act.' I agree with their conclusion."

(1937) 24 A. I. R. 1937 Allahabad 82 (87). — "The balance of authority seems to be that an Appellate Court has no power under it to interfere to the prejudice of a person who was a party to a suit, but who was not impleaded in the appeal: *vide* "Code of Civil Procedure," Chitaley and Annaji Rao, vol. 3,pp. 3003-3004 [1st (1932) Edn.]. I am, therefore, of opinion that defendants 2-7 ought not to have been impleaded."

(1936) 23 A. I. R. 1936 Allahabad 811 (813).—"The ruling cases on this point are collected and noted in Chitaley's Civil Procedure Code, vol. 3, p. 2318, 2nd (1935) Edn."

(1936) 23 A. I. R. 1936 Allahabad 512 (513). — "As regards the conflict I need mention only a few cases although all of them are collected by Chitaley in his Code of Civil Procedure, [1st (1932) Edn.] vol. 3 at p. 2374."

(1934) 21 A. I. R. 1934 Allahabad 253 (255). — ".... the reason being that no one can have vested right in forms of procedure. The subject is discussed in Chitaley's Civil Procedure Code, [1st (1932) Edn.], vol. 1, pp. 4 and 5."

(1943) 30 A. I. R. 1943 Lahore 65 (77) (FB) — "These principles are generally recognized in the decisions of the other High Courts also: see rulings collected under Notes 3 and 8 to S. 115 in Chitaley's Code of Civil Procedure."

(1942) 29 A. I. R. 1942 Lahore 119 (120).—"No authority directly in point has been quoted by either side but in Chitaley's Code of Civil Procedure, [3rd (1940) Edn.] vol. 1, under S. 151 Civil P. C., the learned author deals at some length in Note 6 (p. 1220) with the meaning of the words 'abuse of the process of the Court' in that Section. After dealing ..... exactly the abuse is." [Cited with approval.]

(1941) 28 A. I. R. 1941 Lahore 128 (128) = I. L. R. 1941 Lah. 697 (698). — "This is a petition for revision of an order ..... allowing the plaintiff to sue as a pauper. On my expressing doubt whether a revision against such an order lies the petitioner's learned counsel referred to the Lahore cases cited in Chitaley's Code of Civil Procedure [3rd (1940) Edn.], vol. 1, page 1082."

(1941) 28 A. I. R. 1941 Lahore 96 (96). —"A puisne mortgagee, who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only . . . . . Mulla in his commentary on the Code of Civil Procedure at p. 983 also holds the same view, and so does Chitaley in vol. 3 at p. 2718, [3rd (1940) Edn.]."

(1939) 26 A. I. R. 1939 Lahore 356 (357). — "As pointed out in A.I.R. 1921 Lah. 369 and A. I. R. 1928 ALL. 236 the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Limitation Act, [1st (1938) Edn.] vol. 2, p. 1362 *et seq*."

(1938) 25 A. I. R. 1938 Lahore 345 (346).—"The learned counsel for the present respondents also quoted A. I. R. 1932 ALL. 446, A. I. R. 1933 ALL. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, [1st (1936) Edn.] vol. 1, p. 676."

(1938) 25 A. I. R. 1938 Lahore 220 (222).—"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, [2nd (1935) Edn.])"

(1937) 24 A. I. R. 1937 Lahore 41 (49) =I. L. R. 1937 Lah. 11 (33).—"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure [2nd (1935) Edn. p. 612] that this section (i. e., S. 80) like S. 79 enacts only a rule of procedure. With this view I agree."

(1943) 30 A. I. R. 1943 Nagpur 231 (232). — The Commentary on the Civil Procedure Code was referred to with approval in these words: "It is argued in appeal that O. 32 R. 7 does not apply to execution proceedings, but there is ample authority to show that it does. Cases on the point are collected on page 1924 of Chitaley's Code of Civil Procedure, 3rd (1940) Edn. vol. 2, under Note 11 to O. 21, R. 2."

(1938) 25 A. I. R. 1938 Nagpur 122 (FB) (123)=I.L.R. 1938 Nag. 106 (108). —"It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p. 44 of vol. 1 of Chitaley's Civil Procedure Code [2nd (1935) Edn.] which take that view."

(1937) 24 A. I. R. 1937 Nagpur 268 (269) = I. L. R. 1937 Nag. 519 (520). — "It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh: see also Chitaley and Rao's Code of Civil Procedure, [2nd (1935) Edn.], vol. I, page 712."

(1937) 24 A. I. R. 1937 Nagpur 216 (217) = I. L. R. 1938 Nag. 280 (282). — "In Chitaley and Rao's Civil Procedure Code, [2nd (1935) Edn.], p. 2094 under O. 22, R. 1, it is remarked:

'If, in the first Court, the . . . . either party.'

'I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad. *loc. cit.* that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent'."

(1937) 24 A. I. R. 1937 Nagpur 50 (53) =I. L. R. 1937 Nag. 277 (284). — "This question has been well discussed in Note 10 under S. 162, p. 804, of Chitaley and Annaji Rao's recent Commentary on the Criminal Procedure Code [1st (1936) Edn.]. The learned author's favour the view of the Madras and Calcutta High Courts which is in accordance with the opinion expressed above."

(1936) 23 A. I. R. 1936 Nagpur 228 (230) = I. L. R. 1937 Nag 230 (234). — "The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, [1st (1936) Edn.] vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub-section 3 of the section."

(1935) 22 A. I. R. 1935 Nagpur 189 (190) = 31 N. L. R. 374 (376). — "The same contention as was unsuccessfully put forward in the lower Court is pressed here for the applicants and in support thereof the following observations in the first note to O. 9 R. 9, Civil P. C. [1st (1932) Edn.] appearing at page 1570 of Chitaley's Civil Procedure Code, vol. 2, were cited:

'The word plaintiff . . . . . under this rule'."

(1943) 30 A. I. R. 1943 Oudh 274(276) — "Chitaley in his commentary on the

Code of Civil Procedure, 3rd (1940) Edn., page 3061 says: 'An appeal will, therefore, lie . . . . . on which the order of remand was based. A. I. R. 1923 Lah. 206 is cited . . . . A number of other rulings are mentioned in Chitaley's Civil Procedure Code, and we accept the principle laid down therein."

(1943) 30 A.I.R. 1943 Oudh 266 (268) — The following citation was approved and followed. "Chitaley in his book on the Civil Procedure Code, 3rd (1940) Edn., Vol. I, at page 992 summarises the law in the following words: 'A claim or question to or respecting other property . . . . . or indirectly in the decree or order'."

(1943) 30 A. I.R. 1943 Oudh 243 (259) — " Appellant's learned counsel cites . . . . Chitaley's Civil Procedure Code, 3rd (1940) Edn., Vol. II, page 1557: 'where a plaintiff claims . . . . . would embarras the defendant'."

[Cited with approval and followed.]

(1943) 30 A. I. R. 1943 Oudh 177 (183). — "In Chitaley's commentary on the Indian Limitation Act it is said (vol. III, page 2266, Edition 2): "Mere un-interrupted possession . . . Other co-owner's possession." Reference is then made in the commentary to the following observations of their Lordships of the Privy Council in 47 I. C. 626: "It is important to bear . . . . . other interested members."

(1942) 29 A.I.R. 1942 Oudh 303 (305). —" But there is abundant authority for the proposition that 'Where adverse possession . . . . the limited estate.' (Chitaley's Indian Limitation Act, [2nd (1942) Edn.], Note 14 on Art. 141). A few cases may be cited."

[Cited with approval and followed.]

(1942) 29 A.I.R. 1942 Oudh 169 (172). —"In Vol. 3 of Chitaley's Code of Civil Procedure [3rd (1940) Edn.] it is noted under Rule 15 of O. 33 that . . . . . as is clear from 60 Cal. 630." [The view is approved.]

(1942) 29 A. I. R. 1942 Oudh 31 (32). —" On page 2598 of his Indian Limitation Act [1st (1938) Edn.] Chitaley states that the principle laid down in the cases of this Court cited above applies also to cases . . . . . the application will not come under this clause."

[The view is approved. Now see 2nd 1942 Edn. page 2829.]

(1941) 28 A.I.R. 1941 Oudh 609 (610). —" The consensus of opinion appears to be that a question relating to the stay of execution is one relating to execution but that the decisions thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a decree and are therefore not appealable. These cases are mentioned in Chitaley's Code of Civil Procedure, Vol. 1, [2nd (1935) Edn.], p. 422 in foot-note 5."

(1941) 28 A. I. R. 1941 Oudh 219 (FB) (221) = I. L. R. 16 Luck. 515 (519). —"In this connexion, I may refer to the Notes in Chitaley's Civil Pro. Code, Vol. 2 [2nd (1935) Edn.] page 2123 where he says . . . . . 'In short therefore the test to see whether the suit or appeal abates . . . in the same suit (appeal).' Accepting this as a sound statement of the law, I do not feel that it is possible to depart . . . . etc."

(1941) 28 A. I. R. 1941 Oudh 56 (58, 59) = I. L. R. 16 Luck. 113 (117 & 120). "The question which does arise, however, is whether the plaintiff's suit against defendants 1 and 2 having been dismissed as barred by limitation, the plaintiff was entitled and is entitled to a decree against defendant 3, his vendor, as held by the trial Court. Learned counsel for the plaintiff-appellant has referred to the Notes in Chitaley's Code of Civil Procedure [3rd (1940) Edn.], vol. 2, page 1264, under O. 1, R. 3, and to the provisions of O. 2, R. 3 and S. 99, Civil P. C. He has also referred to the same case in 7 I. C. 69 to which I have referred above, and which is one of the cases quoted in Chitaley's Commentary under O. 1, R. 3 . . . . At page 1264, vol. 2 [3rd (1940) Edn.] of his Commentary on the Civil Procedure Code, Chitaley refers to several other cases of an analogous description."

[Notes cited with approval.]

(1940) 27 A.I.R. 1940 Oudh 305 (307) = I. L. R. 15 Luck. 537 (543). —"Learned counsel for the respondent has referred to Chitaley's Indian Limitation Act, [1st (1938) Edn.], at p. 658 where he says:

'Thus, where a person admits the . . . . . the admission.'

(In the present case the balance is proved by the evidence of the claimant and its existence is not denied in the written statement.) Reference has also been made to a passage on p. 666 which runs as follows:

'Thus, an acknowledgment of a debt need not specify any precise sum as due'."

(1939) 26 A. I. R. 1939 Oudh 284 (285) = I. L. R. 15 Luck. 19 (23). —"I take the following passage based on various rulings

from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure [1st (1936) Edn.] : 'On the making of an . . . . . Section 517'."

(1939) 26 A. I. R. 1939 Oudh 116 (117) =I. L. R. 14 Luck. 538 (541).—"A reference to the Notes to O. 40, R. 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure [2nd (1935) Edn.] and the latest edition of Katju and Das' Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel."

(1939) 26 A. I. R. 1939 Oudh 86 (89). "According to Chitaley's, (Civil Procedure Code [2nd (1935) Edn.] Vol. 1, p. 517, Note 7 : 'A debt . . . . . debt'."

(1938) 25 A. I. R. 1938 Oudh 146 (147) =I. L. R. 14 Luck. 116 (118). — "As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. 1, [2nd (1935) Edn.] of the Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted."

(1938) 25 A. I. R. 1938 Oudh 45 (47 and 48)=I. L. R. 13 Luck. 689 (693 and 695).— "The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided : *vide* the Commentary, Vol. 1, [2nd (1935) Edn.], p. 478, (Note 9, F. N.).

'In my opinion, the contention of the learned counsel for the appellant must be accepted'."

(1937) 24 A. I. R. 1937 Oudh 481 (483) = I. L. R. 13 Luck. 560 (565 & 566). — "Messrs. Chitaley and Annaji Rao in their Commentary on the Code [2nd (1935) Edn. p. 2347] express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 ALL. 661, and other cases."

(1942) 29 A. I. R. 1942 Peshawar 73 (73). — "Learned counsel for the plaintiff has drawn our attention to the Commentary on O 32, R. 2 in Chitaley's edition of the Civil Procedure Code [3rd (1940) Edn.], and to two published Judgments of the Lahore and Madras High Courts, namely 75 I. C. 1028 and 74 I. C. 309. Both the Commentary and the rulings are authorities for the proposition that when . . . . the defect."

(1942) 29 A. I. R. 1942 Peshawar 23 (24). — "He also referred me to the commentary under O. 22, R. 1 Note 9 of the Chitaley's edition of the Civil Procedure Code." [3rd (1940) Edn.]

(1941) 28 A. I. R. 1941 Peshawar 74 — "Chitaley in his commentary under the rule [i. e. O. 20, R. 7, Civil P. C., 3rd (1935) Edn.] has noted that the date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be."

[This view is approved.]

(1941) 28 A. I. R. 1941 Peshawar 69 (71). — "The further question arises whether the appellant should be granted time under S. 149, Civil P. C., or under O. 7, R. 11 for the purpose of making good the deficiency in court-fee . . . . . as it is a point which obviously arises for decision we have consulted the authorities which are referred . . . . . in the Commentary on O. 7, R. 11 in Chitaley's Edition of the Civil Procedure Code [2nd (1935) Edn.] at Note 6."

(1940) 27 A. I. R. 1940 Peshawar 24 (25).— "At Note 10 to O. 21, R. 15 of Chitaley's Civil Procedure Code [2nd (1935) Edn.] the following comments are made as regards the right of appeal against an order made under O. 21, R. 15 :

'The question whether . . . . . of the non-applicant decree-holder'."

(1938) 25 A. I. R. 1938 Peshawar 4 (5).— "The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule (viz.: O. 22, R. 4) in Chitaley's Code of Civil Procedure [2nd (1935) Edn.] and virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition."

(1937) 24 A. I. R. 1937 Peshawar 81 (81). — "Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code [2nd (1935) Edn.] certainly indicates the contrary."

(1937) 24 A. I. R. 1937 Peshawar 41 (41). — "On p. 1480 of Mr. Chitaley's commentary on the Civil Procedure Code [1st (1932) Edn.] it is noted that 'where a plaint

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is presented on the re-opening date after court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. ... Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta though a Calcutta ruling to contrary noted. The proposition as stated appears to me to be correct."

(1937) 24 A.I.R.1937 Peshawar 13(15) —"In this connexion we may note the following Note No. 4 from Mr. Chitaley's Commentary [2nd (1935) Edn., p. 3855] under R. 53 which is as follows : 'Other decrees.— A decree . . . . . this rule'."

(1936) 23 A. I. R. 1936 Peshawar 209 (210).— "We have been referred to Note (7) under S. 48 in Chitaley's Commentary on the Civil Procedure Code [1st (1932) Edn.] where the distinction between a fresh application and an application in continuation of a previous application is illustrated."

(1936) 23 A. I. R. 1936 Peshawar 37 (37).— "Counsel for the appellants quotes from Chitaley's Commentary (Civil P. C., [2nd (1935) Edn.] p. 3005) to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator the arbitrator has authority to award costs, in the award."

(1934) 21 A. I. R. 1934 Peshawar 94 (95). — "He (D. J.) quotes from Chitaley [1st (1932) Edn., p. 1240] as follows: 'All co-promisees . . . . as parties.'

"I have no disagreement with this statement of the law. but in the present case the agreement is not a promise but a promisor. The passage from Chitaley is cited by the learned Additional District Judge to the following effect:

'Where . . . . of suits

"That statement of law applies to the facts of the present case.'

(1934) 21 A. I. R. 1934 Peshawar 57 (61). — "These conflicting views are noted on pp. 746 and 747 of Chitaley's Civil Procedure Code." [1st (1932) Edn.]

(1934) 21 A. I. R. 1934 Peshawar 40 (43.)—"The argument is based on Chitaley's Commentary, [1st (1932) Edition, page 1888 under O. 21, R. 15 of the Code, which is supported by *Gopendra Krishna* v. *Moti Lal*, A. I. R. 1928 Cal. 559."

(1933) 20 A. I. R. 1933 Peshawar 61 (63). — "The law on the subject is lucidly summed up in Chitaley's Commentary on Civil Procedure Code, [1st (1932) Edn.], vol. 1, p. 182, and is stated as follows: 'A party . . . . . them'."

(1941) 28 A. I. R. 1941 Rangoon 60 (60)= 1940 R. L. R. 749 (750). — "He [The Sub-divisional Court] also mentioned a case as cited in Chitaley's Civil Procedure Code [see 3rd (1940) Edn., S. 151 Note 2, Pt. 41], where a stay of execution was granted on the ground that the *ex parte* decree was obtained by fraud. That case is 75 I. C. 419 [A.I.R. 1923 Lah. 514] . . ."

(1937) 24 A. I. R. 1937 Rangoon 391 (392). — "The learned authors of the Code of Criminal Procedure by Chitaley and Annaji Rao, [1st (1932) Edn.], Vol. 1, at p. 200 say : 'Thus an . . . . Proviso.'

'I agree with this view'."

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1. References to Official Reports are invariably given in all cases found in the Official Reports.
2. Parallel references are given upto 1909. References to All India Journals only are given after 1909 with a view to reduce bulk and cost.
3. The Synopsis for each Section as well as the General Index show where exactly to look for the point required.
4. Remarks in the footnotes amplify and illustrate the principles in the commentary and indicate distinguishing features of the case.
5. Any case in the "Table of Cases" will show where to get the entire case-law on the point. The first reference in the foot-notes and the reference to Official Reports are indicated in the "Table of Cases."
6. The special features of this work are indicated in the preface.

S.P.M.

BOMBAY.

NAGPUR.